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Testimony in Support of House Bill 2387
Presented to the House Committee on Corrections and Juvenile Justice
By Kris Ailsieger, Deputy Solicitor General

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Chairman Rubin and Members of the Committee,

I appear today on behalf of Attorney General Derek Schmidt in support of HB 2387. This bill is intended to both clarify existing Kansas case law as well as correct what we believe is a misinterpretation of the law by the Kansas Supreme Court that occurred in *State v. Cheever*.

Under K.S.A. 21-5402, there are two alternative ways to commit the crime of First Degree Murder: (1) intentionally with premeditation, or (2) in the commission of, attempt to commit, or flight from an inherently dangerous felony (“felony murder”). Felony murder was established at common law, and then later codified, to provide prosecutors with an alternative method to prove murder and to deter inherently dangerous crimes that could result in death.

Well established Kansas case law makes clear that “Felony murder and premeditated murder are not separate and distinct crimes, but merely different theories of proving the required elements of premeditation and intent for the crime of first-degree murder.” *State v. Hoge*, 276 Kan. 801, Syl. ¶ 6 (2003). Thus, felony murder has never been considered a lesser included offense of premeditated murder – they’ve always been considered the same crime – so the courts have held that there is no requirement to instruct a jury on felony murder in cases alleging intentional premeditated murder. *See e.g. State v. Jackson*, 280 Kan. 16, 31 (2005); *State v. McKinney*, 265 Kan. 104, 111 (1998). This bill codifies that case law.

The bill goes further, though, to clarify that because felony murder is not a separate and distinct crime from intentional premeditated murder, and thus not a lesser included offense of that crime, it is also not a separate and distinct lesser included offense of capital murder, which is nothing more than intentional premeditated murder with aggravating circumstances. This clarification is sought because in *State v. Cheever*, in spite of the case law stating that felony murder is not a separate and distinct crime from intentional premeditated murder, the Kansas Supreme Court held that it is a separate and distinct lesser included offense of capital murder that must be instructed on, even though the jury was properly instructed on intentional premeditated murder. 295 Kan. 229, 257-59 (2012).

Based on previous case law and practice, this interpretation by the Kansas Supreme Court was unexpected by the bar. Indeed, even Mr. Cheever's defense attorney at trial advised the district court that he did not believe that felony murder was on the tree of lesser included offenses of capital murder, and did not believe a felony murder instruction was required. Thus, the Supreme Court's interpretation represents an anomalous change in this area, and one that threatens the finality of many capital murder convictions throughout the state.

While exact numbers are unknown, if left uncorrected, this anomalous interpretation by the Kansas Supreme Court could result in reversal any pending capital murder case in which, consistent with prior practice and case law, a felony murder instruction was not given. This is not limited to death penalty cases – if left unchanged, the Kansas Supreme Court's new interpretation of this issue may imperil life without parole sentences as well. Even cases where the death penalty was not sought or imposed are at risk of reversal. Therefore, the Attorney General strongly urges passage of this bill to protect the validity of those verdicts.