# Merger and Felony Murder

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I've had several questions recently about the merger doctrine as it applies to felony murder. It's a complicated area, made even more confusing because there are two different doctrines that share the name "merger." I'm not going to address the merger doctrine that requires the court to arrest judgment on the underlying felony when a defendant is convicted of first-degree murder only on the basis of felony murder. *See*, *e.g.*, *State v. Millsaps*, 356 N.C. 556, 560 (2002) ("When a defendant is convicted of felony murder only, the underlying felony constitutes an element of first-degree murder and merges into the murder conviction."). The law in that area is clear. Instead, I'm going to discuss the merger doctrine that prevents certain assaults from serving as the underlying felony for felony murder. In order to give this rule a unique name, and because the rule applies when an assault is an integral part of a homicide, I'll sometimes refer to it as the "part-and-parcel assault rule."

The basic rule was expressed in *State v. Jones*, 353 N.C. 159, 170 n.3 (2000): In "cases involving a single assault victim who dies of his injuries . . . the assault on the victim cannot be used as an underlying felony for purposes of the felony murder rule. Otherwise, virtually all felonious assaults . . . that result in . . . death would be first-degree murders via felony murder, thereby negating lesser homicide charges such as second-degree murder and manslaughter." So it is clear that when A fatally shoots B, A cannot properly be charged with felony murder using, for example, AWDWIK as the predicate felony. As an aside, while this appears to be the majority rule nationally, some states have rejected it. In Georgia, for example, part-and-parcel assaults may form the basis of felony murder charges. *State v. Huntley*, 518 S.E.2d 890 (Ga. 1999). *See generally* Robert L. Simpson, *Application of felony-murder doctrine where the felony relied upon is an includible offense with the homicide*, 40 A.L.R.3d 1341 (comparing approaches).

Just how closely related must the assault and the homicide be in order for the part-and-parcel assault rule to apply? Very closely, under *State v. Carroll*, 356 N.C. 526 (2002). In *Carroll*, the defendant struck the victim with a machete, then strangled her. He was convicted of felony murder, with AWDWISI -- based on the blow with the machete -- as the underlying felony. The reviewing court affirmed, holding that "[t]he victim . . . did not die as a result of the assault with the machete. The blow to her head was not fatal. Rather, the cause of death was strangulation. As such, the assault was a separate offense from the murder. Accordingly, the trial court did not err in submitting a felony murder instruction to the jury because the felonious assault did not merge into the homicide." *Carroll* appeared to involve a slight time gap between the blow with the machete and the strangulation, and perhaps the result would be different if the non-fatal assault were followed immediately by the fatal one -- for example, if A stabbed B during a fight, then immediately shot him. Or, to take the example a step further, if A shot B in the arm, then immediately and fatally in the chest.

Does the merger rule as expressed in *Jones* apply to felonies that are not denominated as assaults but involve similar conduct? For example, is felony child abuse subject to the merger rule? We have very little law in this important area. Several pre-*Jones* cases affirmed felony murder convictions based on felonies that are similar to assaults. *See*, *e.g.*, *State v. Wall*, 304 N.C. 609 (1982) (discharging a firearm into an occupied vehicle); *State v. Pierce*, 346 N.C. 471 (1997) (felony child abuse). And while the court of appeals has continued to follow these precedents for the specific offenses involved, *see*, *e.g.*, *State v. Jackson*, 189 N.C.App. 747 (2008) (discharging a firearm into an occupied vehicle), the holding of *Jones* calls the reasoning of these cases into question. For example, the *Wall* court acknowledged that, under the facts of that case, discharging a firearm into an occupied vehicle was in "integral part of

the homicide," and affirmed the conviction only because it rejected the merger doctrine that *Jones*, at least to some extent, endorsed. Perhaps the part-and-parcel assault rule can be limited to offenses denominated as assaults, but I'm inclined to think that the rationale for the rule applies with equal force to assault-like offenses with different names. If you disagree, please post a comment! In any event, I'm told that a case raising this issue is on appeal now, so perhaps we'll have a definitive answer soon.