

**Testimony in Opposition to SB 307
To the Senate Judiciary Committee**

Testimony of Randall L. Hodgkinson and Jennifer C. Roth

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Chairman Owens and Members of the Committee:

We are providing this testimony to correct several misconceptions regarding the state of the law regarding felony murder in relation to the Kansas Supreme Court's recent ruling in *State v. Berry* (Kan. July 22, 2011). In its testimony, the Kansas County and District Attorneys Association suggests that, due to *Berry*, the felony murder rule is dead. In fact, the felony murder rule is alive and well—it is now simply subject to the same rules for jury consideration as every other crime in the Kansas criminal code. Lesser-included offenses were given in felony murder cases before *Berry*. *Berry* simply clarified that they should be given in felony murder cases *just like every other prosecution involving possible lesser included-offenses*.

Under *Berry*, if evidence supports giving a lesser-included offense instruction, the district court must give the appropriate jury instruction. *Berry* does not mean that lesser-included offense instructions must be given in every felony murder prosecution. *Just like every other prosecution involving possible lesser-included offenses*, the district court will have to review the evidence to determine whether a jury could reasonably convict of a lesser-included offense. And just because the jury is given the *option* of considering a lesser-included offense, it does not require the jury to convict of the lesser-included offense.

Just like in every other prosecution involving possible lesser-included offenses, when instructions are given regarding lesser-included offenses, the district court will also give pattern instructions directing the jury to only consider lesser-included offenses if they cannot agree upon the greater offense. P.I.K. Crim. 3d 56.03(B), 68.09. If the prosecution proves felony murder beyond a reasonable doubt to twelve Kansas citizens, the prosecution will obtain a conviction for felony murder. That was true before *Berry* and it is true after *Berry*.

For example, in Sedgwick County Case No. 07 CR 1733, before *Berry*, the prosecutor charged Asa Adams with felony murder. In a case prosecuted by Marc Bennett, a proponent of SB 307, the district court gave lesser-included offense instructions, but the jury unanimously convicted Mr. Adams of felony murder. In Shawnee County Case No. 03 CR 390, the prosecutor charged Word Ackward with felony murder, the district court gave lesser-included offense instructions, but the jury unanimously convicted Mr. Ackward of felony murder. These examples belie the proponents' claim that *Berry*, by reconciling lesser-included offense practice in felony murder cases with the rest of the criminal code, somehow changed or diluted the felony murder rule.

Certainly there are examples of cases (pre-*Berry* at this point) where lesser-included offense instructions have been given in felony murder cases and where juries have convicted of lesser-included offenses. Under *Berry*, there would be some marginal increase in those outcomes. But, as instructed, every one of those juries must have a reasonable doubt regarding the proof of the felony murder charge to consider lesser-included offenses. And in each one of those cases, a defendant did not (or will not) “get out of jail free,” but was found (or will be found) guilty of a *homicide*, a serious felony with a serious penalty.

In its testimony, the proponents have not pointed to any case entered after *Berry* where, because of *Berry*, lesser-included offense instructions were given to a jury and a jury wrongfully convicted a person of a lesser-included offense.

But under SB 307, juries would not even be given the option of finding the appropriate level of culpability in most or any cases. SB 307, especially under the Mr. Howe’s proposed amendment, would force juries into an all-or-nothing proposition in most or every felony murder case. So even in scenarios where the jury has a reasonable doubt whether the state proved felony murder, but has no reasonable doubt regarding a lesser homicide, the jury would have to choose between acquitting a person (a difficult proposition when there is a tragic loss of life) and convicting a person of felony murder even though jurors had a reasonable doubt regarding that charge. This all-or-nothing approach could also increase the number of hung juries, instead of allowing juries to appropriately resolve these difficult cases.

The proponents have suggested that SB 307 is necessary to clarify the law in this area. No clarification is necessary. The law regarding lesser-included offenses is well known throughout the district courts in Kansas. All *Berry* did was conform felony murder cases to the same practice as every other offense in the criminal code.

On the other hand, enactment and enforcement of SB 307 will introduce *substantial uncertainty into every felony murder case*. Special rules that interfere with the right to a jury trial in a single class of criminal cases certainly raise Equal Protection, Due Process, and Jury Trial Clause concerns, under both the state and federal constitutions. Although the outcome of such claims isn’t predictable at this time, the legislature should expect such claims and probably others to be raised and litigated in every felony murder case after passage and application of SB 307.

Finally, SB 307 as proposed, purports to apply retroactively to pending cases. The Ex Post Facto Clause of the United States Constitution prohibits legislative enactments that disadvantage criminal defendants:

For a criminal or penal law to be ex post facto, two elements must be present: the law “must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it. [*State v. Nunn*, 244 Kan. 207, 219, 768 P.2d 268 (1989), (citing *Weaver v. Graham*, 450 U.S. 24, 29 (1981)).]

There is little doubt that substantively changing the definition of a crime and its lesser included offenses would disadvantage offenders with pending felony murder cases. There is similarly little doubt that retroactive application of a statute that purports to change the definition of felony murder and its lesser included offenses would violate the Ex Post Facto Clause.

The right to a jury trial is fundamental under the United States Constitution and the Kansas Constitution. A critical component of the right to a jury trial is *the jury’s responsibility* to finally determine whether the prosecution has proved its charges beyond a reasonable doubt or whether the prosecution has proved some lesser-included offense. This is a critical check on the prosecutor’s unbridled power to charge or to overcharge offenses.

By providing for the possibility of consideration of lesser-included offenses, the Kansas Constitution and Kansas law properly assigns to twelve Kansas citizens the role of being final arbiters of guilt across the criminal code. The proponents have not suggested any reason why Kansas citizens should have any different or lesser role in felony murder cases. Because of this and because of the constitutional uncertainty that SB 307 will inject into every felony murder prosecution, we urge the Legislature to reject SB 307 in its entirety.

Respectfully submitted,

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