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Testimony Regarding SB 307
Submitted by Marc Bennett, Deputy District Attorney
On Behalf of Nola Tedesco Foulston, District Attorney
Eighteenth Judicial District
And the Kansas County and District Attorneys Association

Honorable Chairwoman Colloton and Members of the House Committee on Corrections and Juvenile Justice:

Thank you for the opportunity to bring to your attention issues related to Senate Bill 307 on behalf of the Kansas County and District Attorneys Association.

For nearly 70 years, since State v. Germany, 173, Kan. 214 (1952), the state of Kansas has recognized what has come to be known as the "felony murder rule." The rule stood for the proposition that when a felony murder was charged, i.e., a murder occurring during the course of an "inherently dangerous felony" such as Aggravated Robbery, the court need not instruct the jury on lesser-inc luded levels of homicide unless the evidence of the underlying felony (the Aggravated Robbery, for instance) was "weak or inconclusive." The long-standing rationale was that a defendant's decision to commit the inherently dangerous felony was sufficient to essentially substitute for the element of premeditation required in first degree murder. State v. Reed, 214 Kan. 562, 564 (1974). When there was clear evidence (not "weak or inconclusive") that the defendant made the decision to take part in an "inherently dangerous felony," that evidence subjected one to a higher level of culpability.

On July 22, 2011, in State v. Berry, the Supreme Court of Kansas held that the felony murder rule was a creation of the courts and based on flawed analysis. The court abandoned the felony murder rule and held that as to Berry and in all future cases, where there is "some evidence that would reasonably justify the conviction of the lesser included crime," the trial court must give the instruction. In short, the felony murder rule was dead.

While there is an argument that this is an equitable analysis – why shouldn't a defendant be afforded the opportunity to a lesser included offense instruction just because he committed an inherently dangerous felony – when the defendant is the cause of the death (abuse of a child by a parent that leads to death, for instance), the Berry decision would allow the defendant to argue he or she was guilty of Second Degree Murder or Manslaughter and allow the jury to decide, the decision to engage in inherently dangerous behavior notwithstanding.

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The public policy of this state has long been that those who willingly enter into acts fraught with inherent dangerousness are responsible for the consequences – ALL the consequences included the deaths of those killed as a result.

A balloon amendment has been offered that offers a great deal of clarity to the issue by simply eliminating lesser included offenses from felony murder trials all together. Follow this suggestion, and we should effectively resolve the issue, rather than run the risk that the appellate courts will think and re-think the meaning of "weak and inconclusive" over and over in the future.

One final note is that Berry may also have an additional collateral consequence concerning those who aid and abet felony-murder. When one is not the shooter, the principal or instrument of the death, but rather the getaway driver, or the lookout to a robbery, for instance, THAT person who agreed to help with a robbery but made no specific agreement to aid in a killing during the robbery can only assume guilt for the death under an aid and abet theory. Meaning, if he didn't pull the trigger, he or she would have to have intentionally aided and abetted the death by taking acts intended to assist another in causing the death, for lesser included offense instruction to be appropriate. In that scenario, there would be no lesser included offenses to instruct the jury concerning the aider and abettor while the principal (the actual shooter) would be entitled to lesser offenses under Berry. This has not yet happened, but the possibility remains.

The KCDAA would ask the legislature to clarify the legislative intent in Kansas is to hold accountable to the fullest extent of the law, those who would endanger the lives of their fellow citizens by engaging in inherently dangerous crimes.

Thank you for your time, attention and consideration in this matter.

Respectfully submitted,

Marc Bennett
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Eighteenth Judicial District