House Corrections and Juvenile Justice Committee
House Bill No. 2387
Testimony of Debra J. Wilson
Opponent
March 14, 2013

I am employed as a public defender and work in the Capital Appeals and Conflicts Office. I handle a wide variety of felony appeals in the Kansas appellate courts, including death penalty appeals.

I wish to address the proposed amendment to K.S.A. 2012 Supp. 21-5402 that would provide that felony murder, as defined in subsection (a)(2) is not a lesser included offense of capital murder.

Under this provision, the capital murder defendant could not receive an instruction on felony murder, even if the facts of the case supported such an instruction. This runs afoul of the decision in of the United States Supreme Court in Beck v. Alabama, 447 U.S. 625, 65 L.Ed.2d 392, 100 S.Ct. 2382 (1980).

In Beck, the Court considered an Alabama death penalty statute that prohibited the trial court from instructing the jury on lesser included offenses in a capital case. The jury was given the choice of convicting the defendant as charged or acquitting the defendant.

Mr. Beck was charged with the capital offense of robbery where the victim is intentionally killed by the defendant. The Supreme Court noted that felony murder – a robbery where the victim was unintentionally killed - was factually a lesser included offense of that capital offense, but that the judge, under the Alabama statute, was prohibited from giving the jury the option of convicting on the lesser offense.

The Court framed the question, "May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict?" The Court then answered in the negative, "We now hold that the death penalty may not be imposed under these circumstances." 447 U.S. 627.

The Court stated:

> While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent

offense-but leaves some doubt with respect to an element that would justify conviction of a capital offense-the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

Such a risk cannot be tolerated in a case in which the defendant's life is at stake. As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments:

"[D]eath is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 357-358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (opinion of STEVENS, J.).

To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case 447 U.S. 637-638.

Because prohibiting the jury's consideration of the lesser included offense of felony murder, when supported by the facts, diminishes the reliability of a guilt determination in a capital case, and violates the holding of Beck v. Alabama, I oppose the proposed amendments to K.S.A. 2012 Supp.21-5402.

Sincerely,
Debra J. Wilson
DebWilson88@hotmail.com
(785)691-8203