

Approved by the Judicial Council December 3, 2010

**REPORT OF THE JUDICIAL COUNCIL  
CRIMINAL LAW ADVISORY COMMITTEE  
ON FELONY MURDER STUDY**

**(December 3, 2010)**

In May, 2010, the Kansas Supreme Court requested that the Judicial Council consider placing the crime of felony murder in a separate statute, so that it is neither a lesser degree of premeditated first degree murder for purposes of lesser included offenses, nor a greater degree of any other homicide. The Council assigned this study to the Criminal Law Advisory Committee.

**COMMITTEE**

The members of the Committee are:

1. **Hon. Nancy L. Caplinger, Chair**, Topeka; Appellate Court Judge and member of the Judicial Council.
2. **James W. Clark**, Lawrence; attorney for the Health Care Stabilization Fund.
3. **Edward G. Collister**, Lawrence; practicing attorney.
4. **Representative Pat Colloton**, Leawood; Kansas State Legislator.
5. **Jim D. Garner**, Coffeyville; Secretary, Kansas Department of Labor.
6. **Deborah Hughes**, Topeka; staff attorney for the Kansas Supreme Court.
7. **Patrick M. Lewis**, Olathe; practicing attorney.
8. **Hon. Michael Malone**, Lawrence; District Judge in the 7<sup>th</sup> Judicial District.
9. **Joel Meinecke**, Topeka; practicing attorney.
10. **Steven L. Opat**, Junction City; Geary County Attorney.
11. **Stephen M. Robison, Vice-Chair**, Wichita; practicing attorney and member of the Judicial Council.
12. **John M. Settle**, Larned; Pawnee County Attorney.
13. **Prof. Thomas Stacy**, Lawrence; Professor at the University of Kansas School of Law
14. **Ann Swegle**, Wichita; Sedgwick County Deputy District Attorney.

15. **Loren L. Taylor**, Kansas City; Attorney and Police Trainer.
16. **Hon. John White**, Bella Vista, AR; retired District Judge.
17. **Debra J. Wilson**, Topeka; Capital Appeals and Conflicts Office.
18. **Ron Wurtz**, Topeka; Federal Public Defender's Office.

## **DISCUSSION**

The study request from the Court stated, "Currently, first degree murder is defined in K.S.A. 21-3401 as the killing of a human being, committed (a) intentionally and with premeditation; or (b) in the commission of, attempt to commit, or flight from an inherently dangerous felony (felony murder). The current statutory structure suggests that premeditated murder and felony murder are alternative means of committing the same crime, and that felony murder is a lesser included offense of premeditated murder, notwithstanding that one crime involves an intentional killing and the other imposes vicarious liability without any intent to kill. Felony murder is a unique crime, sufficiently separate and distinct from an intentional killing, so that it should be set forth in a separate statute, thereby avoiding some of the arguably illogical results dictated by its combination with premeditated murder. Accordingly, the Court would like the Judicial Council to consider placing the crime of felony murder in a separate statute and state that it is neither a lesser degree of premeditated first degree murder for purposes of lesser included offenses (See K.S.A. 21-3107(2)(a)), nor a greater degree of any other homicide."

The Criminal Law Advisory Committee met in July and September, 2010, and discussed whether it would be advisable to pull felony murder out of the 1<sup>st</sup> degree murder statute and place it in a separate statute. The committee members had considerable discussion trying to determine the possible problems that could have arisen to support the request.

The committee reviewed past history of the statute as well as case law following the statute and noted that felony murder has been included in the 1<sup>st</sup> degree murder statute as far back as the 1800s. Until 1990, the penalties for felony murder and premeditated murder were even the same. It was suggested that there could be some difficulty at instruction time with regard to lesser included offenses since the sentences are now different. However, the penalties under the sentencing guidelines are clear now so the committee didn't think that seemed to be an issue. It was proposed that some difficulty could arise when a defendant wants an instruction and the court then has to decide, predicated on the evidence provided, whether or not that instruction is warranted. However, the rules on this have been viewed fairly clearly by the Court. It was then suggested that maybe the problem involves the way the crime is charged, i.e. charging in the alternative and then having to deal with the evidentiary problems that arise in terms of whether you prove premeditation or felony murder and the unanimity instruction in terms of what the jury has decided. However, this issue seems to have been resolved by *State v. Kesselring*, and there is also a PIK instruction available for further guidance.

The Committee then turned its discussion to the court-made rule for determining whether a lesser included offenses instruction should be given in a felony murder cases. It seems that this rule is in direct opposition with the general rule for lesser included offense instructions. Currently, a lesser included offense instruction is only appropriate if the evidence of the felony murder is weak. This seems to be a dichotomy or a conflict between the rules because you weigh the evidence in a felony murder case, but you do not to the same in other situations. For felony murder, you look at the strength of the evidence to support the underlying crime and if it is weak or conflicting, then you look to see whether there is any evidence of the lesser crime. However, if this analysis was flipped and you didn't consider the strength of the evidence of the

main crime first, then the analyses are essentially the same. Furthermore, the lesser included offense rule is a court-made rule that doesn't seem to have anything to do with the felony murder statute itself being part of the first degree murder statute.

The committee also discussed whether there could be problems with regard to jury instructions when charging in the alternative. In general, the basic instruction indicates that there are alternative means so you can convict on premeditated theory, felony murder theory or a combined theory. If it's on a combined theory, then the sentence has to be at the lower end and there is a PIK instruction that allows for that. Therefore, the process really isn't difficult for practitioners.

After this discussion, the committee turned its attention to whether separating felony murder would be of any help to the defense side since it didn't appear it would make a significant difference on the prosecutorial side. On the one hand, it seems like felony murder and premeditated murder are very different crimes and as such they should probably be in separate statutes. However, leaving them together doesn't prevent charging in the alternative. Therefore, the committee agreed that although having separate statutes may make it easier to determine whether there are legitimate lesser included offenses and how to instruct on them, it's not likely that separating felony murder from 1<sup>st</sup> degree premeditated murder would make that much of a difference in the final analysis.

The committee agreed that the felony murder statute within the 1<sup>st</sup> degree murder statute has been the law of the state for more than 100 years. If felony murder were pulled out of 1<sup>st</sup> degree murder statute and if it still were to rely on some other statute for the intent as to the killing, then we would still have that imputed intent for the crime and that is the basis for the felony murder/lesser included offense instruction rule that has developed. Therefore, it seems

that separating out felony murder would not change anything unless the statute were fundamentally altered.

As for the second portion of the request, stating in statute that felony murder is neither a lesser degree of premeditated first degree murder for purposes of lesser included offenses (See K.S.A. 21-3107(2)(a)), nor a greater degree of any other homicide, the committee recognized that under current law, felony murder is a greater offense under appropriate circumstances for instruction purposes for lesser degrees of homicide. Making the suggested change would prohibit this and would be a significant change to current law. It would serve to preclude the giving of lesser included offense instructions in the appropriate cases and the committee agreed that this would be one of the best reasons not to make the change. If this portion of the proposal was designed to address the test for whether lesser included instructions are given, it seems that the power to change that court-made rule lies with the court and not with a change to the statutes that would serve to alter all of the case law.

## **CONCLUSION**

After considerable discussion the committee agreed that felony murder and premeditated murder have been in the same statute for over 150 years and this is consistent with the laws in other states. The law of felony murder and lesser included offenses in Kansas has developed over 100 years and separating felony murder from 1<sup>st</sup> degree murder will not change this developed law. Furthermore, the committee could not find any demonstrable evidence indicating a need for such a change. Therefore, the committee unanimously voted to recommend against both the creation of a separate felony murder statute and the insertion of the statement regarding lesser included offenses into the statute.