N.C.P.I.—CRIM 206.15
FIRST DEGREE MURDER IN PERPETRATION OF A FELONY. FELONY.
GENERAL CRIMINAL VOLUME
JUNE 2014
N.C. Gen. Stat. § 14-17

206.15 FIRST DEGREE MURDER IN PERPETRATION OF A FELONY.[1] CLASS A FELONY.

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).[2] 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."[3]

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1 N.C. Gen. Stat. § 14-17, as amended effective July 1, 1977, and January 1, 1980, provides, "A murder . . . which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary or other felony committed or attempted with the use of a deadly weapon, shall be deemed murder in the first degree . . . ." The effect of the italicized language, which was added by the 1977 amendment, is to eliminate from first degree murder all those felony murders in which the felony is neither one of those specified in N.C. Gen. Stat. § 14-17 nor another felony committed or attempted with the use of a deadly weapon. *See also Enmund v. Florida*, 102 S.Ct. 3368 (1982), *Cabana v. Bullock*, 474 U.S. 376 (1986) and *Tison v. Arizona*, 482 U.S. 921 (1987), which held that the death penalty for this offense violates the Constitution unless the defendant committed, attempted to commit, participated in, or intended the killing or was a major participant in the underlying felony and exhibited reckless indifference to human life. The *Enmund* line of cases did not change the substantive law on felony murder. Accordingly, no changes in this instruction arising from *Enmund* are suggested. N.C.P.I.–Crim. 150.10 and the jury verdict form at the end thereof have been amended to incorporate the *Enmund* requirements.

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

3 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. 202.20A.

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. That special instruction is

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The defendant has been charged with first degree murder in the perpetration of a felony, which is the killing of a human being by a person committing or attempting to commit [arson] [rape] [sexual offense] [robbery] [kidnapping] [burglary] [(*name felony*) with a deadly weapon].

For you to find the defendant guilty of first degree murder in perpetration of a felony, the State must prove [three] [four] things beyond a reasonable doubt:

First, that the defendant [committed] (or) [attempted to commit] (*name felony, e.g., robbery*). (*Define the felony and enumerate its elements, using the Pattern Jury Instruction for that felony.*) and the defendant had the intent to commit (*name felony, e.g. robbery*).

Second, that while [committing] (or) [attempting to commit] (*name felony*), the defendant killed the victim.

[And Third] [Third], 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,[4] 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

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considered appropriate for use with N.C.P.I.–Crim. 206.15, except that it should be inserted immediately before the final mandate (page 4).

4 If there is an issue as to proximate cause of the victim's death, use the following: "The defendant's act need not have been the only cause, nor the last or nearest cause. It is sufficient if it concurred with some other cause acting at the time which, in combination with it, caused the death of the victim."

being born alive.)[5]

NOTE WELL: Where there is evidence that the defendant, though not committing or attempting to commit arson, rape or a sex offense, robbery, kidnapping or burglary, was committing or attempting to commit some other felony with the use of a deadly weapon, add the following:

[And Fourth, that (*name felony, e.g., felonious escape*) was committed or attempted with the use of a deadly weapon. A deadly weapon is a weapon which is likely to cause death or serious bodily injury. In determining whether the instrument is 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 with the victim.

NOTE WELL: If there is evidence that defendant committed the underlying felony in concert with others, but that he may not have actually committed the killing, instructions should be given, as appropriate, on acting in concert (N.C.P.I.–Crim. 202.10) and/or aiding and abetting (N.C.P.I.–Crim. 202.20 or 202.20A).

If there was evidence that defendant was not present, and there was testimony by one or more accomplices, N.C.P.I.–Crim. 206.10A should be considered at this point.

The Enmund v. Florida *instruction should not be given during the guilt determination phase. It has been incorporated in N.C.P.I.–Crim. 150.10, the death penalty hearing instruction.*

FINAL MANDATE

NOTE WELL: Begin by giving the mandate from the instruction for the felony, up to "it would be your duty. . ." and then continue as follows:

. . . and that the defendant had the intent to commit (*name felony*).

. . . and that while [committing] [attempting to commit] (*name felony*), the defendant killed the victim and that the defendant's act was a

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

proximate cause of the victim's death, (and that the defendant [committed] [attempted to commit] (*name felony*) with the use of a deadly weapon),[6] it would be your duty to return a verdict of guilty of first degree murder. 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.[7]

6 Use the parenthetical only when there is evidence of a felony other than arson, rape or sex offense, robbery, kidnapping or burglary.

7 If there is to be an instruction on a lesser included offense, the last sentence should read ". . . you would not return a verdict of guilty of first degree murder in perpetration of a felony."