



## Felon in Possession and Felony Murder

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[Thirteen-year-old Nathan Clark](#) and his teammates traveled from Winston-Salem to Raleigh last Friday night [to play in a weekend soccer tournament](#). The team never took the field. As Clark slept in his hotel room Friday evening, a gun discharged in an adjacent room, sending a bullet through the wall and into the back of Clark's head. Clark died before he could be transported to the hospital.

The man in the room next door, Randall Louis Vater, was a convicted felon who was prohibited by law from possessing a gun. Vater had been out of jail only two weeks, having been released on October 25 after serving a sentence for violating a domestic violence protective order. Vater was charged with involuntary manslaughter and possession of a firearm by a felon based on Clark's death. He is being held in the Wake County Jail under a \$1 million bond.

Authorities have said nothing about how the gun went off. Assuming that the discharge was accidental, could Vater be charged with first-degree murder under the theory of felony murder?

**Felony murder.** Felony murder is a killing that is "committed in the perpetration or attempted perpetration" of certain enumerated felony offenses or that is committed in the commission of a felony involving the use of a deadly weapon. G.S. 14-17. When a killing is committed in connection with such a felony, the offense of murder in the first degree "is established irrespective of premeditation or deliberation or malice aforethought." *State v. Jones*, 353 N.C. 159, 163 (2000) (internal quotations omitted). Indeed, intent to kill is not an element of felony murder. *Id.*

The felony murder rule rests instead on a theory of transferred intent. See *State v. Underwood*, 615 P.2d 153, 160 (1980). The malicious intent of committing the collateral felony is transferred to the homicide, supplying (at least in theory) the necessary intent. *Id.* As a result, many courts require that the predicate felony be inherently dangerous for the felony murder rule to apply. *Id.*

The Supreme Court of North Carolina determined in *State v. Jones*, 353 N.C. 159 (2000) that the felony offense of assault with a deadly weapon with intent to inflict serious injury, when predicated upon culpable or criminal negligence rather than actual intent, could **not** support a conviction for first degree murder. Noting that the felony offenses enumerated as predicate offenses in G.S. 14-17 require that the accused "be purposely resolved to commit the underlying crime in order to be held accountable for unlawful killings that occur during the crime," the *Jones* court reasoned that any predicate felony must require actual intent.

**Felon in Possession.** Vater is charged with the offense of possession of a firearm by a felon under [G.S. 14-415.1](#) based on his alleged possession of the gun that killed Clark. A person violates G.S. 14-415.1 if he or she has previously been convicted of a felony and thereafter purchases, owns, possesses, or has in his custody, care or control a firearm. Thus, possession of a firearm by a felon is a general intent crime. If Vater in fact possessed the gun in the hotel room next to Clark's, that possession certainly is the but-for cause of Clark's death. Had the gun not been there, Clark would not have been shot in the head and killed. But can a status offense like felon-in-possession serve as the predicate felony for felony murder? North Carolina's courts have never addressed this question, but courts from other states have, utilizing different approaches and reaching different conclusions.

**The categorical approach.** Courts in California, Kansas, and Minnesota have determined that the crime of being a felon in possession of a firearm *cannot* serve as the concurrent offense for felony murder. Those courts have applied a categorical approach that considers the crime generally, not as it applies to a particular set of facts. The Supreme Court of Minnesota in *State v. Anderson*, 666 N.W.2d 696 (2003) posited that while *using* a firearm can pose significant danger to human life, simply *possessing* one does not: “[T]here is nothing about a felon’s possession of a firearm, or of a stolen firearm—in the abstract—that in and of itself involves a special danger to human life.” Thus, the court concluded that the predicate offenses of felon in possession of a firearm and possession of a stolen firearm could not support the charge of felony murder. *See also* *State v. Underwood*, 615 P.2d 153, 163 (Kan. 1980) (determining that the unlawful possession of a firearm by a felon, when considered in the abstract “is not a felony inherently dangerous to human life”); *People v. Satchell*, 489 P.2d 1361, 1370 (Cal. 1971) *overruled on other grounds by* *People v. Flood*, 957 P.2d 869 (Cal. 1998) (“[B]ecause we can conceive of such a vast number of situations wherein it would be grossly illogical to impute malice, we must conclude that the [unlawful possession of a firearm] by one previously convicted of a felony is not itself a felony inherently dangerous to human life which will support a second degree felony-murder instruction.”)

**The fact-specific approach.** Other courts have likewise determined, using a circumstance-based analysis, that being a felon in possession of a firearm cannot support a murder conviction for an unintentional killing that results. The Supreme Court of Georgia in *Ford v. State*, 423 S.E.2d 255 (Ga. 1992) reversed the defendant’s felony murder conviction, which was based on his unlawful possession of a firearm. The defendant’s gun discharged while he was cleaning it in the basement of someone else’s home, sending a bullet through the floor and into an apartment above. The person who lived in the upstairs apartment was killed. There was no evidence that the defendant knew there was an apartment above the basement. The *Ford* court posited that the “only rational function of the felony murder rule was to furnish an added deterrent to the perpetration of felonies that because of their nature or the attendant circumstances, create a foreseeable risk of death.” *Id.* at 256. The court reasoned that the possession of a firearm by a felon is not inherently dangerous, though circumstances could render it so. The court concluded that Ford’s possession, which did not involve an assault or other criminal conduct, could not serve as the basis for felony murder.

Georgia courts have reached different conclusions on other facts. *See, e.g.,* *Lawson v. State*, 635 S.E.2d 134 (Ga. 2006) (noting that the defendant was found guilty of felony murder predicated on possession of a weapon by a convicted felon).

The Court of Appeals of Virginia applied a fact-based approach in *Griffin v. Commonwealth*, 533 S.E.2d 653, 658 (Va. 2000), reversing the defendant’s conviction for felony murder based upon his unlawful possession of the gun with which he accidentally shot and killed his roommate. The court found the evidence insufficient to establish that the accidental killing “occurred in furtherance of the charge of possession of a firearm by a convicted felon,” which it deemed necessary to consider the killing within the *res gestae* of the underlying felony and thus the proper subject of a felony murder conviction.

**Back to Vater.** It is unclear what approach the North Carolina courts would take if confronted with a charge of felony murder based on being a felon in possession. If the latter can serve as the underlying felony, what I’ve heard about the case makes me wonder whether a fact-based approach would absolve Vater. He possessed the gun in a hotel that he knew was occupied by others. Depending upon what happened from there, one might find his actions inherently dangerous.