JURY INSTRUCTIONS: AVOIDING THE LANDMINES
NORTH CAROLINA JUDICIAL COLLEGE ON CAPITAL CASE MANAGEMENT

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Introduction

Of all the functions we do as Superior Court judges, perhaps the one most heavily hidden with land mines is the crafting of our jury instructions. No judge can be too careful in preparing any instruction. This is especially true in a death penalty case, which is arguably the most stressful kind of trial. The guilt/innocence phase of a capital murder trial is liberally laced with many opportunities for reversible error. Hopefully, this presentation and the materials that memorialize it will prove to be helpful resources as you navigate your way through the precarious landfield of charging a jury in a capital case.

Theories of First Degree Murder

Practically everyone who watches television knows that first degree murder is the unlawful killing of another human being with malice and with premeditation and deliberation. But what many people, including a number of lawyers, do not know is that this is just one theory of first degree murder in North Carolina. GS 14-17 lists the other kinds of conduct which constitute first degree murder: poison; lying in wait;

imprisonment; starving; torture; and murder committed in the perpetration or the attempted perpetration of any arson, rape, or sex offense, robbery, kidnapping, or other felony committed or attempted with the use of a deadly weapon (the felony murder theory). In addition, the statute includes homicides committed by means of a nuclear, biological, or chemical weapon of mass destruction, as defined in GS 14-288.21. At the outset, then, it is critical to understand that the landscape of jury instructions is much wider than one might otherwise think.

The following are pattern jury instructions on theories of first degree murder as contained in the North Carolina Pattern Jury Instructions for Criminal Cases:

N.C.P.I.—Crim. 206.00 First Degree Murder, Premeditation and Deliberation, Second Degree Murder as Lesser Included Offense
N.C.P.I.—Crim. 206.10: First-Degree Murder Where a Deadly Weapon Is Used, Covering All Lesser-Included Homicide Offenses and Self-Defense
N.C.P.I.—Crim. 206.10A: First Degree Murder—Special Instruction for Accessory Before the Fact
N.C.P.I.—Crim. 206.11: First-Degree Murder Where No Deadly Weapon Is Used, Covering All Lesser-Included Homicide Offenses and Self-Defense
N.C.P.I.—Crim. 206.12: First-Degree Murder By Means of Poison (Including All Lesser-Included Offenses)
N.C.P.I.—Crim. 206.13: First-Degree Murder Where a Deadly Weapon Is Used, Not Involving Self-Defense, Covering All Lesser-Included Homicide Offenses
N.C.P.I.—Crim. 206.14: First-Degree Murder—Murder Committed In Perpetration of a Felony or Murder With Premeditation and Deliberation Where a Deadly Weapon is Used
N.C.P.I.—Crim. 206.15: First-Degree Murder In Perpetration of a Felony
N.C.P.I.—Crim. 206.16: First-Degree Murder by Lying in Wait
N.C.P.I.—Crim. 206.20 First Degree Murder by Torture

Our work in orchestrating our charge begins with carefully sifting through the evidence, and questioning the attorneys on the record about any evidence giving rise to multiple theories.

Because some of these theories are exotic and not often seen in the courtroom, many of us are unfamiliar with them. It is important to read each instruction which even remotely could be given based upon the evidence presented, and digest the respective elements each one contains. Next, we review the evidence again to see if there is evidence which, if believed, establishes the elements of first degree murder under that theory. Finally, we inquire of counsel whether, in their opinion, there is evidence that supports a specific theory of first degree murder.

Moreover, the State may argue more than one theory justifying a conviction of first degree murder on the evidence. When multiple theories are present, they most commonly are the theories of premeditation and deliberation and the felony murder rule. Yet, the evidence may give rise to any number of other combinations of theories. Consequently, it is important to understand that your charge to the jury may involve instructions on multiple theories of first degree murder. Tread carefully across this terrain, Sisters and Brothers: it is easy to step on a landmine.

Charging on Lesser Included Offenses

By far, the most volatile and most litigated issue in capital murder cases is whether to submit the lesser included offense of second degree murder as a possible verdict. This is the most explosive land mine on the field. The Judge can give the State and the Defendant a perfect trial and "be run over by the caboose" at the end of the case by making the wrong call on this issue.

The basic rules seem simple enough: the Court instructs the jury on a lesser-included offense if there is evidence from which the jury can find that the Defendant committed that offense. *Beck v. Alabama*, 447 U.S. 625 (1980). In this case, the United States

Supreme Court ruled that the Due Process Clause of the Fourteenth Amendment requires the lesser-included offense instruction in a capital case be given when there is evidence to support that instruction. However, where there is evidence which, if believed, would establish each element of first degree murder, and there is no conflicting evidence, the Court is not required to charge on a lesser-included offense. *State v. Rose*, 339 NC 172 (1994). The trial judge is not required to give an instruction on a lesser-included offense solely because the jury may believe some but not all of the State's evidence. *State v. Annadale*, 329 NC 557 (1991).

Of course, the challenge is in applying these basic rules to the complex, conflicting, and often confusing evidence elicited in our cases. In North Carolina, the appellate courts have upheld the trial judge's decision not to instruct on second degree murder in a number of cases. The North Carolina Supreme Court in *State v. Strickland*, 307 NC 274 (1983), overruled *State v. Harris,* 290 NC 718 (1976), holding that in a prosecution for a first degree murder on the premeditation and deliberation theory, the trial judge is not required to charge the jury on second degree murder unless there is some evidence tending to show a lack of premeditation and deliberation. Thus, a Defendant is not automatically entitled to have the lesser-included offense of second degree murder submitted to the jury.

Additional cases affirming the trial court's decision not to give the lesser-included offense instruction include: *State v. Hyatt*, 355 NC 642 (2002); *State v. Nicholson*, 355 NC 1 (2002); *State v. King*, 353 NC 457 (2001); *State v. Leazer*, 353 NC 234 (2000); *State v. Cintron*, 351 NC 39 (1999); *State v. Thomas*, 350 NC 315 (1999); *State v. Trull*, 349 NC 428 (1998); *State v. Gary*, 348 NC 510 (1998); *State v. Bonnett*, 348 NC 417 (1998); *State v. Smith*, 347 NC 454 (1998); *State v. Richmond*, 347 NC 412 (199*); *State v. Flowers*, 347 NC 1 (1997); *State v. Larry*, 345 NC 497 (1997); *State v. Lane*, 344 NC 618 (1996); *State v. Walker*, 343 NC 216 (1996); *State v. Williams*, 343 NC 345 (1996); *State v. Gainey*, 343 NC 79 (1996).

On the other hand, North Carolina appellate courts have also awarded a new trial in a number of cases where the judge failed to instruct on second degree murder. In *State v. Millsaps,* 356 NC 556 (2002), the Defendant was tried on two counts of first degree murder, on the dual theories of premeditation and deliberation and felony murder. The murder of the first victim was the underlying felony on the felony murder theory on the second murder charge. The Supreme Court held that if evidence of the underlying felony supporting the felony murder theory is conflicting and the evidence would support a lesser-included offense, the trial judge is required to instruct on all lesser-included offenses supported by the evidence, regardless of whether the State advocated both theories, or solely the felony murder theory.

The Court continued by stating that if the State tries the case on both theories, and the evidence supports not only first degree murder on the premeditation and deliberation theory, but also the lesser-included offense, the trial court must include the lesser-included offense within the premeditation and deliberation theory, regardless of whether all evidence supports the felony murder theory. The Court further declared that if evidence of the underlying felony supporting the felony murder theory is not conflicting, and all the evidence supports the felony murder theory, the trial judge need not instruct on the lesser-included offense of murder based on premeditation and deliberation. The case is submitted on felony murder only.

In *Millsaps*, the Court ruled that the trial judge committed reversible error in failing to instruct on second degree murder as a lesser-included offense of premeditation and deliberation. The Supreme Court vacated the first degree murder convictions which were predicated on the theories of premeditation and deliberation. The first degree murder convictions based on the felony murder theory were left intact because the felony murder conviction involving the first victim merged into the Defendant's felony murder conviction for the second victim. The Court arrested the judgment for the murder conviction of the first victim. Finally, the Court awarded the Defendant a new sentencing hearing for the felony murder conviction of the second victim.

Additional cases holding the trial court committed error in failing to instruct on second degree murder include: *State v. Phipps*, 331 NC 427 (1992); *State v. Pool*, 298 NC 254 (1979).

It is imperative to understand that there are never any lesser-included offenses for first degree murder under the felony murder rule. It is "all or nothing": The Defendant is either guilty of first degree murder or not guilty.

Many times, a defense attorney will request that the Court instruct the jury on second degree murder, particularly where the evidence is overwhelming against the Defendant. The Defendant may even request instructions on voluntary or involuntary manslaughter. Plainly, counsel is trying to cut the client's losses." On the other hand, sometimes counsel will "go for broke" and not request a charge on any lesser-included offense, especially if the evidence against the Defendant is weak. This "all or nothing" approach is clearly designed to enhance the Defendant's chances for acquittal by eliminating other verdict options.

Depending on the evidence, the State may either oppose or consent to defense counsel's proposal to charge the jury on second degree murder. Again, this is usually a question of strategy. If the State believes it has a strong case for first degree murder, it typically objects to the defense request for the lesser-included instruction. However, no prosecutor wants to retry a case. If the State thinks there is a significant chance that failing to charge on second degree murder may result in a reversal, and that the jury likely would reject second degree murder, the State may well consent to the Defendant's request.

The trial judge is required to instruct the jury on all appropriate legal issues rising from the evidence. If the trial judge believes that the evidence warrants submission of a second degree murder, or any other lesser-included offense, then the Court must so instruct the jury, regardless of the consensus of the parties that such instructions are not warranted. "It is the duty of the court to decide any legal questions and to instruct the jury

on the law arising on the evidence presented in the case." *State v. Rogers*, 121 N.C. App 273 (1998)

Special Verdict Sheets

From time to time, there are occasions in first degree murder cases where the Court needs to submit a special verdict sheet to the jury. On a special verdict sheet, the jury answers certain "issues" or questions, as in a civil case. Typically, this arises in several scenarios.

In the first instance, you should submit a special verdict sheet where the State is seeking to convict the Defendant on first degree murder on more than one theory of the murder. This is important because the theory may affect whether the Defendant can be convicted of other felonies. For example, in a pre-planned murder where the Defendant is also charged with first degree murder and armed robbery, the State may prosecute the Defendant on the theories of first degree murder by premeditation and deliberation, and also the felony murder rule, with the armed robbery being the underlying felony. It is critical to know on which theory/theories the jury convicted the Defendant, so that the Court will know how to proceed with the armed robbery charge. If the jury convicts the Defendant of first degree murder under the felony murder rule, then the Court must arrest judgment on the armed robbery case. To sentence the Defendant on that offense would subject the Defendant to double jeopardy on the robbery. For this reason, the Court needs to submit a special verdict sheet so the jury will specify for the record which theory or theories of first degree murder the conviction is based on. Similarly, the theory upon which the Defendant is convicted may determine whether certain aggravating circumstances may be submitted to the jury at the capital sentencing hearing.

Another other scenario where we see a special verdict sheet involves jurisdictional issues. To illustrate, if a victim is kidnapped in North Carolina and then the victim's body is found in South Carolina, the Defendant may be prosecuted for murder in North Carolina. However, the jury would need to find that the killing occurred in North Carolina before it could proceed to consider the Defendant's guilt or innocence on the first degree murder

or any lesser-included charge. Therefore, a special verdict sheet asking for the jury to find in which State the victim was killed is required before the jury considers guilt or innocence on the murder charge.

Copies of a number of special verdicts sheets are attached as appendices to this manuscript in hopes that they may prove of some benefit to you as you deal with this issue in the future. Do not be cavalier: the landmines are deadly.

Guilt of First Degree Murder Based on the Theory of Accessory before the Fact

Under current North Carolina law, a Defendant who is convicted of any felony based on the theory of accessory *before* the fact is punished as a principal for that felony. G.S. 14-5.2. This is not true of an accessory *after* the fact. If the jury should find a Defendant guilty of first degree murder in a capital case as an accessory before the fact based solely on the uncorroborated testimony of one or more principals, co-conspirators, or accessories to the first degree murder, then the Defendant is by statute guilty of a Class B felony. Accordingly, this Defendant who was an accessory before the fact is ineligible for the death penalty, since the accessory would not have been convicted of a Class A felony.

Our Pattern Jury Instructions have special instructions for this issue, N.C.P.I. Crim. 206.10A. It instructs the jury that if it finds the Defendant guilty of first degree murder, it must make an additional finding ("yes" or "no") whether the Defendant's conviction was based solely one the uncorroborated testimony of one or more principals, co-conspirators, or accessories to the first degree murder.

Cases dealing with this issue include *State v Marr*, 342 NC 607 (1996); *State v. Larrimore*, 340 NC 119 (1995); *State v. Wilson*, 338 NC 244 (1984); *State v. Davis*, 319 NC 620 (1987).

Aiding and Abetting and Acting in Concert

Defendants may be convicted for their participation in committing criminal offenses on the theories of aiding and abetting and acting in concert. Aiding and abetting and acting in concert are not crimes in and of themselves. They are kinds of conduct which can render a Defendant guilty of committing a particular criminal offense.

Cases addressing these principles include *State v. Barnes*, 345 NC 184 (1997); *State v. Abraham*, 338 NC 315 (1994); and *State v. Blankenship*, 337 NC 543 (1994).

The Pattern Jury Instructions for these charges are as follows:

N.C.P.I—Crim. 202.20A (Aiding and Abetting – Felony, Misdemeanor); Crim. 202.10 (Acting in Concert)

Diminished Capacity and Voluntary Intoxication

It is well settled that voluntary intoxication is not a legal defense to criminal conduct, nor can it negate the intent to kill in a homicide trial. However, the law does recognize that voluntary intoxication or diminished capacity can render a Defendant incapable of forming the *specific* intent to kill or to premeditate or to deliberate, which are elements of first degree murder. The Defendant has the burden of producing sufficient evidence to warrant the trial court to give instruction on these issues. Expert testimony of a mental health expert that because of diminished capacity or voluntary intoxication, the defendant did not have the ability to formulate the specific intent necessary for first degree murder is needed to submit this charge to the jury. Nevertheless, the State still has the burden of proof beyond a reasonable doubt that the Defendant had the specific intent to kill.

The voluntary intoxication is not given for second degree murder or a lesser included offense, because specific intent is not an element for these crimes. *State v. Harvell*, 334 NC 356 (1993). Neither is it applicable for first degree murder by lying in wait, since that

theory does not take require proof of specific intent. *State v. Baldwin*, 330 NC 446 (1992).

Professor John Rubin from the School of Government has written extensively on this topic. His memoranda on these subjects can be found on the School of Government website http://www.sog.unc.edu/. They include:

John Rubin, "The Diminished Capacity Defense" (Chapel Hill, NC: School of Government, The University of North Carolina at Chapel Hill, Administration of Justice Memorandum No. 92/01, September 1992); John Rubin, "The Voluntary Intoxication Defense" (Chapel Hill, NC: School of Government, The University of North Carolina at Chapel Hill, Administration of Justice Memorandum No. 93/01, April 1993).

Cases dealing with the issues of diminished capacity and voluntary intoxication include *State v. Hamilton*, 338 NC 193 (1994); *State v. Clark*, 324 NC 146 (1999); *State v. Rose*, 232 NC 455 (1988); *State v. Long*, 354 NC 534 (2001); *State v. Morganherring*, 350 NC 701 (1999); *State v. Herring*, 338 NC 271 (1994); *State v. Hamilton*, 338 NC 193 (1994); *State v. Harvell*, 334 NC 356 (1993); *State v. Baldwin* 330 NC 446 (1992); *State v. Vaughn,* 324 NC 301 (1989); and *State v. Mash*, 323 NC 339 (1988).

Self Defense

The law of self defense is being covered specifically during your course on capital case management by Professor Rubin in a separate presentation, and I defer to him and his materials on that topic. Needless to say, it is a very important topic.

I will say that the instruction is very important, but somewhat awkward, and difficult to understand. Chief Justice Exum wrote important language about self-defense in *State v. Watson*, 338 NC 168 (1994), involving issues of excessive force and abandonment. Frankly, while it is good and sound law, it is extremely cumbersome to read and follow,

and yet because the Supreme Court has said it is the law of self-defense, is in every murder jury instruction on self-defense.

The Pattern Jury Instruction Committee for Criminal Cases has re-drafted N.C.P.I. — Crim. 206.10, First Degree Murder Where a Deadly Weapon is Used, Covering All Lesser Included Homicide Offenses and Self-Defense, and N.C.P.I. — Crim. 206.11, First Degree Murder Where No Deadly Weapon is Used, Covering All Lesser Included Homicide Offenses and Self-Defense, to include the self-defense language of the new "defense of habitation" statute, G.S. 14-51.3(a). These will be distributed to you this summer.

The Committee will in the coming year consider a self-defense charge for self-defense cases not involving excessive force or abandonment. In any event, please remember that when to give or not give a self-defense instruction is yet another landmine in the terrain you travel in your jury charge.

Other Topics:

Written Instructions – The trial judge is not required to grant the jury's request for a written copy of jury instructions. It is within the Court's discretion not to give them a written copy. *State v. Haire*, 697 SE2d 396, (2010).

Final Mandate – Be sure to give the final mandate on every charge. Though it may be failure to do so in some cases, in others it may well be plain error. *State v. Wright*, 709 SE2d 471 (2011).

Deadlocked Jury – Be careful: this is another landmine! In *State v. Gilliken*, 719 SE2d 164 (2011), the Court ordered a new trial where the trial judge deviated slightly from the "Allen Charge," N.C.P.I.—Crim. 101.40, Failure of Jury to Reach a Verdict

The Pattern Jury Instruction Committee for Criminal Cases has revised this charge to specifically track the language of G.S.15A – 1235(a),(b), and (c). It will be distributed to you in the summer of 2012. A copy of that charge is included as an appendix.

Multiple Defendants – Where two or more defendants are tried jointly for first degree murder, give separate instructions for each defendant. *State v. Adams,* 711 SE2d 770 (2011) held that the trial judge erroneously grouped the defendants together under one charge and referred to them collectively.

Make Sure the Defendant is Present

Frequently, judges will conduct "informal" charge conference in chambers, where the conversation can be free-wheeling and even brainstorming. Typically, the court reporter is not present at this event. Then, the Court comes back in open court with counsel and places the formal charge conference on the record, recapitulating in capsule form what has been decided at the informal conference.

Remember that the defendant must be personally present at all times, including the charge conference. It is error to conduct the conference informally in chambers in the defendant's absence. *State v. Brogden*, 329 NC 39 (1993)

Stick with the Script – When giving jury instructions, particularly in a capital case, do not ad lib. Do not "go where the spirit leads you." Remember, charging the jury is not "improvisational jazz." Do not deviate from what you have carefully crafted in writing. If not, you know what will happen…a landmine will explode in your face.

Practical Pointers

I read that someone once said that that anyone who makes a major decision should "read and read all they can. And then read some more." I would echo that admonition. It is important to read and absorb all of the relevant cases relating to the topic at hand. In

addition to reading, I would encourage you to "think" all you can about your charge. For me, I need time to "brood" over a subject. I realize we usually do not have that luxury. But if your decision is close to being made late in the afternoon, you might consider taking a recess until the next morning in order to announce it. I find that I can best ruminate on these issues while driving my car or taking a shower. Sometimes, there is an "epiphany moment," where the fog "lifts" to show a clear path ahead.

The other thing that I encourage you to do is "talk" about your charge. We are blessed with a fellowship of fellow judges who are eager to share thoughts, ideas, and resources with us about any topic whatsoever. I have never been turned down by another judge when I have asked for assistance. I have been on the Superior Court bench nineteen years, and still ask for counsel and advice from my colleagues every day. Happily, you can gain invaluable wisdom and guidance from those who have dealt with these issues before.

Sometimes it seems like there is no clear cut answer about how to handle a particular charge. But after reading, thinking and talking about it all you can, there comes a point when you need to rule. I recall Judge Frank W. Snepp from Charlotte saying that eventually you have to "make a decision, right or wrong. Just do the best you can." This is good wisdom for us all.

Conclusion

Yes, the drafting of jury instructions can have perilous consequences. Those appellate judges who "grade our papers" will send a case back for a new trial if we do not do our jobs properly. Fortunately, however, there are many resources available to help us in our decisions.

Instructing a jury in a capital case takes you from point A to point B, it has a beginning and an end, and covers a lot of ground in between. That ground is booby-trapped with legal landmines, which are lethal for the ill-prepared and unsuspecting judge. But with

careful planning, helpful colleagues, and an array of research tools, any trial judge can safely navigate himself or herself across the landscape of jury instruction in a capital case, and not only exhale a sigh of relief at the end, but laugh in the face of danger just dodged.

Acknowledgments and Resources

I wish to acknowledge that much of my research for this topic came from the "North Carolina Capital Case Law Handbook," by Robert Farb, UNC School of Government, 2004. I understand the updated version of this volume is being prepared by Jeff Welty, Assistant Professor of Public Law and Government at the School of Government, who has organized this judicial college course.

In addition, I draw your attention to the wealth of materials on the School of Government website, such as the Survival Guides and Professor Jessie Smith's Criminal Law Compendium, and our North Carolina Trial Judge's Bench Book of Criminal Cases.

I want to also thank and acknowledge my many colleagues who responded to my request for sample special verdict sheets with a barrage of samples, far too many to include as templates. This is just another indication of the professionalism and collegiality of those with whom we serve. What an honor it is to call all of you my colleagues.

STATE OF NORTH CAROLINA COUNTY OF ORANGE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA,)	
)	
v.)	08 CRS 51242,
)	08 CRS 845-47
LAURENCE ALVIN LOVETTE, JR.,)	
Defendant.)	

WE, THE JURY, UNANIMOUSLY FIND THE DEFENDANT, LAURENCE ALVIN LOVETTE, JR., TO BE:

1. Guilty of First Degree Murder

ANSWER: _____

IF YOU ANSWER "YES", IS IT:

A. On the basis of malice, premeditation and deliberation?
ANSWER: _____

B. Under the first degree felony murder rule?
ANSWER: _____

IF YOU ANSWER "YES," UPON WHICH OF THE FOLLOWING FELONIES WAS YOUR VERDICT BASED? (you may check more than one provided the jury unanimously agrees):

_____ Robbery With a Firearm
_____First Degree Kidnapping
_____Possession of Stolen Goods

Or

2. Not Guilty.
ANSWER: _____

THIS THE _____ DAY OF _____, 2011

_____
SIGNATURE OF FOREPERSON

_____
PRINTED NAME OF FOREPERSON

STATE OF NORTH CAROLINA COUNTY OF HARNETT	IN THE GERNERAL COURT OF JUSTICE CRIMINAL SUPERIOR DIVISION FILE NUMBER: 97 CRS 1636
STATE OF NORTH CAROLINA)) VS.)) YONY BONILLA)	VERDICT

WE, THE JURY, UNANIMOUSLY FIND THE DEFENDANT, YONY BONILLA, TO BE:

1. Guilty of First Degree Murder

ANSWER: _____

IF YOU ANSWER "YES", IS IT:

A. On the basis of malice, premeditation and deliberation?
ANSWER: _____

B. Under the first degree felony murder rule?
ANSWER: _____

IF YOU ANSWER "YES," UPON WHICH OF THE FOLLOWING FELONIES WAS YOUR VERDICT BASED? (you may check more than one provided the jury unanimously agrees):

_____ First Degree Kidnapping
_____ Second Degree Kidnapping

Or

2. Guilty of Second Degree Murder
ANSWER: _____

Or

3. Not Guilty.
ANSWER: _____

THIS THE _____ DAY OF _____, 2009

_____

SIGNATURE OF FOREPERSON

_____

PRINTED NAME OF FOREPERSON

NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09 CRS 209725

STATE OF NORTH CAROLINA)
)
v.) **VERDICT**
)
JOSHUA ANDREW STEPP)
Defendant)

We, the jury, return as our unanimous verdict that the defendant is:

_____ Guilty of first degree murder

If you find the defendant guilty of first degree murder, is it:

A. On the basis of malice, premeditation, and deliberation?

ANSWER: _____

B. Under the first degree felony murder rule in the perpetration of rape of a child by an adult?

ANSWER: _____

C. Under the first degree felony murder rule in the attempted perpetration of rape of a child by an adult?

ANSWER: _____

D. Under the first degree felony murder rule in the perpetration of sexual offense with a child by an adult?

ANSWER: _____

If you find the defendant guilty of first degree murder under the first degree felony murder rule in the perpetration of sexual offense with a child by an adult, is it:

1. Based upon a sexual act of anal intercourse?

   ANSWER: _____

2. Based upon a sexual act of penetration by an object into the genital opening of the alleged victim?

   ANSWER: _____

3. Based upon a sexual act of penetration by an object into the anal opening of the alleged victim?

   ANSWER: _____

_____ Guilty of second degree murder

_____ Not guilty

This the _____ day of September, 2011.

_____
Signature of Foreperson of the Jury

_____
Printed Name of Foreperson of the Jury

STATE OF NORTH CAROLINA
COUNTY OF ORANGE

IN THE GERNERAL COURT OF JUSTICE
CRIMINAL SUPERIOR DIVISION
FILE NUMBER: 06CRS54833

STATE OF NORTH CAROLINA)
)
VS.) VERDICT
)
ALVARO CASTILLO)

WE, THE JURY, UNANIMOUSLY FIND THE DEFENDANT, ALVARO CASTILLO, TO BE:

1. Guilty of First Degree Murder

ANSWER: YES

IF YOU ANSWER "YES", IS IT:

A. On the basis of malice, premeditation and deliberation?
ANSWER: YES

B. Under the first degree felony murder rule?
ANSWER: YES

IF YOU ANSWER "YES," UPON WHICH OF THE FOLLOWING FELONIES WAS YOUR VERDICT BASED? (you may check more than one provided the jury unanimously agrees):

_____ Assault with a Deadly Weapon with Intent to Kill (Tiffaney Utsman)
_____ Assault with a Deadly Weapon with Intent to Kill (Andrew Hunt)
_____ Possession of Weapons on Educational Property (rifle)
_____ Possession of Weapons on Educational Property (shotgun)
_____ Discharge of Firearm on Educational Property
_____ Discharge Weapon into Occupied Property
✓ Possession of Weapon of Mass Destruction (4 pipe bombs)
✓ Possession of Weapon of Mass Destruction (3 pipe bombs)
✓ Possession of Weapon of Mass Destruction (shotgun)

Or

[continue to page two of this verdict form]

2. Guilty of Second Degree Murder
ANSWER: _____

Or

3. Not Guilty.
ANSWER: _____

SPECIAL ISSUE: Did you find the defendant not guilty because you were satisfied that he was insane?

ANSWER: _____

THIS THE 21 DAY OF AUGUST, 2009

_____
SIGNATURE OF FOREPERSON

THOMAS W. BOYER
PRINTED NAME OF FOREPERSON

DRAFT

N.C.P.I.—CRIM. 101.40. FAILURE OF JURY TO REACH A VERDICT.

Your foreperson informs me that you have been unable to agree upon a verdict. You are reminded that it is your duty to do whatever you can to reach a verdict. You have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment. Each juror must decide the case for [himself] [herself], but only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, you should not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. However, you should not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.[1] You will now resume your deliberations and continue your efforts to reach a verdict.

[1] *See* G.S. 15A-1235 (b); *State v. Gillikin*, 719 S.E.2d 164 (N.C. Ct. App. 2011) (stressing that the court's instruction must comply with G.S. 15A-1235, particularly in its explanation that "no juror should surrender an honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict").