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State v. Fields: Felony Murder and Psychological Use of a Deadly Weapon

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State v. Fields: Felony Murder and Psychological Use of a Deadly Weapon

At common law all felonies were punishable by death.[1] It seemed logical to make any death that occurred during the commission or attempted commission of a felony first degree murder.[2] This result is known as the felony murder rule. Today, however, most felonies are not punished as severely as murder.[3] Recognizing the harshness that the felony murder rule works when applied to killings associated with many felonies,[4] most jurisdictions have limited the application of the rule. Some have explicitly restricted the types of felony deaths to which the rule may be applied.[5] Others have punished some felony deaths as second degree murder, and still others classify certain felony deaths as manslaughter.[6] A few states have followed the Model Penal Code's suggestion[7] and abolished the felony murder rule.[8] North Carolina, however, retains felony murder as a first degree murder offense.[9]

In 1977 the North Carolina General Assembly amended the felony murder[10] clause of North Carolina General Statutes section 14-17 to read "[a] murder which shall be . . . committed in the perpetration or attempted perpetration of any arson, rape, robbery, kidnapping, burglary, or other felony *committed or attempted with the use of a deadly weapon*, shall be deemed to be murder in the first degree."[11] In *State v. Fields*[12] the North Carolina Supreme Court faced its first opportunity to determine the legislative intent behind the "committed or attempted with the use of a deadly weapon" language. The court concluded that the general assembly did not intend this language to restrict the types of unspeci-

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1. 2 W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 7.5, at 207 n.4 (1986). The common-law felonies, other than murder, were rape, sodomy, robbery, burglary, arson, mayhem, and larceny. *Id.* at 208.

2. *Id.* at 206.

3. *Id.* at 207 n.4.

4. *Id.* at 207; *see infra* note 45 for examples.

5. *See generally* 2 W. LAFAVE & A. SCOTT, *supra* note 1, at 208-11, 213 (discussing the typical kinds of restrictions imposed by different states).

6. *See generally* MODEL PENAL CODE § 210.2 comment 6, at 31-32 n.78 (Official Draft 1980) (listing states that divide felony murder offenses into different degrees).

7. *Id.* at 29. The commentators suggest that a presumption of recklessness and extreme indifference is raised when a death occurs during the commission or attempted commission of certain felonies instead of using the felony murder rule as "an independent basis for establishing the criminality of homicide." *Id.* This change would, in effect, abolish the felony murder rule. *Id.*

8. For a discussion of the states that have abolished the felony murder rule, see Comment, *The Dillon Dilemma: Finding Proportionate Felony-Murder Punishments*, 72 CALIF. L. REV. 1299, 1307 n.40 (1984); *see also infra* note 43 (discussing the four states which have abolished felony murder).

9. N.C. GEN. STAT. § 14-17 (1986).

10. Because the statute does not explicitly refer to an offense as "felony murder," the North Carolina Supreme Court has discouraged use of that term. State v. Davis, 305 N.C. 400, 423, 290 S.E.2d 574, 588 (1982). The clause simply describes one classification of offenses that constitute first degree murder.

11. Act of May 19, 1977, ch. 406, § 1, 1977 N.C. Sess. Laws 407, 407 (codified as amended at N.C. GEN. STAT. § 14-17 (1986) (emphasis added to show language added)); *see infra* note 61 for a statement of the clause.

12. 315 N.C. 191, 337 S.E.2d 518 (1985).

fied felonies which could form the basis of a felony murder conviction to felonies actually committed by physical use of a deadly weapon.[13] The court held that mere possession of a deadly weapon involves a psychological use which is within the purview of the statute.[14]

This Note examines the history of the felony murder rule and its recent treatment in other states. The Note then examines North Carolina's historical approach to the rule and analyzes the *Fields* decision in light of this background. This Note suggests that the general assembly's 1977 amendment to section 14-17 is in keeping with the national trend toward limitation of the rule. It also contends that the North Carolina Supreme Court's interpretation of the amendment is consistent with the court's traditional view of felony murder, but concludes that the court's interpretation is too broad in light of the legislature's attempt to move the scope of the rule away from its common-law roots. This Note suggests alternative wordings for the felony murder clause of section 14-17 to clear its ambiguity and to better convey legislative intent.

The events in *Fields* began one February evening in 1983 with defendant, Anthony Fields, driving his truck around Wake County with two companions, Norman Collins and Douglas Boney.[15] The trio drove into the driveway of Ernest Carter, parked and got out of the truck. Samuel Fisher, Carter's neighbor, observed their arrival. Defendant Fields and Boney then went to a storage shed near the Carter house, opened the shed and removed a chain saw and a maul.[16] Meanwhile, Collins was peering through windows into the Carter home.[17] Knowing that the Carters were not home, Fisher got his shotgun and drove over to the Carter's house to investigate. Collins saw Fisher approach, so he warned his companions. Thereupon, defendant and Boney threw the stolen items into the bushes. Fisher then appeared with his shotgun and told the three to stand against defendant's truck. As Fisher turned to look toward the house for signs of breaking and entering, defendant yelled to him, "Hold it."[18] Fisher immediately turned around only to be shot five times by defendant. Defendant and his friends left the scene. Fisher died as a result of the shooting.[19]

The Wake County Superior Court found defendant guilty of, among other things, murder in the first degree based on four theories.[20] Three of the theories

13. *Id.* at 199, 337 S.E.2d at 523.

14. *Id.*

15. *Id.* at 193, 337 S.E.2d at 519-20.

16. *Id.* at 193, 337 S.E.2d at 520. No mention is made in the opinion of whether force was used to open the shed or whether the shed was locked. *Id.* In his brief, defendant pointed out that no weapon was used to effect the felonies with which he was charged—breaking and entering, and larceny. Defendant-Appellant's Brief at 21, *Fields* (No. 653A84).

17. *Fields*, 315 N.C. at 193, 337 S.E.2d at 520.

18. *Id.* Defendant had a .38-caliber pistol in his waistband and pulled it out at this moment. *Id.* His accomplice Collins, however, did not know that defendant had a gun with him. Defendant-Appellant's Brief at 21.

19. *Fields*, 315 N.C. at 193, 337 S.E.2d at 520.

20. Record at 1-2, *Fields*. Defendant was found guilty of

> first degree murder (with premeditation and deliberation), first degree murder during the commission of second degree burglary (felony murder), first degree murder during the commission of felonious breaking or entering, committed with the use of a deadly weapon

were felony murder—murder committed during the perpetration of felonious breaking and entering, murder committed during the perpetration of felonious larceny, and murder during the commission of a burglary.[21]

On appeal to the North Carolina Supreme Court, defendant Fields argued that as felonies unspecified in section 14-17, the felonious breaking and entering and the felonious larceny must have been accomplished with the actual physical use of a deadly weapon in order to form the basis of a felony murder conviction.[22] Defendant contended that the statute required him, for example, to have used the gun to shoot the lock off the shed, which he did not do.[23] The court rejected as unfounded defendant's interpretation of the statute and held that mere possession of a weapon is sufficient to satisfy the requirement of use.[24] The court explained that the presence of a weapon, though not physically used in the felony, served a psychological use to defendant.[25] The court pointed out that the gun "may bolster [defendant's] confidence, steel his nerve, allay fears of his apprehension. Even under circumstances where the weapon is never used, it functions as a backup, an inanimate accomplice that can cover for the defendant if he is interrupted."[26] The court further explained that the general assembly did not intend to restrict the felony murder rule as narrowly as defendant insisted and, thus, upheld the superior court's decision.[27]

An examination of the historical development of the felony murder rule and of the context giving rise to the North Carolina General Assembly's 1977 amendment will help in understanding why the general assembly limited application of the rule. The felony murder rule in the United States is derived from the English common law.[28] At common law, any death which resulted during the perpetration or attempted perpetration of a felony was prosecuted as murder.[29] Prosecution did not require "intent to kill or injure, [nor] an act done in

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(felony murder), first degree murder during the commission of felonious larceny, committed with the use of a deadly weapon (felony murder).

Id. The *Fields* court upheld all but the felony murder conviction based on second degree burglary. 315 N.C. at 208, 337 S.E.2d at 528. The court found that defendant's activity did not meet the curtilage test for second degree burglary. *Id.* at 196, 337 S.E.2d at 521.

21. *See* Record at 1-2.

22. *Fields*, 315 N.C. at 198, 199, 337 S.E.2d at 523.

23. Defendant-Appellant's Brief at 21.

24. *Fields*, 315 N.C. at 198, 199, 337 S.E.2d at 523.

25. *Id.* at 199, 337 S.E.2d at 523.

26. *Id.*

27. *Id.* at 198, 200, 337 S.E.2d at 524.

28. Exactly how the rule originated is unknown. For a general discussion of some of the different views of the rule's origin, see Roth & Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 449 (1985). For a more detailed discussion of the possible origin, see People v. Aaron, 409 Mich. 672, 299 N.W.2d 304 (1980).

29. 2 W. LAFAVE & A. SCOTT, *supra* note 1, at 206. For purposes of the felony murder rule, the phrase "during the perpetration or attempted perpetration of a felony" means there must be a causal connection between the defendant's conduct and the victim's death. *Id.* at 206 n.1. "[T]he defendant, by his conduct in committing or attempting the felony, must actually *cause* the death." *Id.*

One court's interpretation of the common-law view of felony murder required that the death be a consequence of the defendant's commission of the felony, and not merely a coincidence. Commonwealth v. Redline, 391 Pa. 486, 495, 137 A.2d 472, 476 (1958); *see also* Adlerstein, *Felony-Murder in the New Criminal Codes*, 4 AM. J. CRIM. L. 249, 253 (1976) ("the killing charged must be a conse-

wanton and wilful disregard of the obvious likelihood of causing such harm."[30] Moreover, an accomplice could be convicted for a death that resulted from the actions of a co-felon.[31] This concept became known as the felony murder rule.

Because murder was not divided into degrees at common law,[32] all convictions were punishable by death.[33] "[A]ny unlawful killing of a human being with malice aforethought, either express or implied" was deemed murder.[34] The fiction of constructive malice was invoked to place deaths that occurred during the commission of unlawful acts within the realm of murder statutes.[35] Also at common law, all felonies were punishable by death.[36] Thus, no distinction was made as to a particular felony's degree of dangerousness to human life. All felonies could serve as the basis for application of the felony murder rule.[37] Because the individual punishments for both the murder and the felony were the same, some commentators have concluded that the purpose of the felony murder rule at common law was to convict a defendant for a death that resulted in connection with a failed attempt to commit a felony.[38] Attempts were punished as misdemeanors at common law, and thus "use of the felony-murder rule allowed the courts to punish the actor in the same manner as if his attempt had succeeded."[39]

The harsh effects that the broad scope of the felony murder rule could wreak led English courts to limit the rule's application to crimes in which the underlying felony was dangerous to human life.[40] Eventual dissatisfaction with the idea of constructive malice led Parliament to abolish the rule in 1957.[41]

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quence of the felonious act"); *cf.* R. PERKINS & R. BOYCE, CRIMINAL LAW 67 (3d ed. 1982) (asserting the requirement that the death occur during the commission or attempted commission of a felony should be interpreted to mean *"but for* the felony the deceased would not have been killed"). Thus, proof of a strict causal connection between the felony and the murder was not necessary at common law. *But see infra* text accompanying note 50.

30. R. PERKINS & R. BOYCE, *supra* note 29, at 61. Some authorities have chosen to explain the rule by stating that the intent to commit the felony was transferred to the killing. *See* 2 W. LAFAVE & A. SCOTT, *supra* note 1, at 206 n.2.

31. Harris v. United States, 377 A.2d 34, 37 (D.C. 1977); *cf.* People v. Cabaltero, 31 Cal. App. 2d 52, 87 P.2d 364 (1939) (felon convicted of murder for the killing of one of his co-felons by another co-felon).

32. *See* State v. Streeton, 231 N.C. 301, 304, 56 S.E.2d 649, 652 (1949).

33. G. WILLIAMS, TEXTBOOK OF CRIMINAL LAW 204 (1978).

34. *Streeton*, 231 N.C. at 304, 56 S.E.2d at 652 (1949).

35. G. WILLIAMS, *supra* note 33, at 211. Constructive malice is defined as "[i]mplied malice . . . ; malice which is not shown by direct proof of an intention to do injury (express malice), but which is inferentially established by the necessarily injurious results of the acts shown to have been committed." BLACK'S LAW DICTIONARY 862 (5th ed. 1979).

36. 2 W. LAFAVE & A. SCOTT, *supra* note 1, at 207 n.4. This fact has led some to question whether applying the felony murder rule served any purpose since the punishment for both felonies and murder was death. *See infra* text accompanying notes 38-39.

37. *See* 2 W. LAFAVE & A. SCOTT, *supra* note 1, at 206.

38. MODEL PENAL CODE § 210.2, at 31 n.74 (Official Draft 1980).

39. *Id.*

40. *See* R. PERKINS & R. BOYCE, *supra* note 29, at 62-63; People v. Aaron, 409 Mich. 672, 697-98, 299 N.W.2d 304, 312 (1980) (discussing British position on the felony murder rule).

41. English Homicide Act, 5 & 6 Eliz. 2, ch. 11, § 1 (1) (1957). The statute reads:

> Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express

Despite England's ultimate disfavor with it, however, the felony murder rule enjoys continued application in the United States.[42] Only four states have abolished it.[43] Nevertheless, the majority of states have limited the scope of their felony murder statutes.[44]

The main reason for restricting application of the rule is to prevent application of the harsh punishments that accompany intentional murders in situations in which the death resulted in connection with one of the numerous felonies that possesses no inherent danger and creates no reasonable foreseeability of death.[45] Another possible reason for limiting the rule may be a general reluctance to treat as murder a death caused without actual malice or intent.[46]

The limitations imposed by states retaining the felony murder rule have taken numerous forms. Examples are limitation to common-law felonies,[47] felonies enumerated in a state's statute,[48] and felonies inherently dangerous to

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or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence.

Id.

42. Several reasons for retention of the rule have been articulated. *See generally* Roth & Sundby, *supra* note 28, at 450-59 (discussing the merits and criticisms of the four most common reasons: to deter felons from killing negligently or to deter the commission of the felony itself; to relieve the state of the burden of proving malice by invoking the doctrine of transferred intent; to ensure retribution for the death that occurred; and to hold the defendant generally culpable for the results of his or her bad acts).

43. Hawaii and Kentucky legislatively abolished the felony murder rule by requiring that the killing be intentional. HAW. REV. STAT. § 707.701 (1976); KY. REV. STAT. ANN. § 507.020 (Michie/Bobbs-Merrill 1985). For an excellent discussion of why the Hawaii legislature abolished the felony murder rule, see HAW. REV. STAT. § 701.701 comment (1976). The Michigan Supreme Court abolished the rule in a decision that found felony murder was not sanctioned by statute in that state. *See* People v. Aaron, 409 Mich. 672, 299 N.W.2d 304 (1980). Ohio has relegated to manslaughter the deaths which previously would have fallen under the felony murder statute, and requires intent to kill for a murder conviction. OHIO REV. CODE ANN. §§ 2903.01 to 2903.04 (Anderson 1987).

44. Only a few states retain the common-law position that any felony can serve as the support for a felony murder conviction. *See, e.g.*, GA. CODE ANN. § 16-5-1(c) (1984) "A person . . . commits the offense of murder when, in the commission of a felony, he causes the death of another human being irrespective of malice." *Id.* This provision has been construed to encompass all felonies. *See* Baker v. State, 236 Ga. 754, 758, 225 S.E.2d 269, 272 (1976). For other examples see KAN. STAT. ANN. § 21-3401 (1981) ("any felony"); N.M. STAT. ANN. § 30-2-1 (1984) ("any felony"); TEX. PENAL CODE ANN. § 19.02 (Vernon 1974) ("a felony," excluding manslaughter); WIS. STAT. ANN. § 940.02 (West 1982) ("a felony").

45. *See* People v. Pavlic, 227 Mich. 562, 565, 199 N.W. 373, 374 (1924) (defendant manufactured and sold moonshine—a felony under the statute—so that when a customer of defendant died as a result of getting drunk and sleeping out in the cold, the court refused to apply the felony murder rule on grounds that the act of selling the liquor is "not in itself directly and naturally dangerous to life"); *see also* 2 W. LAFAVE & A. SCOTT, *supra* note 1, at 207 (If defendant files a false tax return and the "revenue agent investigating the taxpayer's return should slip on the taxpayer's front steps and break his neck, the taxpayer ought not to be guilty of murder, though his act in filing a false return may have been an actual cause of death").

46. *See* Comment, *supra* note 8, at 1306-08.

47. *See* 2 W. LAFAVE & A. SCOTT, *supra* note 1, at 208-11; *see also* R. PERKINS & R. BOYCE, *supra* note 29, at 65 (death resulting from statutory rape would be excluded). South Carolina limits application of its felony murder rule to common-law felonies. S.C. CODE ANN. § 16-3-10 (Law. Co-op. 1985).

48. *See* Note, *Felony Murder: A Tort Law Reconceptualization*, 99 HARV. L. REV. 1918, 1919 (1986). Statutes that restrict application of the felony murder rule only to those felonies enumerated in the statute include: COLO. REV. STAT. § 18-3-102 (1986); IDAHO CODE § 18-4003(d) (1979); MO. ANN. STAT. § 565.003 (Vernon 1979); W. VA. CODE § 61-2-1 (1984).

human life.[49] Other restrictions include the requirement that the underlying felony be independent of the homicide, that the time period of the commission of the felony be narrowly construed, and that a causal connection between the felony and the death be shown.[50]

Some states treat deaths occurring during the commission of felonies not mentioned in their first degree murder statutes under their second degree statutes,[51] and Florida punishes for unenumerated felonies under its third degree murder statute.[52] A few states have downgraded felony murder to a second degree murder offense.[53] Most states, however, treat all such crimes as a first degree murder offense.[54]

North Carolina has retained felony murder as a first degree murder offense in North Carolina General Statutes section 14-17.[55] In 1893, the general assembly divided murder into two degrees.[56] A killing was punished as first degree murder if the mode of perpetration was sufficiently heinous.[57] Felony murder was regarded as "sufficiently atrocious to be included in the category of first degree murder."[58]

Prior to the 1977 amendment any felony could support a felony murder conviction in North Carolina.[59] Nevertheless, some North Carolina decisions during this time evidenced a growing concern that the rule's scope was too broad. For example, in *State v. Streeton*[60] the supreme court recognized that since the inception of section 14-17,[61] many statutory felonies had been created that "have no natural tendency to cause death and by reason thereof are much less serious crimes than the common-law felonies giving rise to the felony-mur-

49. *See* R. PERKINS & R. BOYCE, *supra* note 29, at 65. This requirement has been interpreted to include a felony which creates a foreseeable danger to human life. 2 W. LAFAVE & A. SCOTT, *supra* note 1, at 209. California designates as first degree murder those deaths occurring during the commission or attempted commission of certain enumerated felonies; other deaths occurring during the commission or attempted commission of felonies deemed to be inherently dangerous to human life are treated as second degree murder offenses. CAL. PENAL CODE § 189 (West 1987).

50. People v. Aaron, 409 Mich. 672, 700-01, 299 N.W.2d 304, 313 (1980).

51. *See, e.g.*, S.D. CODIFIED LAWS ANN. §§ 22-16-4, -9 (Supp. 1986); VA. CODE ANN. §§ 18.2-32 to -33 (1982).

52. FLA. STAT. ANN. § 782.04(4) (West Supp. 1987).

53. *See, e.g.*, ALASKA STAT. § 11.41.110 (1983); LA. REV. STAT. ANN. § 14:30.1 (West 1986); N.Y. PENAL LAW § 125.25 (McKinney 1975 & 1986); 18 PA. CONS. STAT. ANN. § 2502 (Purdon 1983); UTAH CODE ANN. § 76-5-203 (Supp. 1986); WIS. STAT. ANN. § 940.02 (West 1982).

54. *See* Note, *supra* note 48, at 1919 n.5.

55. N.C. GEN. STAT. § 14-17 (1986); *see also* State v. Davis, 305 N.C. 400, 422, 290 S.E.2d 574, 588 (1982) (emphasizing that North Carolina "recognizes no offense of felony murder in the second degree").

56. Act of Feb. 11, 1893, ch. 85, §§ 1-2, 1893 N.C. Pub. Laws 76, 76 (codified as amended at N.C. GEN. STAT. § 14-17 (1986)).

57. State v. Streeton, 231 N.C. 301, 305, 56 S.E.2d 649, 652 (1949).

58. *Id.*

59. The statute enumerated a few felonies and then added a catchall phrase. For a statement of § 14-17 prior to 1977, see *infra* note 61.

60. 231 N.C. 301, 56 S.E.2d 649 (1949).

61. When *Streeton* was decided, § 14-17 read in part: "A murder . . . which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree . . . ." Act of March 11, 1949, ch. 299, § 1, 1949 N.C. Sess. Laws 262, 262 (codified as amended at N.C. GEN STAT. § 14-17 (1986)).

der rule."[62] Nevertheless, the court refused to determine whether the general assembly intended the words "other felony" in section 14-17[63] to be limited only to those felonies that were inherently dangerous to human life, or to be extended to any and all felonies.[64]

Twenty-three years later, however, the court settled that issue when it inferred a restriction in the felony murder clause in *State v. Thompson*.[65] In *Thompson* the court ruled that the "other felony" language of section 14-17[66] contemplated the commission or attempted commission of any felony that created a "substantial foreseeable human risk and actually result[s] in the loss of life."[67] If the common-law requirement of an interrelationship between the felony and the death was present, the felon could be convicted of felony murder.[68]

The general assembly officially restricted the felonies that could be the basis of a felony murder conviction by amending section 14-17 in 1977 to read in part: "A murder . . . which shall be committed in the perpetration or attempted perpetration of any arson, rape, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree."[69] In *State v. Wall*[70] and *State v. Avery*[71] the supreme court had the opportunity to apply the new language "other felony committed or attempted with the use of a deadly weapon . . . ." Defendant in *Wall* committed the felony of discharging a firearm into an occupied vehicle.[72] The *Avery* court upheld the conviction of a defendant who used firebombs in the perpetration of the felony of attempting to burn a building used for trade.[73] The court determined that the firebombs were deadly weapons within the purview of section 14-17.[74] Both cases involved actual physical use of a deadly weapon in perpetration of the underlying felony. Thus, the court was not required to determine what the word "use" entailed under the statute.

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62. *Streeton*, 231 N.C. at 305, 56 S.E.2d at 652-53. *See also* R. PERKINS & R. BOYCE, *supra* note 29, at 14-15 (noting that many modern felonies were only misdemeanors at common law).

63. *See supra* note 61.

64. *Streeton*, 231 N.C. at 305, 56 S.E.2d at 653. Defendant in *Streeton* was convicted of first degree murder for the shooting death of his kidnapping victim. Although kidnapping was not one of the four named felonies in § 14-17, *see supra* note 61, the court deemed that it came within the "other felony" language of the statute because kidnapping for ransom is "a felony which has a natural tendency to cause death." *Streeton*, 231 N.C. at 306, 56 S.E.2d at 653.

65. 280 N.C. 202, 185 S.E.2d 666 (1972).

66. For the pertinent text of § 14-17 in effect at the time *Thompson* was decided, see *supra* note 61.

67. *Thompson*, 280 N.C. at 211, 185 S.E.2d at 672. Like defendant in *Fields*, defendant in *Thompson* was convicted of murder for the shooting death of his victim in the commission of felonious breaking and entering and felonious larceny. The court concluded that these felonies came within the scope of the "other felony" language of § 14-17 because they were committed while defendant was armed with a pistol, a circumstance that "created substantial foreseeable human risks." *Id.* at 212, 185 S.E.2d at 673.

68. *Id.*

69. Act of May 19, 1977, ch. 406, § 1, 1977 N.C. Sess. Laws 407, 407 (codified as amended at N.C. GEN. STAT. § 14-17 (1986)).

70. 304 N.C. 609, 286 S.E.2d 68 (1982).

71. 315 N.C. 1, 337 S.E.2d 786 (1985).

72. *Wall*, 304 N.C. at 612, 286 S.E.2d at 71.

73. *Avery*, 315 N.C. at 26, 337 S.E.2d at 800.

74. *Id.*

In dictum in *State v. Davis*[75] the court expounded on the implications of the "use" language in section 14-17. Essentially, the *Davis* court viewed the 1977 amendment as a limitation on the broad applications of the felony murder rule as construed in *Streeton* and *Thompson*.[76] The *Davis* court emphasized that the defendant is required to have *used* a deadly weapon during his criminal activity.[77] Nevertheless, like the *Avery* and *Wall* cases, the *Davis* facts did not compel the court to construe the meaning of "use" under the statute.

A few other jurisdictions have wording in their statutes that is similar to the "use" language of North Carolina's felony murder clause. For example, New Hampshire's statute authorizes a first degree murder conviction if the defendant caused the death of a person during the "commission of, or while attempting to commit robbery or burglary while armed with a deadly weapon, the death being caused by the use of such weapon."[78] Research reveals no New Hampshire case that specifically construes the word "use" in the statute. The logical interpretation of the statute, however, is that the defendant can be convicted of felony murder for mere possession of a deadly weapon while committing or attempting to commit the felony so long as the weapon is used to perpetrate the death.

Another statute which deals with possession is the District of Columbia's first degree murder statute.[79] Under that statute, a person can be convicted of felony murder for "perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon."[80] An even more specific statute is found in Connecticut. In that state, a defendant can be convicted of felony murder for a death that occurred during "sexual assault in the first degree with a

75. 305 N.C. 400, 290 S.E.2d 574 (1982). Defendant in *Davis* was convicted of first degree murder after the jury found premeditation, deliberation, and malice aforethought. Felony murder was raised by defendant on appeal questioning whether the lower court erred by not instructing the jury on second degree felony murder. Second degree murder conviction requires intent and malice, but not premeditation and deliberation. Because defendant intentionally killed his victim after perpetrating the felony of burglary, he believed that a lesser charge of second degree felony murder should have been made. The court responded that there is no offense of second degree felony murder in North Carolina. *Id.* at 402-22, 290 S.E.2d at 574-88.

76. *Id.* at 423, 290 S.E.2d at 588.

77. The court stated,

> As can readily be seen from the face of the statute, murders commonly referred to as "felony murders" now include killings occurring during the commission or attempted commission of a felony with the use of a deadly weapon and killings occurring during the perpetration or attempted perpetration of the specified felonies . . . without regard to whether these specified felonies were perpetrated or attempted with the use of a deadly weapon. All such murders are deemed by the statute to be murder in the first degree. Conversely, killings occurring during the commission or attempted commission of a felony *not* committed or attempted with the use of a deadly weapon *and not* one of the felonies specified in the statute are . . . not murder in either the first or second degree.
>
> If the State is to carry its burden of proof on a charge of murder in cases in which a killing occurs during the commission of a felony committed or attempted *without* the use of a deadly weapon *and not* one of the felonies specified in the statute, it must show that the killing was murder as at common law by proof beyond a reasonable doubt that it was an intentional and unlawful killing with malice aforethought.

Id. at 424-25, 290 S.E.2d at 589.

78. N.H. REV. STAT. ANN. § 630:1-a(I)(b)(2) (1986).

79. D.C. CODE ANN. § 22-2401 (1981).

80. *Id.*

firearm."[81] "With a firearm" means that defendant can be convicted if he or she "uses or is armed with and threatens the use of or displays or represents by his words or conduct that he possesses a deadly weapon."[82] Thus, if the weapon is not used to actually perpetrate the felony, then it must be used in some other way, apart from killing the victim.[83]

To the extent that it does not expressly require that the weapon be used to actually commit the felony, section 14-17 is like these three statutes. Otherwise, the statutes in these jurisdictions are easily distinguishable from North Carolina's statute. The New Hampshire and District of Columbia statutes both expressly provide for conviction on the ground of mere possession of a deadly weapon because a defendant "armed with" a deadly weapon can be guilty of felony murder.[84] In Connecticut, the felon must do more than merely possess a deadly weapon; he must use the weapon in some way.[85] For example, the felon could be convicted if he or she brandishes the weapon in front of a victim.[86] Thus, these statutes leave no room for ambiguity. The inclusion of the clear alternative "or armed with" leaves no doubt that mere possession, and the psychological use inherent therein, is enough. It is not necessary to stretch the word "use" in these statutes to mean more than actual physical use.

The felony murder clause in section 14-17, however, leaves much to be desired. The supreme court has repeatedly stated that the 1977 amendment was meant to restrict the scope of the rule,[87] and to do away with the nebulous standards courts had begun to use to construe the rule.[88] Yet the *Fields* court interpreted the statute as contemplating psychological use.[89] This interpretation leaves the statute broad enough to allow the harsh results that the general assembly intended to prevent with the amendment. Thus, if Fisher had suffered a fatal heart attack when defendant Fields ordered him to "hold it," then under the *Fields* rationale, defendant would be guilty of felony murder—defendant's psychological use of his gun would place him within the statute's purview. The *Fields* opinion implies that the only felonies which the general assembly intended to omit are those committed without the presence of a deadly weapon.

Arguably, the general assembly did not intend to reduce drastically the scope of the rule with the 1977 amendment. But in light of the specificity of similar statutes in other jurisdictions,[90] the logical conclusion is that if the North Carolina General Assembly had intended the word "use" to include the psychological use inherent in the possession of a deadly weapon, it would have

81. CONN. GEN. STAT. ANN. §§ 53a-54c (West 1985).

82. *Id.* §§ 53a-70a.

83. *See* State v. DiBattista, 110 Conn. 549, 559, 148 A. 664, 668 (1930) (weapon must be used "either for the purpose of personal injury to [the victim] or to put him in fear").

84. *See supra* text accompanying notes 78-80.

85. *See supra* text accompanying notes 81-82.

86. *DiBattista*, 110 Conn. at 559, 148 A. at 668 (1930).

87. *See, e.g.*, *Fields*, 315 N.C. at 199, 337 S.E.2d at 523; *Davis*, 305 N.C. at 423, 290 S.E.2d at 588.

88. *See supra* text accompanying notes 64-67 & 76.

89. *See supra* text accompanying notes 25-26.

90. *See supra* notes 78-83 and accompanying text.

included sufficiently specific language in its amendment of section 14-17 to convey that intent clearly.

Not even the prosecution in *Fields* foresaw the feasibility of arguing that mere possession of a weapon was sufficient "psychological use" to satisfy the requirement of the statute. Instead, the prosecution invoked common-law felony murder principles to argue that actual use of the weapon to effectuate the felony was not required so long as an interrelationship between the felony and the death by that particular weapon existed.[91]

The *Wall* court asserted that the 1977 amendment was unambiguous on its face.[92] It pointed out that when there is no ambiguity, "there is no room for judicial construction, and the courts must give the statute its plain meaning."[93] That court, however, was not presented with the issue of what use was sufficient, and did not discuss psychological use. Nevertheless, it gave no indication it would have construed the statute to require anything less than actual physical use of a deadly weapon to effectuate a felony.

The *Fields* court faced the issue of psychological use of a weapon as one of first impression in North Carolina. Defendant pointed out the latent ambiguity in the "committed or attempted with the use of a deadly weapon" language in section 14-17.[94] Again, the court refused to determine that the language was ambiguous. The word "use" has been defined broadly enough to include "psychological use."[95] But to find that the general assembly intended the language to include psychological use is to defeat the legislature's attempt to restrict the scope of the rule.[96] As discussed earlier,[97] simple addition of such words as "armed with" or "merely possesses" would have been present if the legislature intended possession and psychological use to suffice for a felony murder conviction.

It is once again up to the general assembly to amend the felony murder clause of section 14-17, because ambiguity is apparent in the present statement of the rule. Intention to restrict application of the felony murder rule could be conveyed in one of two ways. First, if the legislature intended to restrict the scope of the rule to felonies committed with the actual use of a weapon, it could amend the felony murder portion of the statute to read "or other felony committed or attempted and effectuated or attempted to be effectuated by utilizing a deadly weapon." Alternatively, the amendment could read "or other felony ac-

91. Brief for the State at 15-16, *Fields*. The felony need not be the proximate cause of the death to qualify as the "interrelationship." *Id.* For other interpretations of the common-law requirement for a felony murder conviction see *supra* note 29.

92. *Wall*, 304 N.C. at 615, 286 S.E.2d at 72. Defendant in *Wall* objected to conviction under the felony murder rule and argued that the legislature, through the 1977 amendment to § 14-17, "did not intend that the discharging of a firearm into occupied property be included as an underlying felony for the purposes of the felony murder rule." *Id.* at 614, 286 S.E.2d at 72.

93. *Id.* at 615, 286 S.E.2d at 72.

94. *See supra* text accompanying notes 23-26.

95. *See* BLACK'S LAW DICTIONARY 1382 (5th ed. 1979) ("The 'use' of a thing means that one is to enjoy, hold, occupy, or have some manner of benefit thereof. Use also means usefulness, utility, advantage, productive of benefit.").

96. *See supra* text accompanying notes 60-68.

97. *See supra* text following note 86.

tually committed or attempted with physical use of a deadly weapon." Second, if the legislature intended only that a causal connection exist between the felony and the death caused by the defendant's weapon, the amendment could read "or other felony committed or attempted and a deadly weapon is utilized." The word "and" in this proposed amendment makes the statute sufficiently broad to include both felonies actually effectuated with the use of a deadly weapon and deaths which occurred by use of a deadly weapon that are causally connected to the felony.

Even if the general assembly did intend psychological use of a weapon for suffice for a felony murder conviction, a revision in the present statutory language is necessary to prevent futile arguments of ambiguity from arising. An amendment that phrases the statute along the lines of the New Hampshire, District of Columbia, and Connecticut statutes[98] would better convey this intent.

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98. *See supra* text accompanying notes 78-83.