

**FELONY MURDER –NON-SLAYER PARTICIPANT**

**(N.J.S.A. 2C:11-3a(3))**

The defendant is charged in count \_\_\_\_\_ with felony murder in violation of N.J.S.A. 2C:11-3.

The indictment reads in pertinent part as follows:

**(Read indictment or appropriate count, if indictment contains more than one count.)**

**(Continue with basic charge.)**

The State does not contend that the defendant (himself/herself) killed **(name of victim)**. The State charges that **(name of victim)** was shot and killed<sup>1</sup> while defendant, alone or with one or more other persons, was engaged in the commission of or attempt to commit or flight after committing or attempting to commit<sup>2</sup> the crime of (insert predicate crime, eg., robbery), as charged in count \_\_\_\_\_ of the indictment.<sup>3</sup>

The section of the statute applicable to this case reads in pertinent part as follows:

... [C]riminal homicide constitutes murder when:

It is committed when the actor either acting alone or with one or more other persons, is engaged in the commission of or attempt to commit or flight after committing or attempting to commit... (insert predicate crime), and in the course of such crime or the immediate flight therefrom.... any person causes the death of a person other than one of the participants....

Under this law, it does not matter that the act which caused death was committed by a participant in the crime of (predicate crime) other than the defendant, or even by someone other than a participant<sup>4</sup> Nor does it generally matter that the act which caused death was committed recklessly or unintentionally or accidentally.<sup>5</sup> Each participant in the crime of (predicate crime),

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<sup>1</sup> If the death was caused in some other manner, so indicate.

<sup>2</sup> Delete language relating to attempt or flight throughout charge if not applicable. On flight, see State in the Interest of J.R., 234 N.J. Super 388 (Ch. Div. 1988) and cases cited therein.

<sup>3</sup> The crimes enumerated in N.J.S.A. 2C:11-3a(3) are robbery, sexual assault, arson, burglary, kidnapping and criminal escape. It is assumed that the indictment would contain a separate count or counts charging defendant with the predicate crime(s) or attempted crime(s).

<sup>4</sup> Under N.J.S.A. 2C:11-3a(3), a perpetrator would be guilty of murder if the death of the victim (e.g., a bystander, but not another participant) was caused by another person, such as a police officer or a shopkeeper who was being robbed. Cf. State v. Kress, 105 N.J. Super, 514 (Law Div. 1969).

<sup>5</sup> The same result would follow if the death was the result of the victim's fear or fright. See State v. Smith,

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whether the participant (himself/herself) caused the death or not, would be guilty of felony murder.

In order for you to find the defendant guilty of felony murder in this case, the State is required to prove beyond a reasonable doubt, from all the evidence in the case, each of the following elements of the offense charged:

1. That on or about (insert date) the defendant was engaged in the commission of or attempt to commit or flight after committing or attempting to commit the crime of (name of predicate crime), as charged in count \_\_\_\_\_ of the indictment;<sup>6</sup>
2. That the death of **(name of victim)** was caused at some time within the course of the commission of that crime, including its aftermaths of flight and concealment efforts.<sup>7</sup>

**[And, if applicable:**

3. That **(name of victim)** was not a participant in the crime.]

The first element requires the State to prove beyond a reasonable doubt that the defendant was engaged in the commission of or attempt to commit or flight after committing or attempting to commit the crime of (name of predicate crime). I have already defined the elements of (predicate crime), which defendant is accused of having engaged in committing (or attempting to commit) in my instructions concerning count \_\_\_\_\_. You cannot find the defendant guilty of felony murder unless you first find him/her guilty beyond a reasonable doubt of having committed (or attempted to commit) the crime charged in count \_\_\_\_\_.<sup>8</sup>

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210 N.J. Super. 43 (App. Div. 1986); State v. McKeiver, 89 N.J. Super. 52 (Law Div. 1965), as long as the requirements of the causation statute, N.J.S.A. 2C:2-3 were charged and satisfied.

<sup>6</sup> If the facts indicate an attempted crime, see appropriate charge on attempt elsewhere herein and modify to the extent necessary. And if defendant's involvement was or may have been as an accomplice (N.J.S.A. 2C:2-6), see appropriate charges elsewhere herein, including, if also applicable, the defense of renunciation N.J.S.A. 2C:2-6(e)). In this regard, the Commentary on the New Jersey Penal Code points out that subsection c of 2C:2-6, in defining "accomplice," replaces the "aiding and abetting" language of N.J.S.A. 2A:85-14.

<sup>7</sup> Where the issue is whether the predicate crime had terminated when the killing occurred, see State v. Holland, 59 N.J. 451, 458 (1971).

<sup>8</sup> State v. Grey, 147 N.J. 4, 17 and 40 (1996). Where defendant is accused of being engaged in the commission of more than one predicate crime (and, presumably, is so charged in the individual counts of the indictment), the jury should be instructed that they must unanimously agree that defendant has

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[NOTE: Where the defendant has been charged with conspiracy to commit a predicate crime as well as the predicate crime itself, add:

I have also previously defined for you the elements of conspiracy to commit (predicate crime), as charged in count \_\_\_\_\_ of the indictment. Conspiracy to commit (predicate crime) is a separate offense from (predicate crime) and cannot be a basis for a conviction of felony murder. Therefore, if you find defendant guilty beyond a reasonable doubt of conspiracy to commit (predicate crime) as charged in count \_\_\_\_\_, but you find the defendant not guilty of (predicate crime) as charged in count \_\_\_\_\_, you must find him/her not guilty of felony murder.<sup>9]</sup>

The second element requires the State to establish that the victim's death was caused during the commission of or attempt to commit or flight after committing or attempting to commit the (insert predicate crime). In order to meet its burden of proof in this regard, the State must prove beyond a reasonable doubt the following:

1. That but for defendant's conduct or the conduct of one or more others with whom the defendant participated in the commission of, or attempt to commit, or flight after committing or attempting to commit (the predicate crime) the victim would not have died. In other words, that the victim's death would not have occurred without the commission of the (insert predicate crime).<sup>10</sup>

2. That the victim's death was a probable consequence of the commission of or attempt to commit or flight after committing or attempting to commit (insert predicate crime). In order for the death to be a "probable consequence" of the (insert predicate crime) the death must not have been too remote, or too accidental in its occurrence, or too dependent on another's volitional acts to have a just bearing on the defendant's liability or the gravity of his/her offense. In other words, you must decide if the State has proven beyond a reasonable doubt that, under all

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committed (or attempted to commit) at least one of the offenses charged. Grey, 147 N.J. at 17 n. 2, discussing State v. Harris, 141 N.J. 525, 561-564 (1995). In appropriate cases, and when specifically requested by counsel, the jury should be instructed that it must agree unanimously on which predicate crime or crimes defendant was engaged in committing when the death was caused. Harris, 141 N.J. at 563; State v. Parker, 124 N.J. 628, 636-637 (1991).

<sup>9</sup> Grey, 147 N.J. at 15.

<sup>10</sup> State v. Martin, 119 N.J. 2, 11, 19-34 (1990).

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the circumstances, the death did not occur in such an unexpected or unusual manner that it would be unjust to find the defendant responsible for the death.<sup>11</sup>

**[NOTE: In cases where Causation - Removal of Life Support is an issue, the jury should be instructed as follows:**

You have heard testimony that on [date], **(insert victim's name)** was taken off life support and that he/she died at some point after this was done. Should you find beyond a reasonable doubt that **(insert victim's name)** died from medical complications that resulted from injuries caused by defendant's actions, the removal of life support, in this case (method of removal), is not an intervening cause that relieves defendant of any criminal liability for those actions.<sup>12</sup> That is, if defendant's actions set in motion **(insert victim's name)** need for life support, without which death would result naturally, then the causal link between defendant's action and the death of **(insert victim's name)** was not broken by an unforeseen, extraordinary act when **(insert victim's name)** was removed from life support and then expired, unless there was an intervening volitional act of another.]<sup>13</sup>

**(NOTE: In cases in which someone other than a participant causes the death the jury should be instructed as follows:**

A killing which is committed by someone other than a participant in the (insert predicate crime), such as a victim or a police officer, need not be considered too remote, too accidental or too dependent on another's volitional act to have a just bearing on the issue of the defendant's culpability. Our law recognizes that a death which occurs as a result of self-defense or retaliation may not be so unexpected or unusual that it would be unjust to hold a participant in the (insert predicate crime) responsible for the death.<sup>14</sup>)

**(NOTE: Where there is an issue of whether the decedent was a participant in the crime or attempted crime, add:**

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<sup>11</sup> Where divergent factual versions give rise to different theories of causation, the trial court must provide the jury with appropriate instructions to apply, depending on which version it chooses to accept. Thus, in appropriate cases the court must fashion its charge to instruct the jury how to deal with the defendant's (as well as with the State's) factual contentions. State v. Martin, 119 N.J. 2, 16-18 (1990).

<sup>12</sup> State v. Pelham, 176 N.J. 44, 455-456 and n. 2 (2003).

<sup>13</sup> Pelham, 176 N.J. at 467.

<sup>14</sup> State v. Martin, *supra*, 119 N.J. at 32.

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The State must also prove beyond a reasonable doubt that (name of victim) was not a participant in the (predicate crime or attempted crime). A participant is one who participates in or shares in that crime.)

(NOTE: In the event facts appear in the State's or defendant's proofs supporting the affirmative defense contained in 2C:11-3a(3)(a) through (d), but not otherwise the following instructions should be given:

Under the statute which applies here, it is an affirmative defense to the charge of felony murder if there is proof in the case that defendant

- (a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and
- (b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and
- (c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and
- (d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

This means that the affirmative defense is not available to defendant unless there is evidence in the case supporting all of the four requirements, and not merely one, or two or three of them. If there is such supporting evidence, either in the State's proofs or as presented in behalf of the defendant, then it is incumbent upon the State to negate this evidence by proof beyond a reasonable doubt.<sup>15</sup> However, it is not necessary that all four requirements be negated. Since the defense is not available to defendant unless the evidence supports all four of the requirements, it is sufficient for the State in such case to present proof beyond a reasonable doubt negating any one of them).

If you find, after a consideration of all the evidence that the State has proven to your satisfaction beyond a reasonable doubt each of these elements of the offense charged, as I have just explained them to you; that is, (1) that the defendant was engaged in the commission of or

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<sup>15</sup> See State v. Fair, 45 N.J. 77, 91 (1965); State v. Abbott, 36 N.J. 63, 72 (1961); Commentary on New Jersey Penal Code, 35-36.

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attempt to commit or flight after committing or attempting to commit the crime of (name of predicate crime), as charged in count \_\_\_\_\_ of the indictment, (2) that the death of (name of victim) was caused at some time within the course of the commission of that crime, including its aftermaths of flight and concealment efforts [and, if applicable, (3) that (name of victim) was not a participant in the crime], then you must find the defendant guilty of felony murder.

On the other hand, if you find that the State has failed to prove to your satisfaction beyond a reasonable doubt any one or more of those elements of the crime charged, as I have explained them, then you must find the defendant not guilty of felony murder.

**NOTE:** In the event that purposeful or knowing murder, aggravated manslaughter or manslaughter is charged in the indictment the jury should be advised that if the State has failed to prove beyond a reasonable doubt that any participant caused the death of the victim then the defendant should be found not guilty of all charged homicide offenses.

The jury should be further advised with appropriate instructions that if they find beyond a reasonable doubt that any participant did cause the death of the victim but that the State has failed to prove that the defendant was then engaged as an accomplice in the course of the commission of or attempt to commit or flight after committing or attempting to commit the (predicate crime) charged in count \_\_\_\_\_, then they should proceed to consider whether the defendant as an accomplice purposely, knowingly or recklessly caused the death of the victim.<sup>16</sup> (See appropriate charges elsewhere herein.)

**(NOTE:** If the affirmative defense is an issue in the case, incorporate the following into the summary:

If you find there is evidence in the case supporting all elements of the affirmative defense which I explained to you, and that the State has failed to negate beyond a reasonable doubt any one or more of them, then you must find the defendant not guilty of felony murder. But if you find that the State has presented proof beyond a reasonable doubt negating one or more of those elements, and has also proven beyond a reasonable doubt all the elements of the offense charged, then you will must the defendant guilty of felony murder.)

<sup>16</sup>

In the rare event the facts are such that the jury might find the defendant not guilty of felony murder solely because of its conclusion that the victim's death was not caused by the defendant or some other person, quaere: should the predicate crime, e.g., robbery or attempted robbery, be charged as a lesser included offense, where, contrary to the assumption in footnote 3 supra, the indictment does not contain a separate count for the offense? See 2C:1-8(d).