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# A Pattern Jury Instruction for Felony Murder

Arthur A. Murphy\*

## I. Introduction

The author recently drafted a new pattern jury charge on felony murder for the manual of Pennsylvania suggested criminal jury instructions. A subcommittee appointed by the Pennsylvania Supreme Court prepared this manual and keeps it up-to-date.<sup>1</sup> The author serves as reporter to this criminal instructions subcommittee and also conducts a seminar-workshop on pattern instructions at The Dickinson School of Law. Members of this seminar made an important contribution to the new charge: the students' research, drafts, and memoranda supplied the author with a rich source of legal authorities and ideas. If approved by the subcommittee, the new charge will be published as part of the next supplement to the manual of suggested instructions.

The purpose of this Article is to make this revised felony murder instruction, and a note that will accompany it, widely available before regular publication. Judges, prosecutors, and defense counsel may find the instruction and accompanying note useful. The revisions are certainly better than the manual's current versions.<sup>2</sup> Readers may discover substantive, procedural, or linguistic shortcomings in the new material; the author and the subcommittee will be grateful for suggestions on how their work might be improved.

## II. Scope and Function of the Pennsylvania Pattern Instructions

The draft felony murder charge and subcommittee note may seem excessively long and ambitious when compared with the skeletal "official" charges and barebones commentary used in many states

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1. The subcommittee is a unit of the Pennsylvania Supreme Court Committee for Proposed Standard Jury Instructions. Judge Loran L. Lewis of the Court of Common Pleas, Allegheny County, is chairman of the subcommittee. The Pennsylvania Bar Institute publishes the manual.

2. *Pennsylvania Suggested Standard Criminal Jury Instructions*, Instr. 15.2502B (Dec. 1980 Revision).

and federal circuits.<sup>3</sup> The reader can better decide whether the revisions are too comprehensive if he or she knows what the subcommittee conceives to be the proper scope and function of their product.

No all-purpose pattern charge can ever match an instruction thoughtfully crafted by an unhurried, experienced judge for use during a particular trial — an instruction that incorporates the attorneys' valid requests for charge and is precisely tailored to the allegations, evidence, and law needed by the jury. The manual, whose proper title is *Pennsylvania Suggested Standard Criminal Jury Instructions*, is only a resource; it is not a substitute for judicial creativity. The pattern instructions and the accompanying subcommittee notes are intended to save the time of trial judges and attorneys, to reduce the need for legal research and drafting, and to facilitate the preparation of legally correct and easily understood jury instructions. In routine cases, some judges may choose to employ the pattern instructions essentially unaltered, making only minimum changes to shape the instructions to the particular case. Other judges, who prefer to concoct their own charges from scratch, may still find something worthwhile in the pattern instructions. These judges may treat the patterns as a standard for comparison or as a place from which to borrow felicitous language or ideas about arranging the constituents of a jury charge.

The subcommittee note to each instruction is designed to be a piece of practical scholarship. The note explains how and when the instruction should be used, and provides some basic information about the area of law involved. The citation and discussion of legal authority are intended (i) to enable the user to evaluate the correctness of the instruction; and (ii) to provide the user with guidance and research leads that may assist in framing different or additional instructions, handling evidence questions, and dealing with other common issues. When important legal questions that are likely to confront a trial judge are unsettled, the subcommittee note attempts to identify the issues and indicate possible answers.

### III. The New Instruction and Subcommittee Note

The author's draft of the revised instruction and subcommittee note are presented below. The reader will notice that Pennsylvania law retains two common law characteristics of felony murder that are anathema to many scholars. The law imposes a quite strict and

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3. See, e.g., *California Jury Instructions, Criminal* (CALJIC) (5th ed. 1988); *Manual of Model Jury Instructions for the Ninth Circuit* (1984 ed.).

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vicarious type of liability for an unintended death, and apparently continues to regard “malice” as an element that must be articulated in jury charges. The author is not troubled by this traditional kind of culpability and terminology. A person who commits one of the serious felonies enumerated in section 2502(b) of the Crimes Code<sup>4</sup> ought to be treated severely if someone happens to be killed.<sup>5</sup> The element of “malice” that is common to first degree (premeditated), second degree (felony), and third degree (other) murder can be explained to a jury in a concise, straightforward manner.<sup>6</sup> In a case in which all three degrees of murder are at issue, some jurors might even find the culpability required for third degree murder more understandable if told that the specific intention to kill necessary for first degree murder and the commission of a dangerous felony needed for second degree murder are instances of malice. This sort of linguistic justification for retaining malice as an element of first and second degree murder is not terribly persuasive. Obviously the word “malice” is not needed when instructing on either premeditated or felony murder for a charge to be comprehensible; the difficulty is that an instruction omitting “malice” may not be legally adequate in Pennsylvania.<sup>7</sup>

### *A. Revised Instruction*

#### 15.2502B(Crim) SECOND DEGREE MURDER

##### *First Alternative: Defendant Felon Acting Alone*

[(1) I'll start with some terminology and basic principles. The more serious types of crimes are called felonies. For example, (robbery) (\_\_\_\_\_) is a felony. Second-degree murder is often called felony-murder because it is a killing connected with a felony. (The felon need not intend to kill anyone or anticipate that anyone be killed. The person killed can be someone other than a victim of the felony. He need not die immediately; he may die much later and at a different place.) (\_\_\_\_\_.)]

(2) You may find the defendant guilty of second-degree murder, that is felony murder, if you are satisfied that the following three elements have been proven beyond a reasonable doubt:

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4. 18 Pa. Cons. Stat. Ann. § 2502(b) (Purdon 1983).

5. See generally Crump & Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POLICY 359 (1985).

6. See *Pennsylvania Suggested Standard Criminal Jury Instructions*, Instrs. 15.2501A, 15.2502A, 15.2502C (Dec. 1988 Revisions).

7. See *Pennsylvania Suggested Standard Criminal Jury Instructions*, Instr. 15.2501A, p. 3 of subcom. note (Dec. 1988 Revision).

*First*, that the defendant (killed) (caused the death of) \_\_\_\_\_;

*Second*, that the defendant did so while (committing) (attempting) (fleeing after committing) (fleeing after attempting) a certain (robbery) (\_\_\_\_\_); and

*Third*, that the defendant was acting with malice. You can presume that the defendant was acting with malice if you are satisfied beyond a reasonable doubt that he (committed) (attempted) the (robbery) (\_\_\_\_\_). Because (robbery) (\_\_\_\_\_) is a crime inherently dangerous to human life, there does not have to be any other proof of malice.

[(3) I shall now define (robbery) (an attempt to commit robbery) (\_\_\_\_\_): \_\_\_\_\_.]

[(4) A defendant kills "while fleeing" if he does the act that kills during his flight from the scene and there is no break in the chain of events between the felony and the killing.]

*Second Alternative: Killing by Defendant's Co-Felon*

[(1) I'll start with some terminology and basic principles. The more serious types of crimes are called felonies. For example, (robbery) (\_\_\_\_\_) is a felony. Second-degree murder is often called felony-murder because it is a killing connected with a felony. When two people are partners in a successful or unsuccessful attempt to commit a felony and one of them kills a third person, both partners may be guilty of felony-murder. (Neither partner has to intend to kill nor anticipate that anyone will be killed. The person killed can be someone other than a victim of the felony. He need not die immediately; he may die much later and at a different place.) (\_\_\_\_\_).]

(2) You may find the defendant guilty of second-degree murder, that is felony murder, if you are satisfied that the following four elements have been proven beyond a reasonable doubt:

*First*, that \_\_\_\_\_ (killed) (caused the death of) \_\_\_\_\_;

*Second*, that \_\_\_\_\_ did so while he and the defendant were partners in (committing) (attempting) a certain (robbery) (\_\_\_\_\_);

*Third*, that \_\_\_\_\_ did the act that (killed) (caused the death of) \_\_\_\_\_ in furtherance of the (robbery) (robbery attempt) (\_\_\_\_\_); and

*Fourth*, that the defendant was acting with malice. You can presume that the defendant was acting with malice if you are satis-

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fied beyond a reasonable doubt that he and \_\_\_\_\_ were partners in (committing) (attempting) the (robbery) (\_\_\_\_\_). Because (robbery) (\_\_\_\_\_) is a crime inherently dangerous to human life, there does not have to be any other proof of malice.

[(3) I shall now define (robbery) (an attempt to commit robbery) (\_\_\_\_\_): \_\_\_\_\_.]

(4) Going back to the requirement that the defendant and \_\_\_\_\_ were partners in (committing) (attempting) the (robbery) (\_\_\_\_\_):

(I instruct you that they were partners if they were both principals or one of them was a principal and the other was an accomplice. A person is a "principal" if he actually commits the crime or makes the attempt himself. A person is an "accomplice" if he aids or encourages the principal to commit or to attempt the crime and does so intending to get the principal to commit the crime or intending to make it easier for the principal to commit it.)

(I instruct you that they were partners if they conspired to commit the [robbery] [\_\_\_\_\_]. Two people "conspire" to commit a crime if they share the intent that the crime be committed and they agree that one or both of them will commit it or that one of them will help the other to commit it. Their agreement may be express and verbal — they may actually talk about it. Or their agreement may be an unspoken agreement that can be inferred from their words and conduct and the surrounding circumstances. Each knows what the other is thinking — they don't have to talk about it.)

(I instruct you that they were partners if \_\_\_\_\_.)

[(5) I shall now explain the meaning of the "in furtherance" element:

(A partner's act that kills is not in furtherance of the felony if the partner does the act for his own personal reasons that are independent of the felony.)

(A partner's act that kills is in furtherance of the felony if he does the act while fleeing from the scene and if there is no break in the chain of events between the felony and the act. However, even though the partner's act that kills may seem to meet these requirements, it is not in furtherance of the felony if the partner does the act for his own personal reasons which are independent of the felony and the effort to flee.)

(\_\_\_\_\_.)]

*B. Revised Subcommittee Note*

## SUBCOMMITTEE NOTE

When the defendant is charged with second degree murder in violation of Crimes Code § 2502(b), the court will have to frame its charge to correspond with the theory of the case: with whether the defendant allegedly acted alone or with a co-felon, and if with a co-felon, with whether the defendant was a principal, accomplice, or co-conspirator in the underlying felony and with whether his or the co-felon's act caused the death. The charge will have to be phrased somewhat differently if the defendant acted with multiple co-felons or if he is being tried jointly with confederates. The *first* ("single felon") and *second* ("co-felon") alternative instructions are appropriate for two common situations and can readily be adapted to others. The first is for a defendant who had no confederate. The second is for a defendant whose co-felon caused the death.

Subdivision (1) of both instructions may be used if the court wishes to begin with general remarks about the nature of felony murder. The elements in subdivision (2) of both instructions will have to be tailored to the case and will sometimes have to be supplemented. For example, as indicated in subdivision (3), the court must at some point give the jury an adequate definition of the predicate felony or attempt. The *first* element of subdivision (2) will have to be augmented if there is a legal issue of whether the act of the defendant or co-felon was a *direct* cause of the victim's death. See Instruction 15.2501C (criminal homicide — causation). In the "co-felon" alternative, the generic term "partners" will always have to be explained and the concept of "furtherance" may need elaboration; the instructions contained in subdivisions (4) and (5) may serve these purposes.

The rest of this subcommittee note contains additional information and suggestions that may be helpful in evaluating, tailoring, and using either the "single felon" or "co-felon" alternative or in drafting an instruction for a situation not covered by them.

*1. General*

According to the Pennsylvania Supreme Court, the Crimes Code has made no basic change in the law of felony murder. *See, e.g., Commonwealth v. Waters*, 491 Pa. 85, 418 A.2d 312 (1980); *Commonwealth v. Allen*, 475 Pa. 165, 379 A.2d 1335 (1977). The "single felon" and "co-felon" instructions are derived from Crimes Code § 2502(b) and (d) as amended by Act No. 39 (1978); Crimes

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Code § 306 (liability for conduct of another; complicity); and from the case law cited in this subcommittee note. Although Crimes Code § 2502(b) defines second degree murder in terms of a “criminal homicide,” which Crimes Code § 2501(a) in turn defines to require that the death was at least negligently caused by the defendant, the accidental and vicarious aspects of the prior Pennsylvania felony murder law are not altered, *compare Commonwealth v. White*, 490 Pa. 179, 415 A.2d 399 (1980) with *Commonwealth v. Allen*, *supra*.

### 2. Malice

Malice is conclusively presumed from a defendant’s involvement in a predicate felony, *see Commonwealth v. Rawls*, 328 Pa. Super. 469, 477 A.2d 540 (1984). This presumptive approach to malice has been traditional in Pennsylvania, although for a time, some appellate decisions seemed to be moving toward a permissive inference or rebuttable presumption approach, *see, e.g., Commonwealth v. Legg*, 491 Pa. 78, 412 A.2d 1152 (1980) (felony murder rule allows finder of fact to infer killing was malicious because actor engaged in a felony of such a dangerous nature to human life as one of the statutorily enumerated felonies); *Commonwealth v. Allen*, *supra*; *Commonwealth v. Lee*, 484 Pa. 335, 399 A.2d 104 (1979) (Larsen, J., opinion in support of affirmance). Because malice is conclusively presumed, the term malice is arguably superfluous in jury instructions. The subcommittee, however, has cautiously retained the term when describing the *mens rea* element in subdivision (2).

For felony murder, the felony must not be an afterthought, the defendant must have the intent to commit the felony before the homicidal act occurs, *see Commonwealth v. Legg*, *supra*.

### 3. Single Felon Alternative

A central problem in felony murder is how to express the connection that must exist between the defendant, the felony, and the death. When the defendant is the lone felon, his act that leads to the death (i) must occur while he is engaged in perpetrating the felony, Crimes Code § 2502(b), and (ii) must be a direct cause of the death, *see* subcommittee note to Instruction 15.2501(c); *Commonwealth v. Evans*, 383 Pa. Super. 118, 494 A.2d 383 (1985). There is no requirement that the defendant’s homicidal act be in furtherance of the felony. The “in furtherance” requirement applies only when a defendant has a co-felon and the co-felon is the slayer, *see Commonwealth v. Mease*, 357 Pa. Super. 366, 516 A.2d 24 (1986).

With regard to the requirement that the defendant do the fatal

act while he is perpetrating the felony, section 2502(d) defines perpetrating as committing or attempting the felony or fleeing thereafter. In determining whether a killing should be regarded as during flight, the courts look for unity of time, place, and purpose between the felony and the death. They employ concepts of "no break in the chain of events," "fresh pursuit," and "flight from the scene," see *Commonwealth v. Barkley*, 335 Pa. Super. 384, 484 A.2d 189 (1984) (on facts, killing was not during flight). Subdivision (4) of the "single felon" instruction is derived from *Barkley*. *Barkley's* summary of the law regarding flight is still valid even though the case was overruled on procedural grounds by *Commonwealth v. Smith*, 518 Pa. 524, 544 A.2d 943 (1988).

#### 4. Co-Felon Alternative

The problem of expressing the required connection between the defendant, the felony, and the death presents greater conceptual and linguistic difficulties when the slayer is a co-felon rather than the defendant himself. Crimes Code § 2502(b) defines second degree murder in terms of complicity: a homicide committed while defendant was engaged as a principal or accomplice in the perpetration of a felony. Section 2502(d) defines perpetration as:

The act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape . . . .

The courts have read the co-conspirator rule into § 2502(b). For example, according to *Commonwealth v. Waters, supra*, a person other than the slayer, cannot be guilty of felony murder unless a conspiratorial, i.e., a common, design to commit the underlying felony exists when the slaying occurs and the slayer's act causing death is in furtherance of the felony.

#### 4a. Complicity, Conspiracy

The Pennsylvania courts have tended to mingle the complicity and co-conspirator theories and sometimes appear to equate their scopes of liability. The subcommittee, however, has written subdivisions (2) and (4) of the co-felon instruction on the assumption that the two theories, while they overlap, are distinct and not identical in scope of liability. The term "partners" is used as a convenient generic to refer to both a complicitous or conspiratorial relationship with regard to the felony. Depending upon the facts of the case and the theory or theories relied on by the Commonwealth and the defense, the court may use either the suggested complicity or conspir-

acy definition of partners in subdivision (4) or it may use both definitions, *see, e.g., Commonwealth v. Hassine*, 340 Pa. Super. 318, 490 A.2d 438 (1984) (judge's charge based on an "accomplice theory" held proper); *Commonwealth v. Orlowski*, 332 Pa. Super. 600, 481 A.2d 952 (1984) (sufficiency of evidence for murder separately evaluated under accomplice and co-conspirator theories). If feasible, the court should choose a single theory; the instructions will be shorter and more easily understood by the jurors. The instructions in subdivision (4) may require change or elaboration in some cases, for example, if there is an issue of whether the defendant terminated his complicity or withdrew from the conspiracy to commit the predicate felony before the putative co-felon did the fatal act, *see, e.g., Commonwealth v. Lee*, 484 Pa. 335, 399 A.2d 104 (1979) (Larsen, J., opinion in support of affirmance; defense of abandonment and withdrawal); *Commonwealth v. Johnson*, 336 Pa. Super. 1, 485 A.2d 397 (1984) (requirements for effective withdrawal). For ideas on possible modifications to subdivision (4) see Instructions 8.306A (liability for complicity) and 8.306C (co-conspirator liability). For more ideas, *see Commonwealth v. Prosdocimo*, 331 Pa. Super. 51, 479 A.2d 1073 (1984) (scope of complicitous or conspiratorial agreement; did agreement to "rip off" include agreement to rob?); *Commonwealth v. Olds*, 322 Pa. Super. 442, 469 A.2d 1072 (1984) (how can agreement or shared intent be proven? general evidentiary principles).

#### *4b. Perpetration, Furtherance, Causation*

In a case in which a co-felon is the slayer, Crimes Code § 2502(b) and the case law employ concepts of "while perpetrating," "in furtherance," and "direct" causation to state the temporal and causal connections that must exist between the defendant's complicitous or conspiratorial behavior regarding the felony, the act of the co-felon, and the death.

The most easily stated of the connections is the requirement that the co-felon's homicidal act was a direct cause of the death. It is not so easy to formulate all-purpose definitions of the "while perpetrating" and "in furtherance" requirements for a pattern jury instruction. For some situations, *e.g.*, killings during flight, these requirements tend to be amorphous or redundant. Consider the following case: The evidence shows that the defendant robbed a convenience store while his confederate waited at the wheel of the getaway car. When the defendant emerged pursued by an armed clerk, the frightened confederate raced off leaving the defendant at the curb. Two miles down the road the confederate struck and killed a

pedestrian. How should the judge instruct on the "while perpetrating/while fleeing" and the "in furtherance" requirements? If the judge simply quotes Crimes Code §§ 2502(b) and (d), he is likely to confuse or mislead the jury.

*Quaere*: To what extent should a judge try to make the concepts of perpetration and furtherance specific and to what extent should he allow the jurors to give them meaning, the jury in effect making a community judgment whether on the facts, it is just to hold the defendant accountable for the death?

In wording the *second* and *third* elements of subdivision (2), the subcommittee made two choices: (i) The phrase "in furtherance of the felony" is used instead of other formulations that appear to be used interchangeably in many appellate decisions, such as "in furtherance of 'the common design,' 'the shared intent,' or 'the conspiracy' to commit the felony," *see, e.g., Commonwealth v. Waters, supra; Commonwealth v. Johnson, supra*; (ii) a killing by a co-felon during the flight stage should be dealt with as presenting an issue of whether the killing was in furtherance of the felony. *Cf. Commonwealth v. Johnson, supra*.

The Pennsylvania appellate courts have used various concepts and principles for describing when a killing by a co-felon during the attempt, commission, or flight stage is "in furtherance of the felony." Some of them are:

(a) There must be unity of time, place, and purpose between the felony and the act by the co-felon that kills or causes death, *see, e.g., Commonwealth v. Johnson, supra; Commonwealth v. Olds, supra*.

(b) A homicidal act by a co-felon is not in furtherance of the felony if it is an independent act not directed towards carrying out the felony, *see Commonwealth v. Olds, supra*.

(c) The killing must be foreseeable; it must be the probable consequence of the criminal scheme. The defendant should have known that someone could be killed, *see, e.g., Commonwealth v. Johnson, supra*. *Quaere* whether "in furtherance" issues should be submitted to juries in terms of foreseeability. The subcommittee believes they generally should not. The subcommittee relies on those appellate decisions that treat foreseeability as part of the rationale justifying imputed liability and as a judicial test for determining the legal sufficiency of evidence rather than as an appropriate jury standard for felony murder, *compare Commonwealth v. Olds, supra, with Commonwealth v. Johnson*. Jurors could easily misunderstand a foreseeability standard and interpret it to call for more demanding require-

ments for felony murder than the law actually imposes.

Justice Flaherty, concurring and dissenting in *Commonwealth v. Waters, supra*, disapproved charging juries that a defendant may be found guilty of felony murder only if the homicide committed by his co-felon was “in furtherance of” the felony. He believed that the “in furtherance” test cluttered the issue. Justice Flaherty proposed a jury charge that would make all felons responsible for any killing resulting from the energy of the felonious undertaking, *see* 418 A.2d 312, 319.

Subdivision 5 of the second alternative (co-felon) instruction includes two partial explanations of the “in furtherance” element that may be useful for some cases. The first (personal reasons) explanation is derived from *Commonwealth v. Olds, supra*. The second (unbroken flight - personal reasons) explanation is derived from *Commonwealth v. Johnson, supra* and *Commonwealth v. Barkley, supra*.

Sometimes, there may be a question of whether the co-felon’s homicidal act occurred during the commission (attempt) stage of the felony or during the flight. Such questions ordinarily can be dealt with easily since the problem is generally one of phraseology rather than true substance, *see, e.g., Commonwealth v. Maldonado*, 343 Pa. Super. 154, 494 A.2d 402 (1985) (because of the Crimes Code’s definition of robbery, a killing during flight after a *theft* converts the theft to robbery and constitutes felony murder).

##### 5. *Miscellaneous*

Although the subcommittee found no pertinent cases decided under the Crimes Code, it seems that there can be felony murders other than those involving the felonies enumerated in section 2502(b). Such felony murders would be murders of the third degree, *see* Crimes Code 2502(c); *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472 (1978). It also seems that a jury has the power to find the defendant guilty of third degree murder as a lesser offense even though the defendant is charged with and the only evidence establishes, a killing committed in perpetrating a section 2502(b) felony; the trial judge apparently must so instruct the jury, *see Commonwealth v. McNeal*, 456 Pa. 394, 319 A.2d 669 (1974) (the second degree murder referred to in *McNeal* is now third degree). *Cf. Commonwealth v. Olds, supra*. But see the discussion in the subcommittee note to Instruction 15.2501B of the trend away from instructing on lesser homicides not raised by the evidence.

For general discussions of the felony murder doctrine, its content, history, and rationale, *see Commonwealth ex rel Smith v. My-*

ers, 438 Pa. 216, 261 A.2d 555 (1970); W.R. LaFave and A.W. Scott, Jr., *Criminal Law* § 7.5 (felony murder) (2d ed. 1986); D. Crump and S.W. Crump, *In Defense of the Felony Murder Doctrine*, 8 Harv. J. of Law & Public Policy 359 (1985).