Approved: 1-29-98
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Tim Emert at 10:10 a.m. on January 27, 1998 in Room 514-S of the Capitol.

All members were present except: Senator Harrington (excused)

Committee staff present: Mike Heim, Legislative Research Department
Jerry Donaldson Legislative Research Department
Gordon Self, Revisor of Statutes
Mary Blair, Committee Secretary

Conferees appearing before the committee: Randy Hearrell, Ks Judicial Council
Judge Marla Luckert, Chair, Ks Criminal Law Advisory Committee
Judge Gary Rulon, Ks Court of Appeals
Judge David Knudson, Chair, Advisory Committee for Pattern Jury Instruction for Kansas (PIK)
Jim Clark, Ks County & District Attorney Asso.

Others attending: See attached list

Minutes of the 1/21 meeting were approved on a motion by Senator Bond and seconded by Senator Oleen. Carried.

The Chair briefly summarized requests for bill introduction(s). The following organization's or individual's request for bill introduction(s) passed unanimously on a motion and second by the following Senators :

	Motion	**Second**
Kansas Judicial Administration	Bond	Oleen
Department of Corrections	Bond	Goodwin.
Kansas Sentencing Commission	Petty	Goodwin.
Kansas Banker's Asso.	Oleen	Bond.
Kansas Automobile Dealer's Asso.	Donovan	Pugh.
Kansas National Education Asso.	Goodwin	Petty.
Clay Co. D.A. (Hardenburger)	Bond	Oleen.
Gary Denning (Vidrickson)	Bond	Goodwin.
Senator Bond	Goodwin	Bond.
Senator Goodwin	Bond	Goodwin.

The Chair announced that Marilyn Scafe has been nominated by the Governor for a position as Chair and Member of the Kansas Parole Board. He advised the Committee to review the confirmation information summary and attached paperwork and stated that if there were no objections by Friday, January 30, a confirmation vote would be called on Tuesday, Feb. 3.

SB 449 -Crimes and criminal procedure; relating to lesser included offenses

Conferee Hearrell briefly explained the need for **SB 449** stating that the language in K.S.A. 21-3107, the lesser included offense statute, has caused confusion and problems. He introduced Conferee Luckert to testify about this in more detail.

Conferee Luckert testified in favor of **SB 449** stating that the amendments to the bill (which were proposed by the Judicial Council after a study was done by the Criminal Law Advisory Committee on K.S.A. 21-3107), will clarify current problems in the application of K.S.A. 21-3107. She cited examples of the problems that have arisen over the application of portions of the statute, problems that have caused confusion and uncertainty either at the time or at a later date when a case has been taken to the Court of Appeals. She acknowledged the members of her committee (attachment 1) and detailed it's recommendations. (attachment 2) She further acknowledged a letter from Judge Tuggle, Kansas District Judges' Association, requesting Committee's consideration of **SB 449**. (attachment 3) Brief discussion on certain language in the bill, followed.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

Conferee Rulon, a proponent of **SB 449**,briefly covered portions of his written testimony (attachment 4) and related to the Committee his experience presiding over a case (State vs Horn) which exemplified the problems conferee Luckert discussed. He urged the Committee, on behalf of the court of appeals, to adopt **SB 449.**

Conferee Knudson testified in support of **SB 449**. He related the role and responsibility of the PIK committee and stated that as chair of that committee, he is "well acquainted with the problems the present statute [K.S.A. 21-3107] has caused for the effective and efficient administration of justice". He cited examples of several problems and stated that **SB 449** would rectify them. (attachment 5)

Conferee Clark testified as a proponent of **SB 449**. He offered written testimony which covers several cases dealing with the problems of lesser included offenses under K.S. A. 21-3107. He briefly summarized State v. Fike and provided a sampling of Kansas appellate court decisions relating to the applications of the Fike decision on lesser included offense instructions. (attachment 6)

The Chair stated that the Committee would further consider the **SB 449** on Wednesday, January 28.

Meeting adjourned at 11:02 a.m. The next scheduled meeting is Wednesday, January 28

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1-27-98

NAME	REPRESENTING
Jerry Clark	KCDAA
David Graham	Attorney General
Kyle S. Smith	KBI
Vicki Glenn Hebert	Budget
Kathy M. Kearney	Judicial Council
Myrla J. Lockett	Judicial Council
Bob Jones	KSC
KEVIN GRAHAM	KAN. SENTENCE COMM.
Larrie Ann Brown	Kans Govt Consult.
Heather Randall	Whitney Kamran, P.A.
Patrick Brazil	Court of Appeals
Christy Molzen	Judicial Council
Kevin Bedlington	Court of Appeals
[illegible]	PIK Committee - Jud. Council
Gary W. Nelson	Court of Appeals
Carole Rucht	SRS
Kathy Porter	OJA
Nancy Lindberg	AG

S Jud 1-27-98 att 1

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(Revised 7/97)

Senate Judiciary
1-27-98
att 1

SJud 1-27-98 Att 2

Judicial Council Testimony
on
SB 449

Senate Judiciary Committee
January 27, 1998

The Judicial Council undertook a study of the area of lesser included offenses in criminal cases and has proposed the changes found in SB 449. The Judicial Council's study began when the Council received requests from the chair of the House Judiciary Committee and separate requests from some judges. Judicial Council assigned the criminal law advisory committee the task of studying K.S.A. 21-3107 which is known as the lesser included offense statute.

Under K.S.A. 21-3107, a criminal defendant charged with a crime is entitled to have the jury instructed upon lesser included offenses. If the jury determines that it has a reasonable doubt as to the crime charged, the jury must then determine if the defendant committed the lesser crime.

I wish I could give you a clear, precise explanation of what a lesser included offense is under the provisions of K.S.A. 21-3107. If I could, we would probably not be discussing this topic today. The language of K.S.A. 21-3107 has caused confusion, uncertainty and the reversal of many convictions causing the retrial of many cases and, on rare occasion, the discharge of defendants without a retrial. In one case where the Court of Appeals reversed a conviction, the Court ended the analysis with a plea to the legislature to clear up the confusion surrounding the lesser included offense.

It is not the entire statute which creates problems. Determination of some lesser included offenses is straight forward. For example, subsection (2)(a) of K.S.A. 21-3107, defines a lesser included offense as a "lesser degree of the crime charged." This provision has historically been

Senate Judicial 1-27-98 att 2

interpreted to cover homicides and certain thefts. In other words, if there has been an alleged theft where there is some evidence that the stolen property is of a value less than $500.00 and other evidence that the property is valued more than $500.00, the court will instruct the jury as to felony theft and misdemeanor theft. The Committee did not suggest changes to this provision or to the provisions which allow for instructions on attempts to commit the crime charged.

Generally, problems arose because of the difficulty in applying the language of current subpart (2)(d), which includes within the definition of a lesser included crime "a crime necessarily proved if the crime charged were proved." The Kansas Supreme Court had interpreted this provision to require the trial court to examine the charging instrument and the evidence which must be adduced at trial for the purpose of proving the crime as charged. First, the trial court must examine the elements of the lesser and greater crimes. If the statutory elements of the lesser offense are all included in the elements of the crime charged, instructions on the lesser included offense would be given. However, even if the statutory elements of the lesser offense are not all included in the statutory elements of the crime charged, the court must consider the second step. In this step, trial courts must determine whether any offenses were "necessarily proved" as alleged in the charging instrument and in the facts as established during the trial. If the factual allegations and the evidence at trial necessarily proved a lesser crime, the trial court had to instruct on that lesser crime.[1]

This second step made the inquiry case specific, making it impossible to state any clear cut rule that one crime was necessarily a lesser included offense of another crime. Under the facts of one case, there might be an obligation to instruct on a lesser offense, while under the facts of another case it would be error to give the same instruction. An example would be in the case law where a

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[1] *State v. Fike*, 243 Kan. 365, 367, 757 P.2d 724, 726 (1988).

defendant was charged with burglary and requests an instruction on criminal trespass. In 1976, the Kansas Supreme Court concluded that criminal trespass was not a lesser included crime of aggravated burglary because criminal trespass contains the additional element of the intruder's actual or constructive notice that the intruder has no authority to enter or remain within the structure.[2] In 1980, the statute was amended to allow constructive notice to be established by proving the building was locked and secured against passage.[3] In 1983, the Court of Appeals in one case determined that criminal trespass was a lesser included crime, with the court focusing upon the change in the statute and the evidence that the building was locked.[4] A short time later, another panel of the Court of Appeals disagreed, with Chief Judge Brazil dissenting. The Court of Appeals determined that the element of notice was not necessarily proved in establishing a burglary. The Court noted that the information charging the defendant did not allege that the building was locked, shut or secured against passage.[5]

Last week in our court house a case was tried where the information did allege that the building was locked and that the defendant had been told not to enter the premises. The victim testified that she had told the defendant, her ex-boyfriend, that she did not want to see him again and he was not to come to her house. A few days later, he entered her home when she was gone, knowing she would be at work. He testified that he only entered the home in the hopes of making up with her. She arrived, called police and he was removed from the premises. She later found some jewelry was

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2 *State v. Williams*, 220 Kan. 610, 614-15, 556 P.2d 184 (1976).

3 L. 1980, ch. 99, sec. 1.

4 *State v. Ponds*, 18 Kan. App.2d 231, 850 P.2d 280 (1993), *rev'd on other grounds*, 255 Kan. 672, 877 P.2d 386 (1994).

5 *State v. Rush*, 18 Kan. App. 2d 694, 859 P.2d 387 (1993).

missing. The defendant argued he was entitled to an instruction on criminal trespass. He distinguished the Court of Appeals cases by stating that in his circumstance, the charging documents alleged notice. His testimony was that he did not enter the building with the intent to take any property. Under some of the language of the Court of Appeals decisions, I could construct persuasive arguments for giving the instruction and for not giving the instruction. Certainly there are grounds for an appeal.

In addition to this uncertainty is a great deal of confusion for a jury. Imagine sitting on a jury where you had been told that you were considering charges of first degree murder. Then when you hear the instructions at the end of the evidence, for the first time you find out you may be considering first-degree murder, second-degree murder, manslaughter, involuntary manslaughter, felony-murder, aggravated assault, assault, and perhaps other offenses. While the judge alerts the jury that there maybe other crimes for them to consider, the jury cannot be advised of the specifics at an earlier point because the analysis depends upon what the evidence will be.

Because of the confusion and uncertainty caused by current subpart (d), the committee recommends the deletion of that provision. This decision was not without dissent. More difficult was the decision of what other test should be utilized. Statutes from all other states, the federal code, the model penal code, and suggestions from many writings were reviewed. After considerable discussion, the Committee voted to recommend the addition of language which creates an elements test where "all the elements of the lesser crime are identical to some of the elements of the crime charged." This statutory elements test is the test utilized by the federal courts.

The next substantive change relates to what steps must be taken to cause an issue related to the jury instructions to be an appealable issue. As a general rule, before a party may appeal an issue, the issue must have been presented to the trial court. Subsection (3) of K.S.A. 21-3107 was

24

interpreted as an exception to this rule. In a criminal case, trial counsel could remain totally silent regarding requests for lesser included instructions, but on appeal could raise the possibility of error for not giving an instruction. Many felt that if a trial judge had the opportunity to hear the arguments for the instruction, the instruction might be given. This would reduce the expense and other problems related to an appeal, reversal and need for retrial.

The committee proposes striking subsection (3) of K.S.A. 21-3107 and amending K.S.A. 22-3414 to make it clear that jury instructions regarding lesser included offenses are no longer an exception to the rule requiring counsel to bring objections to instructions to the attention of the trial court. The proposal does allow the trial court the discretion to give a lesser included offense instruction even though neither party has requested it. However, while the trial court has the power to give an instruction without a request, its failure to do so will not be reversible on appeal absent clear error.

Even when the instruction is requested by a party, the trial court retains discretion as to when to give the instruction on a lesser included offense. The proposed language in section 2(3) limits the judges' obligation to instruct to cases "where there is some evidence which would reasonably justify a conviction of some lesser included crime . . . ." The appropriate standard to be utilized was the subject of considerable debate. There is a considerable variance in the approach of the various jurisdictions surveyed. The committee felt that a standard which would require the instruction if there was "any" evidence was too low; yet, the committee felt that the standard should not be so stringent that, in effect, the judge's judgment substituted for the juries.

The Judicial Council believes that these amendments will clarify the current problems in the application of K.S.A. 21-3107 and urge adoption of SB 449.

S Jud 1-27 att 3

DISTRICT COURT OF KANSAS
TWELFTH JUDICIAL DISTRICT
Cloud, Jewell, Lincoln, Mitchell, Republic and Washington

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THOMAS M. TUGGLE
District Judge
913-243-8125

JO ANNE RICE
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Official Court Reporter
913-243-8193

January 23, 1998

Hon. Tim Emert, Chairman
Senate Judiciary Committee
State Capitol Building
Topeka, KS 66601

Re: S. B. 449.

Dear Senator Emert and Committee Members:

The executive committee of the Kansas District Judges' Association reviewed SB449 which, among other things, prevents a defendant on appeal from claiming an error on instructions unless he or she objected at trial.

The executive committee voted to endorse and support this bill as a common sense and fair way to deal with a continuing problem. The Kansas District Judges' Association respectfully requests that this bill be given serious consideration by the committee.

Sincerely,

Thomas M. Tuggle

TMT/jr
cc: Hon. Marla J. Luckert
Ms. Kathy Porter

Senate Judiciary
1-27-98
att 3

SJud 1-27-98 Att 4

KANSAS COURT OF APPEALS

GARY W. RULON
JUDGE

301 WEST TENTH
TOPEKA, KANSAS 66612-1507

(913) 296-6184

January 27, 1998

Honorable Tim Emert
Chair, Senate Judiciary Committee
Statehouse
Topeka, Kansas 66612

Dear Mr. Chairman:

Attached find a copy of my testimony concerning Senate Bill # 449.

Submitted by:

Gary W. Rulon
Judge, Kansas Court of Appeals

cc: Honorable Kay McFarland, Chief Justice of the Kansas Supreme Court
Honorable Tyler C. Lockett, Justice of the Kansas Supreme Court

Senate Judiciary
1-27-98
Att. 4

LESSER INCLUDED OFFENSES

In Kansas a defendant's right to have the jury instructed on a lesser included offense is provided by statute. K.S.A. 21-3107 reads in relevant part,

. . . .

"(2) Upon prosecution for a crime, the defendant may be convicted of either the crime charged or an included crime, but not both. An included crime may be any of the following:

"(a) A lesser degree of the same crime;

"(b) an attempt to commit the crime charged;

"(c) an attempt to commit a lesser degree of the crime charged; or

"(d) a crime necessarily proved if the crime charged were proved.

"(3) In cases where the crime charged may include some lesser crime, it is the duty of the trial court to instruct the jury, not only as to the crime charged but as to all lesser crimes of which the accused might be found guilty under the information or indictment and upon the evidence adduced. If the defendant objects to the giving of the instructions, the defendant shall be considered to have waived objection to any error in the failure to give them, and the failure shall not be a basis for reversal of the case on appeal."

A body of case law has developed interpreting the statute and Kansas appellate courts have applied the following precepts.

4-2

"The court has a duty to instruct the jury of all lesser included offenses established by substantial evidence, however weak. *State v. Harmon*, 254 Kan. 87, Syl. ¶ 1, 865 P.2d 1011 (1993). This is an affirmative duty of the trial court and applies whether or not the defendant requests the instructions." *State v. Bowman*, 252 Kan. 883, 892, 850 P.2d 236 (1993).

The seminal case on lesser included crimes is *State v. Fike*, 243 Kan. 365, Syl. ¶ 1, 757 P.2d 724 (1988).

"In determining whether a lesser crime is a lesser included offense under K.S.A. . . . 21-3107(2)(d), a two-step analysis or two-pronged test has been adopted. The first step is to determine whether all of the statutory elements of the alleged lesser included crime are among the statutory elements required to prove the crime charged. If so, the lesser crime is a lesser included crime of the crime charged. Under the second prong of the test, even if the statutory elements of the lesser crime are not all included in the statutory elements of the crime charged, the lesser crime may still be a lesser included crime under K.S.A. . . . 21-3107(2)(d) if the factual allegations of the charging document and the evidence required to be adduced at trial in order to prove the crime charged would also necessarily prove the lesser crime." *State v. Fike*, 243 Kan. 365, Syl. ¶ 1, 757 P.2d 724 (1988).

"K.S.A. 21-3107(2) does not require an included offense to be a lesser degree of the same crime having a lesser penalty. [Citation omitted.]" *State v. Berberich*, 248 Kan. 854, 860, 811 P.2d 1192 (1991)

"The second prong of the *Fike* test requires both that the charging instrument allege facts which would prove the alleged lesser

included offense and that the evidence required to prove the charge establish that such offense was committed. *State v. Webber*, 260 Kan. 263,281, __ P.2d __ (1996).

"Instructions on lesser included offenses must be given even though the evidence is weak and inconclusive and consists solely of the testimony of the defendant." *State v. Spresser*, 257 Kan. 664, 672, 896 P.2d 1005 (1995).

"Evidence supporting a lesser included instruction may be presented by either the defendant or the State." *State v. Coleman*, 253 Kan. 335, 354, 856 P.2d 121 (1993).

> An instruction on a lesser included offense is required if there is substantial evidence upon which the defendant might reasonably have been convicted of the lesser offense. The duty does not arise unless there is evidence supporting the lesser offense. While there is some weighing of the evidence in this analysis, the weighing of evidence is not a retrial of the case. The evidence supporting the lesser included offense must be viewed in the light most favorable to the defendant. *State v. Shannon*, 258 Kan. 425, Syl. ¶ 1, 905 P.2d 649 (1995).

"[A]s the Court of Appeals . . . noted, the test is not what the State *may* prove, but what the State is *required* to prove." (Emphasis in original) *State v. Rush*, 255 Kan. 672, 677, 877 P.2d 386 (1994).

While a defendant waives the right to challenge the failure to give a lesser included instruction if he or she objects to the instruction, if a defendant requests an instruction on what he or she believes is a lesser included crime and the trial court agrees, and the defendant is then convicted of the lesser crime, the defendant can still appeal. The defendant can argue that the court had no jurisdiction to convict

him or her of the crime because in fact the crime was not a lesser included crime of the greater crime.

> "The charging document is the jurisdictional instrument which gives the court authority to convict a defendant of crimes charged in the complaint or of the lesser included crimes thereof. Conversely, if a crime is not specifically stated in the information or is not a lesser included offense of the crime charged, the district court lacks jurisdiction to convict a defendant of the crime, regardless of the evidence presented."
>
> "A conviction based upon a charge not made in the information and not properly before the district court is a clear violation of due process under the Fourteenth Amendment to the Constitution of the United States. In a criminal action the trial court must not only have jurisdiction over the offense charged, but it must also have jurisdiction over the question which its judgment assumes to decide."

State v. Horn, 20 Kan.App. 2d 689, Syl. ¶¶ 1 & 2, 892 P.2d 513, *rev. denied*, 257 Kan. 1095 (1995) citing *State v. Chatmon*, 234 Kan. 197, 204-05, 671 P.2d 531 (1983).

Most of the problems arise in this area because of the nature of the second prong of the *Fike* test and such problems are aggravated by the language in the statute and case law placing an affirmative duty upon the trial court to give a lesser included instruction when necessary. Under the current state of the law a defendant may raise an allegation of error regarding a lesser included instruction on appeal even though he or she never raised the issue at trial. This places the district court in the unenviable position of deciding, usually at the last minute, whether to give a lesser included instruction. The court has the responsibility of spotting any lesser included crimes arising under either of the prongs of the *Fike*. Only if the defendant

objects to the giving of such an instruction and the court sustains the objection, will the defendant waive the right to challenge the court action on appeal. K.S.A. 21-3107(3). See also *State v. Warbritton*, 211 Kan. 506, 506 P.2d 1152 (1973) (K.S.A. 21-3107[3] controls over the more general statutes, K.S.A. 22-3414[3] which requires a party to object to the giving or failure to give an instruction to preserve the issue on appeal.)

It appears that early in this states history the courts were not faced with the convoluted nature of lesser included crimes as defined in the second prong of the *Fike* test.

> "Prior to the adoption of the Kansas Criminal Code in 1969, Kansas followed the traditional common-law rule on instructing the jury on lesser included offenses, i.e., the elements test. G.S.1868, ch. 82, § 121 provided that upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment and guilty of any degree inferior thereto or of an attempt to commit the offense. G.S.1868, ch. 82, § 122 stated that upon the trial of an indictment for a felony the defendant may be found guilty of any other felony or misdemeanor necessarily included in that with which he is charged in the indictment or information. When the Kansas Criminal Code was adopted, K.S.A. 21-3107(2)(a), (b), and (c) replaced the 1868 codification of the common law." *State v. Berberich*, 248 Kan. at 857-58.

> "When the legislature enacted the Kansas Code of Criminal Procedure in 1969, it modified and enlarged the common law duty to instruct on lesser included offenses (the elements test) by adding subsection (d) to K.S.A. 21-3107(2). In addition to the common-law elements test, judges are now required to also instruct the jury on

lesser included offenses when there is evidence submitted to the jury of a crime necessarily proved if the crime charged were proved." 248 Kan. at 859-860.

THE QUESTION PRESENTED IS WHETHER THERE IS A WAY TO CLARIFY THE LAW OF LESSER INCLUDED OFFENSES SO THAT BOTH BENCH AND BAR WILL HAVE A BETTER UNDERSTANDING OF EXACTLY WHAT CONSTITUTES A LESSER INCLUDED OFFENSE AND ENACT RULES BY WHICH THE TRIAL AND THE APPELLATE COURTS CAN EFFICIENTLY AND FAIRLY EXAMINE THE GIVING OR FAILURE TO GIVE A LESSER INCLUDED INSTRUCTION.

Commentators agree that the lesser included doctrine was developed at early common law and exists in some form in both state and federal jurisdictions. Shellenberger & Strazzella, *The Lesser included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 Marq. L. Rev. 1 (Fall 1995). In applying the doctrine of lesser included offenses a court must ask two questions: how is a lesser included offense defined and under what circumstances should a trial court give a lesser included instruction. *State v. Jefferies*, 430 N.W.2d 728, 730 (Iowa 1988.)

Various jurisdictions have adopted different approaches for determining when a crime is a lesser included crime of the offense charged. One Kansas commentator states that the way a jurisdiction defines a lesser included offense generally fall into four categories. Note, *The Doctrine of Lesser Included Offenses in Kansas*, 15 Washburn L.J. 1, 40 (1976). The first category includes crimes which are lesser degrees of the same crime such as murder and manslaughter. The second

type is an offense which is necessarily committed by committing the crime charged. The third category encompasses attempts as lesser included crimes. The fourth category includes crimes that are included because of the accusations in the pleadings. According to this author, Kansas has not recognized the fourth category of lesser includeds. Note, *The Doctrine of Lesser Included Offenses in Kansas*, 15 Washburn L.J. 1, at 41-43 (1976). While this may have been the case in 1976, it appears Kansas now recognizes this fourth category of lesser includeds since the *Fike* decision.

Another commentator defines what is and is not a lesser included crime using three tests, the statutory elements test, the pleadings test and the evidence test. The statutory elements test considers only the elements of the crimes as set forth in the criminal statutes. This is the approach utilized by the federal courts. See *Schmuck v. United States*, 489 U.S. 708 (1989).

The pleadings approach looks to the pleadings to supplement the statutory definition. The pleadings approach allows the inquiry to be broadened to include consideration of allegations in the charging document that are beyond the statutory elements.

The third test is the evidence test. Under the evidence test the court examines the evidence actually adduced at trial.

> "For example, if evidence presented at trial shows that the defendant shot the victim in the leg, then discharging a weapon would be a [lesser included offense] of simple assault, even though the statute

defining simple assault does not mention weapons and the charging instrument does not allege the precise means of committing the assault."

Shellenberger & Strazzella, *The Lesser included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 Marq. L. Rev. at 8-13 (Fall 1995).

Still others define lesser included offenses using three different approaches: the common-law or strict statutory-elements approach, the cognate approach, or the Model Penal Code approach. *State v. Jefferies*, 430 N.W.2d at 730.

The common-law or strict statutory-elements approach simply looks to the elements of the main and lesser crimes as defined by statute and does not consider the charging document or the evidence. The court simply lays the applicable statutes side by side and examines their elements in the abstract. If the lesser offense contains an element that is not an element of the greater offense, it cannot be a lesser included offense of the greater. 430 N.W.2d at 730.

The cognate approach is actually subdivided into two parts. One is the cognate-pleading method which involves examining the facts alleged in the charging document rather than just the statutory elements of the offense. The second is the cognate-evidence approach where the court focuses on the evidence supporting the charge rather than on the statutory elements or the accusatory pleadings. According to *Jefferies*, the cognate approach has been adopted by a majority of the jurisdictions in response to the rigidity of the strict statutory-elements approach. 430 P.2d at 731.

In reality, both cognate approaches define crimes that are "lesser related" offenses but are not really lesser included offenses.

> "To be precise, lesser included offenses are only crimes that are included within the elements of another crime. Related or cognate offenses, on the other hand, are crimes that are in some way related or similar to each other, but that are not necessarily included within each other. [A lesser included offense] only has elements that are included within those of the greater, with no elements in addition to those of the greater. In contrast, related offenses could each have elements that the other does not have."

Shellenberger & Strazzella, *The Lesser included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 Marq. L. Rev. at 15 (Fall 1995).

The third approach is advocated by the Model Penal Code:

> "A defendant may be convicted of an offense included in the offense charged in the indictment [or the information]. An offense is so included when:
>
> "(a) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
>
> "(b) it consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein; or
>
> "(c) it differs from the offense charged only in the respect that a

less serious injury or risk of injury to the same person, property or public interest or lesser kind of culpability suffices to establish its commission. [Citation omitted.]" 430 N.W.2d at 732.

Kansas appears to have adopted a combination of the Model Penal Code and cognate-pleadings approach.

IN EXAMINING HOW TO MODIFY THIS STATE'S APPROACH TO LESSER INCLUDE OFFENSES, THE FIRST QUESTION PERHAPS IS WHETHER A CRIMINAL DEFENDANT HAS ANY RIGHT OUTSIDE THE STATUTORY ENACTMENT TO HAVE A JURY INSTRUCTED ON A LESSER INCLUDED OFFENSE? AT THIS POINT IN TIME THE ANSWER APPEARS TO BE A QUALIFIED NO.

Under current United States Supreme Court precedent the only time the Court has found that a defendant has a Constitutional right to have the jury instructed on any lesser included offense is in capital cases. *Beck v. Alabama*, 447 U.S. 625, (1980). In *Beck* the Court struck down a Alabama statute that prohibited the giving of lesser included instructions on a charge of capital murder as being unconstitutional. 447 U.S. at 628-29.

However, there are exceptions to this rule. Even in capital cases, a defendant is not entitled to a lesser included instruction if the evidence could not support the lesser included offense. *Hopper v. Evans*, 456 U.S. 605 (1982). Also, the court is not required to instruct on a lesser included offense in a capital case where the statute of limitations has run on the lesser offense and the defendant refuses to waive the

statute. *Spanziano v. Florida*, 468 U.S. 447 (1984). The Tenth Circuit has held that a state trial court's failure to instruct on a lesser included offense in a non-capital case, even where there was sufficient evidence to warrant such an instruction, could not be grounds for habeas corpus relief in federal court. *Chaves v. Kerby*, 848 F.2d 1101 (10th Cir. 1988).

Arguably if failure or refusal to give a lesser included instruction cannot be grounds for federal habeas relief in a noncapital case, there is no Constitutional right to a lesser included instruction in a noncapital case. Were there such a right it would be subject to review in federal court by a writ of habeas corpus. See 28 U.S.C. 2254. However, the Sixth Circuit has recognized that due process requires that a lesser included instruction be given if warranted by the evidence and has found that this rule is not limited to capital cases. *Ferrazza v. Mintzes*, 735 F.2d 967, 968 (6th Cir. 1984). For a more in depth survey of the federal circuits' position on this subject see Shellenberger & Strazzella, *The Lesser included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 Marq. L. Rev. at 42-85. (Fall 1995).

THE RELEVANCE OF THE ABOVE FEDERAL CASES IS THAT ABSENT A CONSTITUTIONAL RIGHT TO A LESSER INCLUDED INSTRUCTION, THE LEGISLATURE WOULD BE FREE TO SET LIMITS UPON WHEN SUCH AN INSTRUCTION MUST BE GIVEN AND DEFINE A STANDARD OF REVIEW ON APPEAL. OBVIOUSLY THE STATE COULD NOT PROHIBIT THE GIVING OF LESSER INCLUDED INSTRUCTIONS IN CAPITAL CASES UNDER *BECK V. ALABAMA*, BUT SHORT OF THAT, THERE DOES NOT APPEAR TO BE A SUBSTANTIAL LIMIT UPON THE STATE'S ABILITY TO RESTRICT THE RIGHT.

4-12

Rule 31(c) of the Federal Rules of Criminal Procedure states that, "The defendant may be found guilty of an offense necessarily included in the offense charged or an offense necessarily included therein if the attempt is an offense." The federal courts have fashioned a 4 or 5 prong test to evaluate claims that a lesser included instruction is necessary.

> "In this circuit it is settled that a defendant is entitled to a lesser included offense instruction if, but only if, the following conditions are met: (1) An appropriate instruction must be requested; (2) the elements of the lesser offense are identical to part of the elements of the greater offense; (3) there is some evidence that would justify conviction of the lesser offense; (4) the proof on the differentiating element or elements must be sufficiently in dispute that the jury may consistently find the defendant innocent of the greater offense but guilty of the lesser; and (5) a charge on the lesser offense may appropriately be requested by either the prosecution or the defense." *United States v. Scharf*, 558 F.2d 498, 502 (8th Cir. 1977). See *U.S. v. Young*, 862 F.2d 815, 820 (10th Cir. 1989) (Tenth Circuit utilizes only the first 4 of the elements of the above test.)

Under the federal rules the courts apparently use only the statutory elements approach to determine if a crime is a lesser included crime. See *Schmuck v. United States*, 489 U.S. 705 (1989) and Shellenberger & Strazzella, *The Lesser included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 Marq. L. Rev. at 8-10 (Fall 1995). The Tenth Circuit has found that where a defendant does not request an instruction on a lesser included offense he or she is barred from raising the issue on appeal. 862 F.2d at 820. See also 100 A.L.R. Fed. 481 at 492 (Cases which hold that a proper request at trial is

necessary to preserve the issue.) Thus, under the federal rules, only the identity of the elements test determines if a crime is a lesser included crime of another and if a defendant does not ask for or object to the giving of a lesser included instruction, the issue is barred on appeal.

If the state does not want to eliminate lesser included instructions altogether, there are to be several ways to clarify how one determines what is or is not a lesser included crime, who may raise the issue in the trial court, and what is the appellate court's jurisdiction and standard of review.

The first option that needs to be considered is enacting a statute which would list each crime and then any lesser included crime. The bench and bar would then simply be able to refer to the statute and determine if the crime charged had any lesser included crimes. If there were statutory defined lesser included crimes, the court would merely have to review the evidence adduced at trial to see if the evidence would support the lesser included crime and determine if the defendant's theory of defense precluded a finding of guilt on the lesser included. This statute would augment the identity of the elements test.

However, the real difficulty in dealing with lesser included crimes is not the elements test but the second prong of the *Fike* test, the necessarily proved crimes based on the language in the charging document and the evidence adduced at trial. Research shows that at least one state has decided that it will only use the identity of the elements test or the statutory elements test to determine what is and is not a lesser included crime of the crime charged. *State v. Keffer*, 860 P.2d 1118 (Wyo. 1993). The Wyoming statute dealing with lesser included crimes mirrors the federal rule

and the Wyoming Supreme Court ruled that from that date forward only the common law approach or the statutory elements approach would be used to determine if a crime is a lesser included offense of another crime. 860 P.2d at 1131, 1133-1134. The *Keffer* opinion makes a thorough review of the types of lesser included statutes in use, a review of United States Supreme Court decisions on the subject and discusses double jeopardy, due process, and notice concerns that are implicated by which type of lesser statute or policy is in place. In the final analysis the court found that the statutory elements test was the most straight-forward, least confusing and least fraught with pitfalls for both the parties and the courts. Thus one option to consider would be to follow Wyoming's approach and statutorily change K.S.A. 21-3107 to mirror rule 31(c) of the federal rules of criminal procedure and mandate that only the statutory elements test be used in determining if a crime is a lesser included crime. This would bring Kansas procedure into harmony with federal law and federal precedent. If there was a statute listing all crimes and any lesser included crimes, this would be a simple process of looking up the crime charged and then reviewing the evidence adduced at trial to see if it would support the giving of an instruction on a lesser included. A defendant could not be heard to complain that he or she did not have notice as the statute would place the bench and bar on explicit notice of what could be considered a lesser included crime of the crime charged. However, this approach has been criticized as inherently inflexible. The rigid results of this theory are said to conflict with the primary function of the lesser-included doctrine which is to allow the jury to correlate more closely the criminal conviction with the act committed. 430 N.W.2d at 731.

Even if the legislature declined to limit lesser included offenses to those that met the statutory elements test, a statutory list of lesser included crimes would still

be vastly beneficial to the bench and bar in applying the first prong of *Fike*.

Also, a procedural change that should be given serious consideration is to remove the language in K.S.A. 21-3701(3) which places an affirmative duty upon the court to recognize and instruct on any lesser included crime where there is evidence to support such an instruction. It should not be the duty of the trial judge to examine the statutes, the pleadings, and the evidence adduced at trial to see if there are conceivably any lesser included crimes, but such responsibility should rest with counsel for the state and for the defense to raise such issues.

Research indicates that many if not most states require the defendant to raise the question of a lesser included instruction at trial in order to preserve the issue on appeal. In *State v. Leyba*, the defendant argued that it was error for the trial court not to instruct the jury *sua sponte* on the elements of a lesser included crime. 915 P.2d 794, 797 (Mont. 1996). "The rule in Montana and in the majority of states is that if a request for such an [lesser included] instruction is not made, the appellate court will no overturn the conviction absent plain error." 915 P.2d at 798.

> "Plain errors are those errors so shocking that they seriously affect the fundamental fairness and basic integrity of the proceedings conducted below . . . [S]uch errors are to be noticed only in exceptional cases or under peculiar circumstances to prevent a clear miscarriage of justice. [Citations omitted.]" *U.S. v. Hallock*, 941 F.2d 36, 42 (1st Cir. 1991).

In *State v. Whittle*, 156 Ariz 405, 752 P.2d 494 (1988), the Arizona Supreme Court considered a case where the defendant was originally tried on one count of

first degree murder but convicted of the lesser included offense of reckless second degree murder. Upon the defendant's motion, the trial court ordered a new trial because the evidence would not support reckless second degree murder. The Arizona Court of Appeals reversed and remanded for sentencing. The Supreme Court granted defendant's petition for review. 156 Ariz. at 406-07.

The defendant argued that the trial court should have instructed the jury *sua sponte* on all lesser included degrees of homicide supported by the evidence. The court held that while the Arizona rules of criminal procedure require the trial court to submit forms of verdicts for all necessarily included offenses, the rules also provide that a party may not assign as error the failure to submit a verdict form unless a timely objection is made to the trial court. The court went on to note that there were two exceptions to the rule, one for a capital case where the court has a duty to instruct on lesser included offenses even if not requested, and the second in cases where the failure to give a lesser included instruction and verdict form amounted to fundamental error. 156 Ariz. at 406-07

> "[A] failure to instruct, absent a request, should be examined to determine if fundamental error has occurred. Fundamental error is error of such dimensions that it cannot be said it is possible for a defendant to have had a fair trial. * * *
> "Reversal is required because the error went to the very foundation of his theory of the case and took away a right essential to his defense"
> 156 Ariz. at 407.

The court concluded that under the facts of that case the failure to give instructions on other possible lesser included offenses did not interfere with the

defendant's ability to conduct his defense.

In *Keffer*, the Wyoming court noted that an objection must be made to give the trial court the opportunity to correct any possible error in instructing the jury before the jury retires. In the absence of such an objection, review is limited to the noticing of any plain error. When the error is preserved, the question of what offenses are necessarily included in the charged offense is a question of law and review is de novo. 860 P.2d at 1137.

In *Huntley v. State*, 750 P.2d 1134 (1988), the Oklahoma Court of Criminal Appeals noted that where a defendant fails to request an instruction on a lesser included offense, he or she waives consideration of the issue on appeal absent a showing of fundamental error. 750 P.2d at 1135.

Thus K.S.A. 21-3107 could be modified to place the burden of requesting an instruction on a lesser included offense back where it belongs, with the parities. A requirement that the parties initiate a request for such an instruction is consistent with the adversarial nature of our system. Accord *Keffer*, 860 P.2d at 1134.

The statute might be modified to read:

> "In cases where the crime charged may include some lesser crime as defined in K.S.A. [new statute(s) listing crimes and lesser included crimes], a defendant has a right to have the jury instructed not only as to the crime charged but as to all lesser crimes of which the accused might be found guilty under the information or indictment and which is supported by the evidence adduced. The parties have the affirmative duty to raise the issue of

> instructing the jury on any lesser included offense prior to the time the court charges the jury. Absent a request for or an objection to the giving or failure to instruct on a lesser included offense, the parties shall be barred from raising the issue on appeal except in cases where the death penalty is imposed.

Under this language a defendant continues to have the right to have the jury instructed on a lesser included crime when appropriate, but the burden now shifts to the defendant to either ask for or object in order to preserve the issue on appeal. The state could still request a lesser included instruction if it feels that proof of any of the elements of the greater crime are weak, but could not appeal if the court refuses except on a question reserved.

In reviewing a party's claim that the court erred in refusing to grant or in overruling an objection to a lesser included instruction the appellate court would arguably apply a two part analysis. First, was the crime a lesser included crime of the crime charged. Whether one crime is a lesser included of another would be a question of law and the appellate scope of review would be de novo. *Keffer*, 860 P.2d at 1137 accord *U.S. v. Spencer*, 905 F.2d 1260 (9th Cir. 1990). The second step would be for the court to decide whether there was evidence that would support the giving of such an instruction. At least one state has found that the decision of whether there is sufficient evidence to justify instructing the jury on a lesser included offense is subject to the abuse of discretion standard. *Rumbo v. State*, 750 P.2d 1132 (Okl. Cr. 1988).

In conclusion there are several avenues that the legislature could take to alleviate some of the difficulty the bench and bar have in analyzing and applying the doctrine of lesser included offenses.

- Enact a statute or statutes which list, by type of crime,*.i.e.*, crimes against persons, sex offense crimes etc., and any and all lesser included crimes.

- Modify K.S.A. 21-3107 to generally mirror Rule 31(c) of the Federal Rules of Criminal procedure and limit the definition of lesser included crimes to those which are either listed in the above suggested statute or ones which satisfy the statutory identity of the elements test.

- Amend K.S.A. 21- 3107 to mandate that the state and the defendant have the duty to raise the issue of any possible lesser included offense instruction to the trial court and absent a request for or an objection to such an instruction, the issue cannot be the basis for reversal on appeal except in a capital case.

- Enact a statute, similar to K.S.A. 21-4721 limiting the appellate court's jurisdiction to review cases involving lesser included instructions to situations where:

> A defendant is convicted of a capital crime; or
> a party has requested or objected to an instruction and the issue is;
>
> > whether the crime is a lesser included crime as a matter of law; and
> > whether, under the abuse of discretion standard, the evidence adduced at trial would justify a jury verdict on the lesser included

crime in accord with the defendant's theory and whether the evidence would preclude a finding of guilt on the lesser offense.

The above proposed statutory revision would arguably clarify when a trial court is required to give a lesser included instruction and simplify the appellate court's of review.

APPENDIX I

LESSER INCLUDED OFFENSES IN THE FEDERAL COURTS UNDER Fed. R. Crim. Proc. 31(c).

"The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or and offense necessarily included therein if the attempt is an offense." Fed. R. Crim. Proc. 31(c).

The 10th Circuit Court of Appeals has ruled that the court should give an instruction on a lesser included offense if:

"(1) there has been a proper request,
(2) the lesser included offense consists of some, but not all, of the elements of the offense charged,
(3) the elements differentiating the two offenses is a matter of dispute, and
(4) a jury could rationally convict on the lesser offense and acquit on the greater offense." *U.S. v Young*, 862 F.2d 815, 820 (10th Cir. 1988).

"A defendant must establish each element to be entitled to a lesser offense instruction." [Citation omitted.] 862 F.2d at 820.

The 8th Circuit uses a slightly different test.

"(1) An appropriate instruction must be requested;

4-22

(2) the elements of the lesser offense are identical to part of the elements of the greater offense;

(3) there is some evidence that would justify conviction of the lesser offense;

(4) the proof on the differentiating element or elements must be sufficiently in dispute that the jury may consistently find the defendant innocent of the greater offense but guilty of the lesser; and

(5) a charge on the lesser offense may appropriately be requested by either the prosecution of the defense." *United States v. Scharf*, 558 F.2d 498, 502 (8th Cir. 1977).

Under either test, when a defendant seeks to raise on appeal the trial court's failure to *sua sponte* give an instruction on a lesser included offense, the standard of review is under the "plain error" doctrine.

Plain error - Fed. R. Crim. Proc. 52(b).

"Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court" Fed. R. Crim. Proc. 52(b)

"Plain error" has been defined as,

"[The] doctrine which encompasses those errors which are obvious and highly prejudicial, which affect the substantial rights of the accused,

4-23

and which, if uncorrected would be an affront to the integrity and reputation of judicial proceedings *U.S. v. McCord*, 166 U.S. App. D.C. 1, 501 F.2d 334,341." Black's Law Dictionary 1150 (6th ed 1990).

Paraphrasing the language in one decision, there is a high standard that an appellant must meet before the court will find plain error. Such errors are limited to those which undermine the fundamental fairness of a trial and are restricted to those which are obvious, or seriously affect the fairness, integrity or public reputation of judicial proceedings. Necessarily, the plain error exception is to be used sparingly, only to prevent justice from miscarrying. Inasmuch as plain error gives the defendant a free second bite at the cherry, it is to be narrowly limited. The doctrine focuses only on those errors so shocking that they seriously affect the fundamental fairness and basic integrity of the proceedings conducted below. *U.S. V. Henson,* 945 F.2d 430, 440 (1st Cir. 1991). (attached)

Kansas has not adopted the "plain error" rule, but, under the proposed statute, would analyze the question of failure to give a jury instruction on a lesser included offense when no instruction was requested, or where no objection to such an instruction was proffered, under the clearly erroneous rule. See K.S.A. 22-3414(3)

Clearly Erroneous

4-24

"No party may assign as error the giving or failure to give an instruction unless he or she objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he or she objects and the grounds for the objection, unless the instruction is clearly erroneous. An instruction is clearly erroneous only if the reviewing court reaches a firm conviction that if the trial error had not occurred there is a real possibility the jury would have returned a different verdict." *State v. DePriest,* 258 Kan. 596, Syl. ¶ 4, 907 P.2d 868 (1995).

Other states have used the phrase "fundamental error" to describe the appellate court's review in such circumstances.

Fundamental error is error of such dimensions that it cannot be said it is possible for a defendant to have had a fair trial. Reversal is required because the error went to the very foundation of the defendant's theory of the case and took away a right essential to his or her defense. See *State v. Whittle*, 156 Ariz. 405, 407, 752 P.2d 494 (1988). In *Whittle*, the court found that under the facts of the case, the trial court's failure to *sua sponte* give and instruction on a lesser included offense did not interfere with the defendant's ability to conduct his defense.

KANSAS COURT OF APPEALS
301 WEST TENTH
TOPEKA, KANSAS 66612-1507

DAVID S. KNUDSON
JUDGE

(913) 296-5410

January 27, 1998

Senate Judiciary Committee
State Capitol
Topeka, Kansas 66612

RE: S.B. 449 (Am. to K.S.A. 21-3107, multiple prosecutions for same act)

Mr. Chairman and members of the Senate Judiciary Committee:

Thank you for affording me this opportunity to express support for S.B. 449, amending K.S.A. 21-3107.

As chairperson of the advisory committee for pattern jury instructions for Kansas (PIK) and having been on the bench for 17 years, I am well acquainted with the problems the present statute has caused for the effective and efficient administration of justice.

The PIK committee is charged by the Judicial Council with the responsibility to prepare pattern instructions that district judges may rely upon when instructing a jury. These pattern instructions do not have the force of law, but are to be followed whenever possible. In addition to preparing pattern instructions, the PIK committee also provides notes on use and case comments for the easy and quick reference of busy trial judges. A positive strength of pattern instructions is that their use promotes uniformity and consistency throughout the state of Kansas. Thus, trial judges and litigators generally do not have interminable squabbles about what instructions should be given a jury. This benefits all concerned.

Present K.S.A. 21-3107(2)(d) and 21-3107(3) move us in an opposite direction. What is "a crime necessarily proved if the crime charged were proved?" That depends upon what crime is charged by the State, how the charging document is drafted, and what evidence is presented at trial. This literally sets the stage for protracted arguments about whether a particular offense is a lesser included offense that the trial court must instruct upon.

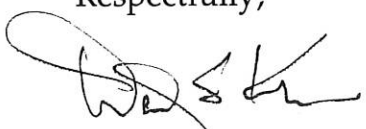
Another problem is that the statute imposes a duty upon the trial judge to decide whether a lesser included offense instruction is necessary without a concomitant duty of the defendant to request such an instruction. Under such circumstances, if the trial judge does not realize a lesser offense instruction should be given, there is a strong probability a conviction will be overturned on appeal.

Senate Judiciary
1-27-98
att 5

These kinds of problems caused by the present law of lesser included offenses prevents the PIK committee from providing generic instructions, notes on use, and comment, to assist the trial judges of Kansas. This is because under the present statute a decision as to whether a lesser included offense is warranted must be made on a case by case basis and is dependent upon the specifics of the charging document and the evidence presented at trial.

We believe S.B. 449 goes a long way toward rectifying these problems. First, lesser included crimes would be restricted to the traditional elements test. This would greatly simplify the proceedings at the trial court level and would minimize the game playing that exists under the current law. Defendants could not as easily sandbag the district court and create an issue for appeal. Second, the PIK committee would be able to readily identify lesser included offenses under the traditional identity of elements test as the issue would no longer be dependent upon the specifics of the charging document and the evidence in support of those specifics introduced at trial. For reasons I have already stated, this would promote uniformity and consistency in jury instructions.

Respectfully,



David S. Knudson

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Testimony in Support of
Senate Bill No. 449
James W. Clark, Excecutive Director, KCDAA

I. Fike is a Four-lettered Word

In 1988, the Kansas Supreme Court considered the issue of whether aggravated sexual battery was a lesser included offense of indecent liberties with a child, and held that it was not. In affirming a conviction of the latter, where the district court declined to give an instruction on the lesser offense, Chief Justice Holmes stated: "There are very few areas of the criminal law which have given the appellate courts more difficulty than the problem of lesser offenses under K.S.A. 1987 Supp. 21-3107". State v. Fike, 234 Kan. 365, 757 P.2d 724, at 725. It then proceeded to make the matter worse. It espoused a two-step process actually developed in an opinion of Justice Allegrucci in State v. Adams, 242 Kan. 20, 774 P.2d 833 (1987). The first step, the elements test, "is ordinarily fairly straightforward, and requires a jury instruction on a particular lesser offense whenever all of its statutory elements will automatically be proved if the State establishes the elements of the crime as charged." Fike, at 726. The second step, required under 21-3701(2)(d), requires the trial court to consider the factual allegation in the charging document and the evidence adduced at trial; and where the allegation does not meet the statutory elements test, and the evidence also proves the lesser crime, an instruction on the lesser included crime is required. The second step, then, in considering the factual allegations and the evidence adduced, is necessarily driven by the facts of each case, and which are then scrutinized by the appellate courts in each case, with varying results.

Senate Bill 449 is the result of a request of the Kansas Judicial Council, and attempts to solve the problem of the second step of Fike by simply eliminating it. The bill amends K.S.A. 21-3107 by removing section (2)(d), thus leaving determinations of lesser included offenses to the elements test only. This is the test employed by the federal government, and was the test in Kansas prior to the revisions of the criminal code in 1970. The bill also removes language pertaining to a judge's duty to instruct from 21-3701 to K.S.A. 22-3414, the section on trial procedure.

2. The Dilemmas of Horn

In 1995, the Kansas Court of Appeals reversed a conviction of aggravated sexual battery, holding that it is not a lesser included offense of aggravated criminal sodomy hence the district court lacked jurisdiction over the offense. In State v. Horn, 20 Kan.App.2d 689, 892 P.2d 513, it reversed the conviction, even though the instruction had been requested by the defendant, because the trial court lacked jurisdiction over the offense. The result is that because of the confusing state of the law of lesser included offenses, defendant was able to request such an instruction, be acquitted of the higher charged crime, and then have his conviction of the lesser crime reversed.

SB 449 does not entirely eliminate the Horn dilemma, in that the amendment to K.S.A. 22-3414 in section 2 (line 38) only requires an objection to an instruction, is does not preclude requesting an improper instruction, as was the case in Horn. Nevertheless, by restricting lesser included offense instructions to the elements test, and requiring objection even to lesser included offenses, the law of lesser included instructions will become more certain, and less likely to be described in four-letter words.

Senate Judiciary
1-27-98
att. 6

Fike and its Progeny

A sampling of Kansas appellate court decisions relating to the application of the Fike decision on lesser included offense instructions.

Compiled by James W. Clark
Criminal Law Advisory Committee
Kansas Judicial Council July 11, 1997
Updated for Senate Judiciary Committee January 26, 1998

State v. Burgess, 62263 (FR 2/17/89), a conviction for voluntary manslaughter was reversed, the Court of Appeals finding that since there was some evidence of self defense, a jury could have found lawful conduct done in an unlawful manner, and it was error not to instruct on the lesser included offense of involuntary manslaughter.

State v. Ishman, 61992 (SN 5/12/89), defendant convicted of lesser included offense of voluntary manslaughter appeals because his counsel objected to the instruction. The Court of Appeals held a defendant cannot control the giving of instructions as required in K.S.A 21-3701, in effect "go for broke" to either be convicted of the higher offense or acquitted. While the statute requires defendant to waive error if he fails to object, and the instruction is not given, where his objection is overruled and the instruction given, there is no error.

State v. Martinez, 62813 (SG 9/8/89), a battery conviction was reversed as it was not a lesser included offense of aggravated battery, and the lesser included offense instruction should not have been given. The Court of Appeals held that where a shooting was involved, the only question was whether defendant did it intentionally or accidentally. If the latter, acquittal required. (Both the State and defendant objected to the instruction on those same grounds).

State v. Summers, 63348 (NO 1/26/90), conviction for aggravated sexual battery reversed, not a lesser included offense of indecent liberties with a child. Trial court lacked jurisdiction over the lower offense, even where defense counsel requested the instruction.

State v. Smith, 68188 (AT 7/2/93), defendant requested instruction on conspiracy as lesser included offense of aiding and abetting a burglary, the trial court granted request, and Court of Appeals reversed, holding it was not a lesser included offense, hence no jurisdiction.

State v. Ponds, 18 K.A.2d 231 (4/9/93), the failure to instruct on criminal trespass as a lesser included offense of burglary was error, burglary conviction reversed.

State v. Rush, 18 K.A.2d 694 (8/27/93), a different panel of the Court of Appeals held criminal trespass not a lesser included offense of burglary.

State v. Embray, 69387 (SG 5/6/94), the Court of Appeals holds that where the victim and defendant's testimony was contradictory, attempted rape conviction reversed for failure to instruct on battery. The Court acknowledged that State v. Arnold, 223 Kan. 715, held battery not a lesser included offense of rape, but that decision was 10 years before Fike.

State v. Rush, 255 Kan. 672 (7/8/94), the Supreme Court finally resolves the conflicting opinions of the Court of Appeals and holds that criminal trespassing is not a lesser included offense of burglary. In so doing it attempts to clarify the second prong of Fike, it limits it to what the State is required to prove, not what it may prove.

State v. Diggs, 70632 (WY 8/5/94), defense counsel did not object to instruction on criminal trespassing as a lesser included offense of burglary, and even stated he wanted it. Criminal trespassing conviction reversed for lack of jurisdiction, as no longer a lesser included offense of burglary.

State v. Rader, 256 Kan. 364 (12/9/94), the Supreme Court finally holds theft by threat is not a lesser included offense of robbery.

State v. Horn, 20 K.A.2d 689 (3/24/95), even though requested by defense counsel, instruction on aggravated sexual battery was error, as it is not a lesser included offense of aggravated sodomy, and conviction reversed. After noting the numerous appeals based on lesser included offense instructions, even those requested by defense counsel, the Court of Appeals states "Common sense tells us some remedy is needed. We believe most of the dense legal fog which shrouds claims of trial court errors based upon failure to instruct on lesser included crimes would diminish if our legislature would promulgate a statutory list of lesser included crimes for each felony crime found in our criminal code."

State v. Ochoa, 20 K.A.2d 1014 (4/28/95), level 4 aggravated battery reversed for failure to instruct on levels 5, 7, and 8, indicating the addition of severity levels has exacerbated the instruction problem.

State v. Shannon, 258 Kan. 425 (10/27/95), new test: lesser included offense instruction viewed in light most favorable to defendant.

State v. Faust, 73105 (DK 2/16/96), defendant kicked baby sitter in face and ribs, resulting in loss of teeth. Aggravated battery conviction reversed for failure to instruct on battery, even though no request by defense counsel, since defendant testified she wasn't intending to hurt the victim.

State v. Kiser, 72046 (RN 2/23/96), defendant charged with four counts of first degree murder, convicted of two second degree murders and two voluntary manslaughters, complains that voluntary manslaughter should not have been instructed as a lesser included offense as no evidence of heat of passion. The Court of Appeals finds that where defendant requested the instruction, actually benefitted by it, it was invited error.

In re M.D.R., 74267 (SN 4/5/96), the Court of Appeals reverses an adjudication of criminal trespass, holding that under Rush, it is not a lesser included offense of burglary; and since it was not charged, the juvenile court lacked jurisdiction over the offense. The Court also reverses an adjudication of criminal damage to property, as it is not a lesser included offense of theft.

State v. Cruse, 73409 (LB 5/17/96), the Court of Appeals reverses a conviction of attempted voluntary manslaughter, holding that where defendant stole a rifle, walked around town, stopped at a location across the street from a store, then fired at least two shots through the store windows, and admitted the first shot was intended for one of the customers, who had no prior contact with defendant, it was error to instruct on attempted voluntary manslaughter as a lesser, included offense of attempted second degree murder. The Court holds that the element of heat of passion was required to convict for voluntary manslaughter, which is not contained in the charged offense.

State v. Brown, 73303 (SG 5/10/96), defendant challenges a conviction of child abuse, alleging error in the failure to instruct on the lesser offense of battery. In determining that evidence does not support the instruction, the Court of Appeals distinguishes between evidence offered to prove the elements and evidence offered to impeach. Although the State elicited evidence of defendant's statement to detectives that she had set the baby down in a hard manner, the evidence was offered to show defendant was covering up. Her actual testimony at trial was that she did not harm the child, hence she was either guilty of the charged offense or not guilty.

State v. Schroeder, 73352 (MI 5/10/96), the Court of Appeals reverses a conviction of agg battery which resulted from defendant entering a club with a baseball bat and striking one of the patrons who was seated at the bar. The Court holds that the failure to instruct on the lesser offense of battery was error, since intent to injure is an element, and defendant testified he did not intend to injure the victim, only hit him, and the injury to victim's forehead resulted when the victim grabbed a chair to defend himself and it backfired. After wading through the myriad instructions required by the new agg battery statutes, the Court relies on State v. Wagner, 248 Kan. 240, in which use of a gun as a club required instructing on the lesser offense, reasoning that if a gun requires the instruction, so does a bat.

State v. Winfree, 71101 (JO 5/17/96), while the crimes arose out of a domestic violence incident four years ago, this case got bogged down in the appellate court system because of the disagreement over whether criminal trespassing was a lesser included offense of agg burglary. At one point, the trial court vacated the conviction for failure to instruct on criminal trespass, and a year later the State moved for reconsideration after the Supreme Court decision (ironically named Rush). The State's motion was ultimately granted and defendant now appeals that decision, as well as an accompanying kidnapping conviction. The Court considers the issue of the State's motion for reconsideration. While ignoring the continuing problem of conflicting Court of Appeals' decisions, this panel reaches back to 1919 for precedent in holding that a court retains the power to reconsider its decisions in order to prevent errors, Luft, 104 Kan. 353. Defendant's argument that the kidnapping conviction should be set aside because he cannot receive a fair retrial on the agg burglary charge is mercifully declared moot.

State v. Mays, 74165 (JO 10/4/96), where the victim testified that she helped defendant burn baby clothes and shoes, while her on-scene statement placed the action on defendant, the conflicting testimony made the failure to include "without the consent of (victim)" clear error, requiring reversal of the arson conviction. The Court affirms a conviction of reckless agg battery, holding it a lesser included offense of the charged intentional agg battery.

State v. Pierce, 260 Kan. 859 (10/25/96), in affirming an intentional first-degree murder conviction, the Supreme Court holds that reckless second degree murder is an extension of second degree murder, hence is a lesser, included crime of first-degree murder. However, since the evidence established only an intentional shooting, there was no duty to instruct on reckless, and the trial court properly instructed on second, voluntary and involuntary manslaughter.

State v. Coffman, 260 Kan. 811 (10/25/96), in affirming two counts of agg sodomy involving a 6-year-old victim, the Supreme Court holds that although the trial court was concerned with the second prong of Fike and wanted to instruct on the lesser included offense of indecent liberties, defense counsel's objection to the proposed instruction constitutes a waiver of any error under 22-3701(3). The Court specifically rejects California law that imposes an absolute duty to instruct in spite of the objections of counsel, and declines to consider the argument that 21-3701 unconstitutionally invades the province of the jury, for failure to raise it with the trial court.

State v. Pope, 23 K.A.2d 69 (11/22/96), defendant was charged in the alternative with intentional second-degree murder and reckless second-degree murder, and convicted of the former. The Court distinguishes between unintentional second-degree murder and involuntary manslaughter by the "extreme indifference to the value of human life" element in the former, and finds no error in failing to instruct on the lesser included offense.

State v. Burns, 23 K.A.2d 52 (1/17/97), following an earlier mistrial, defendant was convicted of agg indecent liberties. The Court finds no error in instructing of agg indecent liberties as a lesser offense of rape; holding that under the second prong of Fike, where the rape included digital penetration, it necessarily included agg indecent liberties.

State v. Treiber, 74803 (NO 12/13/96), defendant was charged with two counts of contributing to a child's misconduct under 21-3612(a)(4) for harboring his son when he escaped from the youth center. Since defendant answered all inquiries regarding his son's whereabouts and the statute requires specific intent, defendant moved for a judgment of acquittal, whereupon the State moved to amend the complaint to add a violation of 21-3612(a)(1), apparently in the alternative. The trial court, after denying defendant's motion, granted the State's motion, but then instructed on the lower offense as a lesser included offense, rather than as an alternative charge. Defendant was, of course, convicted of the lesser charge, and appeals, contending that 3612(a)(1), causing or encouraging a child to be a CINC, is not a lesser included offense of 3612(a)(4), sheltering or concealing. The Court of Appeals holds that it is not a lesser included offense, under either prong of the Fike test, noting that the child is a runaway, not a CINC. Royce dissents, on the grounds that Fike establishes a test under 21-3107(2)(d), but not under 3107(2)(a), and would affirm under the latter, as the Legislature has established the lesser degree of crime within the same statute, irrespective of the Fike test, citing Bowman and McClanahan.

State v. Clark, 261 Kan. 175 (1/24/97), defendant was convicted of first-degree murder and contends error in failure to instruct on reckless second degree. In affirming, the Supreme Court follows Pierce in holding that where there is substantial evidence, reckless second degree "depraved heart" murder is a lesser included offense of first degree murder. However, in this case, where defendant had been threatening the victim, had previously fired two shots at another victim before putting the gun to the victim's temple and firing it, there was insufficient evidence to justify the instruction.

State v. Fairbanks, 74009 (SA 1/31/97), defendant was convicted of agg intimidation of a witness for threatening his ex-spouse to drop battery charges against him. He alleges error in the failure to instruct on criminal threat as a lesser included offense. The Court of Appeals holds that rules governing lesser included offenses apply only to greater and lesser crimes, and not to general and specific crimes. It then finds criminal threat is a general crime, while agg intimidation is more specific, since it relates to witnesses.

State v. Mitchell, 23 K.A.2d 413 (1/31/97), defendant was involved in a struggle with other occupants of a car, which resulted in the car crashing into a pole. Defendant struck his head in the collision and thought another passenger was pointing a gun at him, so he shot him. He was charged with first-degree murder, and the court instructed on both intentional and reckless second, and voluntary manslaughter. The Court of Appeals reverses the reckless second-degree conviction for failure to instruct on involuntary manslaughter, since there was some evidence of self-defense and a jury could have found self defense but that defendant's conduct was unlawful or wanton, Clark, 218 Kan. 18.

State v. Robinson, 261 Kan. 865 (3/7/97), the Supreme Court considers for the first time the depraved heart, or reckless, second degree murder, and holds that it is not void for vagueness because it is indistinguishable from reckless involuntary manslaughter. The difference is whether the recklessness is the result of extreme indifference or ordinary recklessness, which is a question of fact. In reaching this conclusion, the Court acknowledges the Court of Appeals' decision in State v. Mitchell (23 K.A.2d 413). The Court also finds no error in the failure to instruct on the lesser included offense of voluntary manslaughter, where defendant stated he did not intend to kill the victim when he lodged the golf club in his skull; and the State did not contest his testimony.

State v. Santiago, 74488 (LV 1/3/97), battery is not a lesser included offense of aggravated indecent liberties, under either prong of the Fike test.

State v. Thompson, 73751 (JO 1/10/97), defendant was caught with property taken from victim's car, and testimony conflicted on whether the car was in the garage or in the driveway. Accordingly, failure to instruct on simple burglary of the vehicle as a lesser included offense of agg burglary was error.

State v. Smith, 74447 (SN 3/21/97), the Court of Appeals reverses a conviction of agg robbery for failure to instruct on theft as a lesser included offense. Defendant testified that he went into the store and asked for money, but denied having a gun. From this evidence, the Court finds a jury could have found that defendant obtained control over the money without using force or threat of bodily harm, citing Blockman, 255 Kan. 953.

State v. Adams, 74119 (RN 3/28/97), defendant was convicted of agg indecent liberties, after the trial court instructed on it as a lesser included offense of rape under Coberly, 233 Kan. 100. The Court of Appeals first finds that Coberly concerned multiplicity, rather than lesser offense; and was decided prior to Fike. It then holds that agg indecent liberties was not a lesser offense under either prong of Fike, and reverses the conviction for lack of jurisdiction.

State v. Joiner, 75118 (MC 3/21/97), the Court of Appeals finds that battery is not a lesser included offense of attempted rape, since there is no requirement in 21-3502 that the victim be touched in a rude, insulting, or angry manner.

State v. Garcia, 23 K.A.2d 847 (4/25/97), the refusal to instruct on agg assault as a lesser included offense of attempted second-degree murder was not error, as the former requires apprehension of bodily harm, which the latter does not.

State v. Symonds, 75262 (RN 4/11/97), in a homicide resulting from a drunken brawl over a keg of beer, the Court of Appeals reverses a conviction of second degree murder for failure to instruct on the lesser offense of involuntary manslaughter. The Court finds that even though defendant cocked the gun and the victim was unarmed, there was enough evidence that the gun went off during a struggle and may have been accidental, to require the instruction. It also reverses imposition of a $250,000 fine for the failure to make findings as required by 21-4607.

State v. Jackson, 75955 (WY 6/27/97), the Court of Appeals affirms a conviction of agg indecent liberties, holding that an instruction on the lesser offense of indecent liberties was not required where there was no evidence of consent. The Court declines to hold that the absence of resistance constitutes consent.

State v. Altum, 262 Kan. 733 (7/11/97), in affirming a felony murder conviction based on the underlying abuse of a child, the Supreme Court holds that instructing on lesser included offenses are not required unless the evidence of the underlying felony is weak, and where there was overwhelming evidence the child was beaten and shaken, and that defendant was the abuser, no such instructions were required. The Court notes defendant's arguments that the evidence only established his beating, not shaking, and that he lacked intent to cruelly beat the child self-defeating; as beating alone is abuse, and the only intent required is to hit.

State v. Large, 75975 (JO 7/11/97), defendant was convicted of agg battery as a lesser included of stalking. In affirming, the Court of Appeals holds that evidence of marital discord was properly admitted to show the nature of the relationship between the parties and to establish motive. It also finds no error in the refusal to give the sympathy instruction in PIK 51.07, holding error, if any, was harmless by the fact the jury acquitted on the stalking charge.

State v. Sloan, 73749 (SN 7/18/97), after a verbal confrontation in victim's apartment, defendant left the apartment, went downstairs to the parking lot, got in her car, and when victim came down to renew the conversation, defendant drove the car at her, crushing her against a wall. The Court of Appeals finds that where defendant invited victim to the parking lot, drove at her without braking, then killed her, there was sufficient evidence to sustain the second-degree conviction. It also finds no error in the failure to instruct on the lesser included offense of voluntary manslaughter, since mere words are not provocation and there was no way defendant could have objectively been in fear of her life.

City of McPherson v. Boardman, 76100 (MC 8/1/97), the Court of Appeals finds disorderly conduct is not a lesser included offense of battery, based on a discussion of Kansas statutory elements, rather than analysis of the relevant municipal code provisions.

State v. Anderson, 75928 (JO 9/5/97), the Court of Appeals reverses a conviction of agg assault, holding that it is not a lesser included offense under Fike, applying the limitations of the second prong established in Gibson, 246 Kan. 298.

State v. Zimmerman, 76280 (LB 10/24/97), the Court of Appeals holds that the refusal to give a requested instruction on conspiracy taken from Roberts, 223 Kan. 522, did not prejudice defendant's ability to present a defense and would have been unnecessary and confusing. The Court also finds no error in the refusal to instruct on conspiracy to possess as a lesser included offense of conspiracy to sell.

State v. Sanders, 75743 (SG 10/17/97), defendant contends that unless the jury found gross negligence or recklessness, he could only be convicted of vehicular homicide. The Court of Appeals holds that where the jury was instructed on involuntary manslaughter requiring a finding of "recklessness", was given an instruction defining reckless conduct, and one on the lesser included offense of vehicular homicide, the instructions were proper under Makin, 223 Kan.743.

State v. Williams, 77168, ___ Kan. ___ (10/31/97), defendant was convicted of felony murder based on abuse of a child. The Supreme Court retains the strict analysis of lesser included offense instructions applied to felony murder cases, and applies the two-step process from Hupp, 248 Kan. 644: if evidence of the underlying felony is strong, no lesser included instructions need be given; but if not strong, the trial court must consider evidence of lesser offenses, and if no such evidence, no instructions need be given. It then holds that from uncontroverted evidence of both shaking and blunt force injuries the evidence of the underlying felony was so strong that no lesser included instructions were required.

State v. Follin, 74874, ___ Kan. ___ (10/31/97), defendant was convicted of first degree murder in the slaying of his two young daughters. On appeal, he argues that his anger at his wife's affair was evidence of heat of passion, which required instructing on voluntary manslaughter. The Supreme Court rejects the argument, holding that there was insufficient evidence of provocation, especially in the time lapse between defendant's contact with his wife and the murders; and, in a case of first impression, such provocation is not a defense as against innocent third parties.

State v. Lee, 76483, ___ Kan. ___ (10/31/97), the Supreme Court finds from evidence that defendant told victim killing her would be no problem, taking her to a remote area and ordering a friend to "waste" her, then when the friend declined, shooting her twice, there was insufficient evidence to require instruction on second degree murder as a lesser included offense.

State v. Coleman, 77226 (WY 11/26/97), where the victim testified that the depreciated value and the insurance reimbursement were both over $500, and defendant failed to dispute the value, there was no evidence to support an instruction on misdemeanor theft as a lesser included offense.

State v. Kraft, 77120 (WI, 12/31/97), holds that sexual battery was not a lesser included offense of rape, the Court of Appeals holds that failure to object to alleged prosecutor misconduct precludes review; and that the trial court finding that the failure to object was harmless error was supported by the record.

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September 24, 1997

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Dear Jim:

This is a tardy answer to your letter of August 29. We have been in New Mexico visiting a terminally ill relative. Hence the delayed response.

Congratulations on your appointment to the Judicial Council Advisory Committee on Criminal Law Revision. I am sure that your contribution will be a significant one. You will find that among the incidents of your service is that thirty years from now some eager and perceptive youngster will be asking what you meant when you drafted something that you have totally forgotten and haven't the slightest idea what you intended other than what you said.

I have no recollection of the discussion or circumstances that produced K.S.A. 21-3107 (2) (d). Obviously it was not controversial or a matter in which the committee members had a great amount of interest. If that had been the case, I probably would have remembered. It is my present thought that we intended only to clarify what we believed to be the then existing law. We did not intend to alter or enlarge the included offense concept. Perhaps our drafting was inept or our thinking unduly simplistic, but I think we had in mind only the idea expressed in part one of the court's two step analysis. It is with the utmost respect and deference that I suggest that the supreme court, aided and abetted by lawyers who practice before it, may have been a party to making a simple proposition complex.

In the drafting process our committee often drew upon the American Law Institute's model Penal Code. You may find the Institute's published draft and commentaries useful. My notes on our committee's deliberations were deposited in the Archives of the Kansas State Historical Society. I assume they are accessible there. Of the dozen or so lawyers who served on our committee, Lee Hornbaker of Junction City and I are the only remaining members who served during the entire seven year period of the study. Lee was an active and thoughtful member and may remember things that I have forgotten. Since you suggest that there may be

some relationship between one's memory and the condition of his knees, it may be relevant that Lee has had both knees replaced during the past couple of years. Bill Ferguson, who was attorney general during much of the time the committee sat, often attended our meetings. However, Bill's interests have shifted to Meso-American archaeology, and he probably doesn't think much about criminal law. Tom Van Bebber, now a federal judge, was on the committee for a while, but I don't know whether he was there when we drafted the section that has caused the trouble. You might check with him.

Others who served on the committee have passed to their reward. Wherever they are, I think it not unlikely that they are seated around a paper-strewn conference table talking about criminal law and telling war stories. Indeed, I should not be surprised to encounter Judge White, our committee chairman, descending from some mountain bearing a revised version of the Ten Commandments suitably engraved on Cowley County limestone.

Very truly yours,

Paul E. Wilson

6-9