206.10 FIRST-DEGREE MURDER WHERE A DEADLY WEAPON IS USED, COVERING ALL LESSER INCLUDED HOMICIDE OFFENSES AND SELF-DEFENSE. FELONY.

NOTE WELL: If self-defense is at issue and the assault occurred in defendant's home, place of residence, workplace or motor vehicle, see N.C.P.I.—Crim. 308.80, Defense of Habitation.

NOTE WELL: If the State contends that the defendant is not entitled to the use of defensive force because the defendant was attempting to commit, committing, or escaping after the commission of a felony, and that felony offense was immediately causally connected to the circumstances giving rise to the use of such defensive force, the jury should be instructed pursuant to N.C.P.I.—Crim. 308.90. If the felony offense alleged was immediately causally connected to the circumstances giving rise to the defensive forced use, the defendant would be disqualified from the benefit of using such defensive force.

NOTE WELL: N.C. Gen. Stat. §§ 15-176.4; 15A-2000(a): When the defendant is indicted for first degree murder the court shall, upon request by either party, instruct the jury as follows:

"In the event that the defendant is convicted of murder in the first degree, the court will conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment (without parole).[1] If that time comes, you will receive separate sentencing instructions. However, at this time your only concern is to determine whether the defendant is guilty of the crime charged or any lesser included offenses about which you are instructed."[2]

The defendant has been charged with first degree murder.

Under the law and the evidence in this case, it is your duty to return one of the following verdicts:

1) guilty of first-degree murder,

2) guilty of second-degree murder,[3]

3) guilty of voluntary manslaughter,

4) guilty of involuntary manslaughter, or

5) not guilty.

First degree murder is the unlawful killing of a human being with malice and with premeditation and deliberation.

Second-degree murder is the unlawful killing of a human being with malice, but without premeditation and deliberation.

Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation.

Involuntary manslaughter is the unintentional killing of a human being by an unlawful act not amounting to a felony or by an act done in a criminally negligent way.

The defendant would be excused of first-degree murder and second-degree murder on the ground of self-defense if:

First, the defendant believed it was necessary to use deadly force against the victim[4] in order to save the defendant from death or great bodily harm.

And Second, the circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness. In determining the reasonableness of the defendant's belief, you should consider the circumstances as you find them to have existed from the evidence, including (the size, age and strength of the defendant as compared to the victim), (the fierceness of the assault, if any, upon the defendant), (whether the victim had a weapon in the victim's possession), (and the reputation, if any, of the victim for danger and violence) (describe other circumstances, as appropriate from the evidence).

The defendant would not be guilty of any murder or manslaughter if the defendant acted in self-defense, and if the defendant (was not the aggressor in provoking the fight and) did not use excessive force under the circumstances.

(One enters a fight voluntarily if one uses toward one's opponent abusive language, which, considering all of the circumstances, is calculated and intended to provoke a fight. If the defendant voluntarily and without provocation entered the fight, the defendant would be considered the aggressor unless the defendant thereafter attempted to abandon the fight and gave notice to the deceased that the defendant was doing so. In other words, a person who uses defensive force is justified if the person withdraws, in good faith, from physical contact with the person who was provoked, and indicates clearly that [he] [she] desires to withdraw and terminate the use of force, but the person who was provoked continues or resumes the use of force. A person is also justified in using defensive force when the force used by the person who was provoked is so serious that the person using defensive force reasonably believes that [he] [she] was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force likely to cause death or serious bodily harm was the only way to escape the danger. The defendant is not entitled to the benefit of self-defense if the defendant was the aggressor[5] with the intent to kill or inflict serious bodily harm upon the deceased.[6])

> *NOTE WELL: Instructions on aggressors and provocation should only be used if there is some evidence presented that defendant provoked the confrontation. See N.C. Gen. Stat. § 14-51.4(2). If no such evidence is presented, the preceding parenthetical and reference to the aggressor throughout this instruction would not be given. In addition, the remainder of the instruction, including the mandate, would need to be edited accordingly to remove references to the aggressor.* ***It is reversible error to instruct***

the jury on the aggressor doctrine if the record lacks evidence from which the jury could infer that the defendant was an aggressor at the time the defendant allegedly acted in self-defense. State v. Hicks, 2022-NCCOA-263.

A defendant does not have the right to use excessive force. A defendant uses excessive force if the defendant uses more force than reasonably appeared to the defendant to be necessary at the time of the killing. It is for you the jury to determine the reasonableness of the force used by the defendant under all of the circumstances as they appeared to the defendant at the time.

Furthermore, the defendant has no duty to retreat in a place where the defendant has a lawful right to be.[7] (The defendant would have a lawful right to be in the defendant's [home][8] [own premises] [place of residence] [workplace][9] [motor vehicle][10].)

NOTE WELL: The preceding parenthetical should only be given where the place involved was the defendant's [home] [own premises] [place of residence] [workplace] [motor vehicle].[11]

Therefore, in order for you to find the defendant guilty of first-degree murder or second-degree murder, the State must prove beyond a reasonable doubt, among other things, that the defendant did not act in self-defense, or, failing in this, that the defendant was the aggressor with the intent to kill or to inflict serious bodily harm upon the deceased. If the State fails to prove that the defendant did not act in self-defense or was the aggressor with intent to kill or to inflict serious bodily harm, you may not convict the defendant of either first- or second-degree murder. However, you may convict the defendant of voluntary manslaughter if the State proves that the defendant was the aggressor without murderous intent in provoking the fight in which the deceased was killed, or that the defendant used excessive force.

For you to find the defendant guilty of first-degree murder, the state must prove six things beyond a reasonable doubt:

First, that the defendant intentionally[12] and with malice killed the victim with a deadly weapon.

Malice means not only hatred, ill will, or spite, as it is ordinarily understood, but it also means the condition of mind which prompts a person to intentionally take the life of another or to intentionally inflict serious bodily harm that proximately results in another person's death without just cause, excuse or justification. If the State proves beyond a reasonable doubt, (or it is admitted)[13] that the defendant intentionally killed the victim with a deadly weapon or intentionally inflicted a wound upon the deceased with a deadly weapon that proximately caused the victim's death, you may infer first, that the killing was unlawful, and second, that it was done with malice, but you are not compelled to do so.[14] You may consider this along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice.

[A firearm is a deadly weapon.] [A deadly weapon is a weapon which is likely to cause death or serious injury. In determining whether the instrument involved was a deadly weapon, you should consider its nature, the manner in which it was used, and the size and strength of the defendant as compared to the victim.]

Second, the State must prove that the defendant's act was a proximate cause of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred,[15] and one that a reasonably careful and prudent person could foresee would probably produce such [injury] [damage] or some similar injurious result. (The defendant's act need not have been the only cause, nor the last or nearest cause. It is sufficient if

it occurred with some other cause acting at the same time, which, in combination with, caused the death of the victim.) (A child has been killed if the child was born alive, but died as a result of injuries inflicted prior to being born alive.)[16]

Third, that the defendant intended to kill the victim. Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proven by circumstances from which it may be inferred. An intent to kill may be inferred from the nature of the assault, the manner in which the assault was made, the conduct of the parties and any other relevant circumstances.

Fourth, that the defendant acted with premeditation, that is, that the defendant formed the intent to kill the victim over some period of time, however short, before the defendant acted.

Fifth, that the defendant acted with deliberation, which means that the defendant acted while the defendant was in a cool state of mind. This does not mean that there had to be a total absence of passion or emotion. If the intent to kill was formed with a fixed purpose, not under the influence of some suddenly aroused violent passion, it is immaterial that the defendant was in a state of passion or excited when the intent was carried into effect.

Neither premeditation nor deliberation is usually susceptible of direct proof. They may be proved by circumstances from which they may be inferred, such as the [lack of provocation by the victim] [conduct of the defendant before, during and after the killing] [threats and declarations of the defendant] [use of grossly excessive force] [infliction of lethal wounds after the victim is felled] [brutal or vicious circumstances of the killing] [manner in which or means by which the killing was done][17] [ill will between the parties].[18]

And Sixth, that the defendant did not act in self-defense or that the defendant was the aggressor in provoking the fight with the intent to kill or inflict serious bodily harm upon the deceased.

Second Degree Murder differs from first degree murder in that the State does not have to prove specific intent to kill, premeditation, or deliberation. For you to find the defendant guilty of second-degree murder, the State must prove beyond a reasonable doubt that the defendant unlawfully, intentionally[19] and with malice wounded the victim with a deadly weapon, proximately causing the victim's death. The State must also prove that the defendant did not act in self-defense, or if the defendant did act in self-defense, the State must prove that the defendant was the aggressor in provoking the fight with the intent to kill or inflict serious bodily harm.

Voluntary Manslaughter is the unlawful killing of a human being without malice, premeditation, and deliberation. A killing is not committed with malice if the defendant acts in the heat of passion upon adequate provocation.

The heat of passion does not mean mere anger. It means that at the time the defendant acted, the defendant's state of mind was so violent as to overcome reason, so much so that the defendant could not think to the extent necessary to form a deliberate purpose and control the defendant's actions. Adequate provocation means anything that has a natural tendency to produce such passion in a person of average mind and disposition.[20] Also, the defendant's act must have taken place so soon after the provocation that the passion of a person of average mind and disposition would not have cooled.

The burden is on the State to prove beyond a reasonable doubt that the defendant did not act in the heat of passion upon adequate provocation, but rather that the defendant acted with malice. If the State fails to meet this burden, the defendant can be guilty of no more than voluntary manslaughter.

For you to find the defendant guilty of voluntary manslaughter, the State must prove three things beyond a reasonable doubt:

First, that the defendant killed the victim by an intentional[21] and unlawful act.

Second, that the defendant's act was a proximate cause[22] of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred.

And Third, that the defendant [did not act in self-defense] or [though acting in self-defense [was the aggressor] (or) [though acting in self-defense used excessive force].

Voluntary manslaughter is also committed if the defendant kills in self-defense but uses excessive force under the circumstances or was the aggressor without murderous intent in provoking the fight in which the killing took place.

The burden is on the State to prove beyond a reasonable doubt that the defendant did not act in self-defense. However, if the State proves beyond a reasonable doubt that the defendant, though otherwise acting in self-defense, [used excessive force] (or) [was the aggressor, though the defendant had no murderous intent when the defendant entered the fight], the defendant would be guilty of voluntary manslaughter.[23]

If you do not find the defendant guilty of murder or voluntary manslaughter, you must consider whether the defendant is guilty of involuntary manslaughter. Involuntary manslaughter is the unintentional killing of a human being by an unlawful act that is not a felony, or by an act done in a criminally negligent way.

For you to find the defendant guilty of involuntary manslaughter, the State must prove two things beyond a reasonable doubt:

First, that the defendant acted

a) [unlawfully] [The defendant's act was unlawful if (*define crime alleged to have been violated,* e.g*., defendant recklessly discharged a gun, killing the victim*).]

b) [in a criminally negligent way].[24] [Criminal negligence is more than mere carelessness. The defendant's act was criminally negligent, if, judging by reasonable foresight, it was done with such gross recklessness or carelessness as to amount to a heedless indifference to the safety and rights of others.]

And Second, the State must prove that this [unlawful] (or) [criminally negligent] act proximately caused the victim's death.

(If the victim died by accident or misadventure, that is, without wrongful purpose or criminal negligence on the part of the defendant, the defendant would not be guilty.[25] The burden of proving accident is not on the defendant. The defendant’s assertion of accident is merely a denial that the defendant has committed any crime. The burden remains on the State to prove the defendant's guilt beyond a reasonable doubt.)

FINAL MANDATE ON ALL CHARGES AND DEFENSES

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant, acting with malice and not in self-defense, wounded the victim with a deadly weapon thereby proximately causing the victim's death, that the defendant intended to kill the victim, and that the defendant acted after premeditation and with deliberation, it would be your duty to return a verdict of guilty of first-degree murder. If you do not

so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of first-degree murder, but will determine whether the defendant is guilty of second degree murder.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant intentionally and with malice but not in self-defense wounded the victim with a deadly weapon thereby proximately causing the victim's death, it would be your duty to return a verdict of guilty of second-degree murder. If you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of second-degree murder, but will determine whether the defendant is guilty of voluntary manslaughter.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant intentionally wounded the victim with a deadly weapon and thereby proximately caused the victim's death, and that the defendant was the aggressor in provoking the fight or used excessive force, it would be your duty to find the defendant guilty of voluntary manslaughter even if the state has failed to prove that the defendant did not act in self-defense.

Or, if you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant intentionally and not in self-defense wounded the victim with a deadly weapon and thereby proximately caused the victim's death, but the State has failed to satisfy you beyond a reasonable doubt that defendant did not act in the heat of passion upon adequate provocation, it would be your duty to return a verdict of guilty of voluntary manslaughter.

If you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of voluntary manslaughter,

but will determine whether the defendant is guilty of involuntary manslaughter.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant [committed the offense of (name crime)] [acted in a criminally negligent way] thereby proximately causing the victim's death, it would be your duty to return a verdict of guilty of involuntary manslaughter. However, if you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

And finally, if the State has failed to satisfy you beyond a reasonable doubt that the defendant did not act in self-defense, that the defendant was the aggressor, or that the defendant used excessive force, then the defendant's action would be justified by self-defense; and it would be your duty to return a verdict of not guilty.

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1. The parenthetical phrase, without parole, must be used for offenses occurring on or after October 1, 1994.

2. N.C. Gen. Stat. § 14-5.2 (effective July 1, 1981) abolished all distinctions between accessories before the fact and principals to felonies as to both trial and punishment, except that if a person who would have been guilty and punishable as an accessory before the fact is convicted of a capital felony, and the jury finds that his conviction was based solely on the uncorroborated testimony of one or more principals, co-conspirators or accessories to the crime, he shall be guilty of a Class B felony. The act applies to all offenses committed on or after July 1, 1981. *See* N.C.P.I.—Crim. 202.30.

As to felonies allegedly committed before that date, accessories before the fact should be tried (and punished) according to previously existing law. *See* N.C.P.I.—Crim. 202.20, 202.30 and *State v. Small*, 301 N.C. 407, 272 S.E.2d 128 (1980).

See N.C.P.I.—Crim. 206.10A for suggested procedure and instruction where an accessory before the fact is convicted of first-degree murder.

3. If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is no evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second-degree murder." *S v. Strickland*, 307 N.C. 274, 293 (1983), overruling *S v. Harris*, 290 N.C. 718 (1976).

4. N.C. Gen. Stat. § 14-51.3.

5. N.C. Gen. Stat. § 14-51.4(2).

6. Pursuant to N.C. Gen. Stat. § 14-51.4(1), self-defense is also not available to a person who used defensive force and who was attempting to commit, committing, or escaping after the commission of a felony. If evidence is presented on this point, then the instruction should be modified accordingly pursuant to N.C.P.I.—Crim. 308.90 to add this provision at this point in the substantive instruction.

7. *See* N.C.P.I.—Crim. 308.10.

8. N.C. Gen. Stat. § 14-51.2 (a) (1) states that a home is a "building or conveyance of any kind, to include its curtilage, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed as a temporary or permanent residence." Curtilage is the area "immediately surrounding and associated with the home," which may include "the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings." *State v. Grice*, 367 N.C. 753, 759 (2015) (citations and quotations omitted) (defining curtilage in a Fourth Amendment case).

9. N.C. Gen. Stat. § 14-51.2 (a) (4) states that a workplace is a "building or conveyance of any kind, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, which is being used for commercial purposes."

10. N.C. Gen. Stat. § 14-51.2 (a) (3); which incorporates N.C. Gen. Stat. § 20-4.01 (23), defines "motor vehicle" as "Every vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle. This shall not include mopeds as defined in N.C. Gen. Stat. § 20-4.01(27)d1."

11. "[W]herever an individual is lawfully located—whether it is his home, motor vehicle, workplace, or any other place where he has the lawful right to be—the individual may stand his ground and defend himself from attack when he reasonably believes such force is necessary to prevent imminent death or great bodily harm to himself or another." *State v. Bass*, 371 N.C. 456, 541, 819 S.E.2d 322, 326 (2018). "[A] defendant entitled to any self-defense instruction is entitled to a complete self-defense instruction, which includes the relevant stand-your-ground provision." *Id*.

12. If a definition of intent is required, *see* N.C.P.I.—Crim. 120.10. If a further definition of general intent or specific intent is required, you may consider giving the following additional instruction: [Specific Intent is a mental purpose, aim or design to accomplish a specific harm or result] [General Intent is a mental purpose, aim or design to perform an act, even though the actor does not necessarily desire the consequences that result] *Black's Law Dictionary*, 825-26 (Bryan A. Garner, 8th ed. 2004).

13. Use the parenthetical only if defendant admits to an intentional shooting in open court. *See State v. McCoy*, 303 N.C. 1, 28-29 (1981).

14. In *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965 (1985), the Supreme Court held that a mandatory presumption, if it relieves the State of its burden of persuasion on an element of the offense, violates the Due Process Clause. This raises questions concerning the validity of the mandatory presumption of malice required in *S. v. Reynolds*, 307 N.C. 184 (1982).

15. Where there is a serious issue as to proximate cause, further instructions may be helpful, *e.g.*, "The defendant's act need not have been the last cause or the nearest cause. It is sufficient if it concurred with some other cause acting at the same time, which in

combination with it, proximately caused the death of (*name victim*)." This language was approved in *State v. Messick*, 159 N.C. App. 232 (2003), *per curiam* affirmed, 358 N.C. 145 (2004). ("Defendant's act does not have to be the sole proximate cause of death. It is sufficient that the act was a proximate cause which in combination with another possible cause resulted in [the victim's] death.").

16. This sentence is only to be provided if the offense involved the killing of a child.

17. If there is evidence of lack of mental capacity to premeditate or deliberate, *see S. v. Shank*, 322 N.C. 243, 250-251 (1988), *S. v. Weeks*, 322 N.C. 152 (1988) and *S. v. Rose*, 323 N.C. 455 (1988), and N.C.P.I.—Crim. 305.11.

18. *See State v. Battle*, 322 N.C. 114 (1988).

19. Neither second-degree murder nor voluntary manslaughter has as an essential element an intent to kill. In connection with these two offenses, the phrase 'intentional killing' refers not to the presence of a specific intent to kill, but rather to the fact that the act which resulted in death is intentionally committed and is an act of assault which in itself amounts to a felony or is likely to cause death or serious bodily injury. Such an act committed in the heat of passion suddenly aroused by adequate provocation or in the imperfect exercise of the right of self-defense is voluntary manslaughter. But such an act can never be involuntary manslaughter. This is so because the crime of involuntary manslaughter involves the commission of an act, whether intentional or not, which in itself is not a felony or likely to result in death or great bodily harm. *S. v. Ray*, 299 N.C. 151, 158 (1980). *See also S. v. Jordan*, 140 N.C. App. 594 (2000); *S. v. Coble*, 351 N.C. 448 (2000).

20. If some evidence tends to show legally sufficient provocation (*e.g.,* assault), but other evidence tends to show that the provocation, if any, was insufficient (*e.g.,* mere words), the jury should be told the kind of provocation that the law regards as insufficient, *e.g.,* "Words and gestures alone, however insulting, do not constitute adequate provocation when no assault is made or threatened against the defendant."

21. "Neither second-degree murder nor voluntary manslaughter has as an essential element an intent to kill. In connection with these two offenses, the phrase 'intentional killing' refers not to the presence of a specific intent to kill, but rather to the fact that the act which resulted in death is intentionally committed and is an act of assault which in itself amounts to a felony or is likely to cause death or serious bodily injury. Such an act committed in the heat of passion suddenly aroused by adequate provocation or in the imperfect exercise of the right of self-defense is voluntary manslaughter. But such an act can never be involuntary manslaughter. This is so because the crime of involuntary manslaughter involves the commission of an act, whether intentional or not, which in itself is not a felony or likely to result in death or great bodily harm." *S. v. Ray*, 299 N.C. 151, 158 (1980). *See also S. v. Jordan*, 140 N.C. App. 594 (2000); *S. v. Coble*, 351 N.C. 448 (2000).

22. Where there is a serious issue as to proximate cause, further instructions may be helpful, *e.g.,* "The defendant's act need not have been the last cause or the nearest cause. It is sufficient if it concurred with some other cause acting at the same time, which in combination with it, proximately caused the death of the victim."

23. Where the evidence raises the issue of retreat, *see* N.C.P.I.—Crim. 308.10.

24. Note that you must choose either "unlawfully" or "in a criminally negligent way." Jurors should not be given both options.

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25. In the event that the evidence shows that there was an accident, give N.C.P.I.—Crim. 307.10.