

To: Chairman Colloton and the House Corrections & Juvenile Justice Committee
From: Steve Howe, Johnson County District Attorney
Date: March 6, 2012

Re: **Testimony supporting Substitute Bill for SB 307**

Chairman Colloton and Members of the Corrections & Juvenile Justice Committee:

Thank you for this opportunity to present testimony on the Substitute Bill for SB307. My name is Steve Howe and I am the District Attorney in Johnson County, Kansas. I am here today testifying in support of the Substitute Bill for SB307 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 by 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 Substitute Bill for SB307 is the most appropriate means to address the Supreme Court's ruling. The bill simply states 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. The Substitute Bill for SB307 will clarify the law of lesser included offenses in felony murder cases. The KCDAA respectfully request the House Judiciary to support this amended version of the Substitute Bill for SB307.

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

Sincerely,

Stephen M. Howe
Johnson County District Attorney

House Corrections and Juvenile Justice
Committee
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