

grade of offense, and of murders known to the common law, and to the codes of Pennsylvania, and of Tennessee and New Jersey, some constitute here manslaughter—some excusable and others justifiable homicide. The *residuum* left makes murder in the second degree.

You perceive in the reading one class of murders, which are declared to be murders in the first degree, because done in the attempt to perpetrate a felony. Now the defendant is not charged with such murder; and not being charged, he cannot be found guilty of such murder. I submit it as a legal proposition to the court, that to find the defendant guilty of murder in the first degree under that clause of the statute, he must be charged with murder done in the attempt to perpetrate, or in the perpetration of a felony.

It is not in the power of the prosecution to ask you to find a capital murder in this case, because of its being a murder done in the perpetration of a felony. If the fact were so proved, they could not ask it, for that is not the murder charged in the indictment. The legislature thought proper to provide, that every murder (not every killing) committed in the attempt to commit felony should take the rank of murder in the first degree, for that cause. The fact of the attempted felony is the fact which determines the grade of the crime, and it is therefore a material fact. I shall not trouble you with any question of variance between the proof and the charge, that is a question for the Court, after verdict, involving the fate of the prosecution; but, I shall ask the Court to instruct you, that in this case the prosecution can't demand at your hands the finding a murder in the first degree for such cause.

There is good reason for this. Your lives and liberty would be in peril if you could be found guilty of an offense not contained in the indictment found against you. The principle is not technical. It is a bulwark essential to innocence. You are entitled to a clear, distinct and specific accusation, that you may come prepared to meet it. The right is fundamental. The utmost that can be claimed for the testimony of the State is that Worrell had knowledge of the killing at the moment