



STATE OF KANSAS

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March 3, 1978

ATTORNEY GENERAL OPINION NO. 78- 101

Honorable Ronald R. Hein
Kansas State Senator
Room 143-N, Statehouse
Topeka, Kansas 66612

Re: Crimes And Punishments--First Degree Murder And Felony
Murder--Double Jeopardy And Lesser Included Offenses

Synopsis: Felony murder is not a lesser included offense of first
degree murder under House Bill 2863.

The State is not required to elect between first degree
murder and felony murder charges.

Acquittal of first degree murder would not bar a subse-
quent prosecution for felony murder involving the same
homicide under traditional rules of double jeopardy.

There are no lesser included offenses of felony murder
under the provisions of House Bill 2863, although where
commission of the felony is disputed or the evidence is
not clear, it is not error for the court to instruct a
lesser degree of homicide.

* * *

Dear Senator Hein:

You inquire concerning House Bill 2863 as amended by the House
Committee of the Whole, which defines the offenses of first degree
murder and felony murder and specifies penalties therefor, death
or life imprisonment for first degree murder and life imprisonment
for felony murder.

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You inquire first whether under the bill, felony murder is a lesser included offense of first degree murder. Kansas case law directly provides an answer. A lesser included offense of an offense charged is one in which all of the elements are necessarily proved if the charged offense is proved. *State v. Woods*, 214 K. 739, 744, 522 P.2d 364 (1974). Kansas cases specifically hold that felony murder is an offense to which any instruction on lesser included offenses has no application. *State v. Reed*, 214 K. 562, 520 P.2d 1314 (1974), *State v. Moffit*, 199 K. 514, 431 P.2d 879 (1967).

"In the past this court has held that in a murder committed during the commission of a felony the usual rule requiring instructions on lesser included offenses does not apply If a murder is committed while engaged in a felony the felonious conduct itself if held tantamount to the elements of deliberation and premeditation which are otherwise required for first degree murder Therefore, to support a conviction for felony murder all that is required is to prove that a felony was being committed which was inherently dangerous to human life, and that the homicide was a direct result of the commission of that felony." [Citations omitted.] 214 K. at 564.

Proof of felony murder requires proof that an independent felony be perpetrated at the time the homicide occurred. Conversely, first degree murder requires proof of an intentional, malicious, and premeditated killing, which is not necessarily an element of felony murder. It is clear that each offense has separate elements and the proof of either crime does not necessarily prove the other. Felony murder is not a lesser included offense of first degree murder.

You also inquire whether there are any other lesser included homicide offenses in a charge of felony murder. It is my opinion there are not. The purpose of the felony murder rule is to relieve the State of the burden of establishing premeditation and malice when a homicide occurs during the commission of a felony, the killer's malignant purpose being inferred by proof of the collateral felony which is inherently dangerous to human life. *State v. Clark*, 204 K. 38, 460 P.2d 586 (1969). The doctrine has been applied even where the killing may have been accidental or unintentional. *State v. Goodseal*, 220 K. 487, 553 P.2d 279 (1976).

Thus, a lesser degree of homicide is not necessarily established by a proof of felony murder. It has further been held that even the

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underlying felony serving as a basis for the inferred malice is not a lesser included offense since felony murder is a generically different and disconnected offense requiring separate elements of proof. *Harris v. State*, 20 Crim. Law Rptr. 2010 (Okla. Court of Appeals - Oct. 5, 1976).

It should be pointed out, however, that where a defendant is charged with felony murder, and the commission of the felony is disputed or the evidence is not clear, a trial court does not commit reversible error in instructing the jury on a lesser degree of homicide if the evidence supports such instructions. *State v. Bradford*, 219 K. 336, 548 P.2d 812 (1976).

You ask whether a prosecutor must make an election between charges of first degree murder and felony murder. Again, prior case law provides a definitive answer. A line of cases holds that the State is not required to elect between murder theories charged, as long as the defendant is fully apprised of charges against him. *State v. Wilson*, 220 K. 341, 522 P.2d 931 (1976); *State v. Domer*, 1 Ohio App. 2d 155, 204 N.E.2d 69 (1965).

Significantly, in a recent opinion by the Kansas Supreme Court, *State v. Jackson*, (No. 48,974 - February 25, 1978) the Court affirmed a conviction where the defendant was charged conjunctively with both premeditated murder and felony murder. The Court held it was not reversible error to so charge, even though the defendant ultimately was convicted on both charges involving a single homicide. However, it pointed out that the defendant could not be punished for both offenses, and a wiser course of action would be to instruct on the charges in the alternative.

You also inquire whether an accused who is acquitted of first degree murder is still subject to prosecution for felony murder involving the same homicide.

Culpable conduct by a defendant in a single transaction may amount to multiple violations of the criminal code. Kansas decisions under the double jeopardy clause and its codification in K.S.A. 1977 Supp. 21-3108 have held identity of offenses to be an indispensable element of prior jeopardy. These cases have held that where given conduct constitutes separate offenses and one offense requires proof of facts which the other does not, prosecution of one is not barred by prosecution of the other. *State v. Worth*, 217 K. 393, 537 P.2d 191 (1975); *State v. Pruitt*, 216 K. 103, 531 P.2d 860 (1975). Most recently the Supreme Court of Kansas, in *State v. Edgington*, (49,126 - January 21, 1978) held that prosecution for perjury under K.S.A. 21-3805 was not barred by a prior prosecution under K.S.A. 75-4302(d) for failing to file a statement of substantial interest, under the same misconduct.

Because the offense of felony murder and first degree murder do not have common elements and proof of the offenses entails proof of

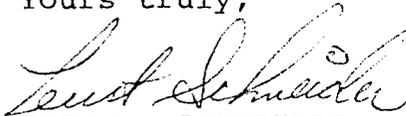
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differing facts, under the traditional principles of double jeopardy, acquittal of first degree murder would not foreclose prosecution for felony murder involving the same homicide.

There are grounds for a contrary argument. The rule against double jeopardy bars prosecution of an accused for an offense if the defendant has been previously prosecuted for the same crime based on the same facts. As indicated above, the Kansas Supreme Court is accustomed to saying that proof that a homicide was committed in the perpetration of a felony is "tantamount" to the premeditation and deliberation which would otherwise be necessary to establish first degree murder. Taking the statement at face value, it may be argued that the felony murder rule is but an evidentiary rule for proof of premeditation and deliberation, and that acquittal of first degree murder precludes a subsequent prosecution for felony murder based on the same homicide. However, as defined in K.S.A. 21-3401, first degree murder, is either a premeditated and deliberate homicide or a homicide committed in the perpetration or attempt to perpetrate any felony, and the argument is not compellingly persuasive. Obviously, it is impossible for us to anticipate the arguments which might be raised by the defense in a particular case. However, applying traditional double jeopardy criteria, acquittal of first degree murder would not preclude a subsequent prosecution for felony murder involving the same homicide.

Apparently, debate of House Bill 2863 has suddenly prompted a good deal of intellectual curiosity, real or feigned, concerning the felony murder rule. Felony murder has been an offense in this state for 110 years. Nothing in House Bill 2863 alters the existing offense, and none of the questions in your letter raise any issue which has not been settled for many years. House Bill 2863 raises squarely but one issue, that of capital punishment. A decisive majority of Kansas voters support its enactment. Largely academic and tangential questions involving only peripheral matters should not be used to delay prompt consideration of the bill. The time is long past for the evasive and dilatory tactics which mark the Senate consideration of the bill thus far. I hope that, with these last questions disposed of, the Senate will proceed without further delay to act upon the bill. Kansans have spoken with a clear voice on the issue of capital punishment, and they are entitled to have the measure considered fully and promptly, without parliamentary maneuvers, repetitive opinion requests, and other devices designed to serve only as pretexts for refusing to face the issue squarely. I hope that the Senate will act, and that it will act promptly to pass House Bill 2863.

Yours truly,


CURT T. SCHNEIDER
Attorney General

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