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Death by Automobile as First Degree Murder Utilizing the Felony Murder Rule

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DEATH BY AUTOMOBILE AS FIRST DEGREE MURDER UTILIZING THE FELONY MURDER RULE

I. INTRODUCTION

On May 6, 1997, a Forsyth County, North Carolina jury returned a verdict of guilty of first degree murder and two life sentences without parole against Thomas Richard Jones for the defendant's role in a fatal car accident in September of 1996.[1] Although the first degree murder conviction and the two life sentences are the most severe ever handed down in North Carolina against a drunk driver causing a fatality,[2] it was less severe than the death penalty sentence that was sought by the Forsyth County Prosecutor.[3] The jury in this instance chose not to impose the sentence of death on the defendant. However, with Forsyth County prosecutor, Vince Rabil, vowing to utilize the felony-murder rule in the future for similar cases,[4] the question arises of whether first-degree murder convictions for death by automobile are

1 *See* Rich McKay, *Jurors Give Driver Two Life Sentences*, GREENSBORO NEWS & RECORD, May 7, 1997, at A1.

2 *See id.*

3 In addition to being the toughest sentence handed down in North Carolina for a DUI causing fatality, the death penalty sought by the prosecutor is the most severe penalty attempted in the nation. *See* McKay, *supra* note 1, at A1.

4 *See id.*

properly within the purview of the felony-murder doctrine.

In discussing the relevant issues brought forward by this case, Part Two of this article will begin by offering a description of the facts leading up to and including the fatal crash. Part Three will give a history of the felony murder rule, exploring its purpose as well as its modern trends and limitations and will examine whether use of the felony murder rule in this instance runs against the modern tide of its acceptance. Part Four will detail the State's theory and application of the felony-murder rule in this case. It will include a discussion of the relevant arguments for and against the State's theory. Part Five will discuss the traditional use of the felony-murder rule in cases of death by a vehicle and will survey felony-murder statutes nationwide to determine the potential for the felony-murder rule's use in similar situations. The article will conclude with Part Six summarizing the relevant issues produced by this case and offer an editorial of the utilization of the felony-murder rule for vehicular homicide.

II. STATEMENT OF THE SCENARIO[5]

On September 4, 1996, sometime around 10:30 P.M., the defendant was operating a 1996 Nissan Altima in Forsyth County, North Carolina.[6] Moments prior to the crash witnesses observed the Defendant's car traveling at a rate of speed somewhere between 45 and 65 M.P.H. in a 35 M.P.H. zone.[7] The Defendant's car was swerving from side to side and at one point ran up over a curb causing a hubcap from the car to fall off.[8] The Defendant's car ran into the rear of another auto just one to two minutes before the crash.[9] The Defendant proceeded down the road and at some point crossed the center line causing the victim's 1995 Mazda MX-3 to cross into the Defendant's lane of travel in an unsuccessful attempt to avoid the collision.[10] The Mazda was occupied by six passengers, two in the front seat and four in the rear seat.[11] The impact on the passenger side of the Mazda resulted in the death of two of

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5 The facts of the case offered are derived from both the Forsyth County Prosecutor's Brief, as well as the Defendant's Brief. Although the facts as offered by the State were accepted "arguendo" by the Defendant, any discrepancies between the two versions will be noted. *See* State's Brief on Felony Murder, State of North Carolina v. Thomas Richard Jones, Forsyth County Superior Court, (96 CRS 34278); *see also* DEFENDANT'S BRIEF TO PRECLUDE TRIAL ON FELONY MURDER THEORY, State v. Jones, 96 CRS 34278, 34279, 36858, 36862, 36861, In the General Court of Justice, Superior Court Division [hereinafter DEFENDANT'S BRIEF]. Sources are on file with the author.

6 *See* State's Brief, *supra* note 5, at 1-2, *Jones* (96 CRS 34278).

7 *See id.* at 3.

8 *See id.*

9 The State characterized this incident as "a repeated ramming" while the Defendant believed this to be an exaggerated description of the event. *Id.*

10 *See id.* at 1-2.

11 *See* State's Brief, *supra* note 5, at 2, *Jones* (96 CRS 34278).

the passengers.[12] Three other passengers suffered multiple bone fractures as well as various internal injuries requiring surgery.[13] While the defendant was being treated for his injuries at the hospital, police noticed a "moderate" odor of alcohol coming from the defendant.[14] Two blood samples were taken several hours apart.[15] The first indicated a blood alcohol content of .05 while the second test was unable to detect the presence of alcohol.[16] The tests did reveal that to a "reasonable scientific certainty," the defendant was under the influence, at the time of the crash, of xanax and two other impairing narcotic substances.[17] At the time of the accident the defendant had charges pending for Driving While Impaired in Iredell County, North Carolina.[18] The Forsyth County prosecutor proceeded to charge the defendant with Murder in the First Degree utilizing the North Carolina felony-murder statute.[19] The precise theory of the State will be discussed in Part Four. Prior to this, however, I believe it is relevant to study the history of the felony-murder rule.

III. HISTORY AND DEVELOPMENT OF THE FELONY MURDER RULE

The common law definition of the felony murder doctrine is, "the author of an unintended homicide is guilty of murder if the killing takes place in the perpetration of a felony."[20] The doctrine of felony murder is attributed to English Law and Lord Coke in his 1644 statement, "that a death caused by an unlawful act is murder."[21] Coke went on to offer this illustration:

> If a man shoots at a wild fowl and accidentally kills a man, that is an excusable homicide because the act of shooting is not unlawful; but if a man shoots at a cock or a hen belonging to another man and

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12 *See id.*

13 *See id.*

14 *Id.*

15 *See id.* at 2-3.

16 *See* State's Brief, *supra* note 5, at 2-3, *Jones* (96 CRS 34278).

17 The State proffered that its expert testimony would be that the defendant was to reasonable scientific certainty, appreciably impaired and unfit to operate a motor vehicle at the time of the crash. *See id.* at 3.

18 *See id.* at 4.

19 *See id.*

20 2 WHARTON'S CRIMINAL LAW § 147, at 295 (15th ed. 1994).

21 *Id.* at 295-96.

accidentally kills a man, that is murder because the act is unlawful.[22]

This doctrine was later amended to cover only those unlawful acts which were felonies.[23] It is very important to note, however, that at the time of the felony murder rule's inception, all felonies were punished by death.[24] Therefore, whether the accused was being sentenced to death for the actual killing or for the underlying felony was of little consequence.[25]

Some have criticized Lord Coke's statement as completely lacking in authority and as a mistake made by Coke in his translation of earlier common law decisions.[26] Critics argue that the common law holdings on which Coke relied pronounced that such accidental killings done in the perpetration of an unlawful act would be unlawful but not murder.[27] This early common law definition of the felony-murder rule went mostly unchallenged however because, as noted above, the punishment for an unlawful killing and a felony were both death.[28] England began to retreat from the felony-murder rule in the Nineteenth century by offering the limitation that only those felonious acts done that are reasonably known to be dangerous and likely to cause death were to be utilized for the underlying felony.[29] This retreat culminated in the 1957 Act which abolished the felony-murder rule in England.[30]

The theory of felony-murder is that while there is no malice "in fact" in the actual killing, the malice is supplied by the act of committing the felony.[31] The malice in committing the felony is then transferred to the homicide.[32] A homicide

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22 *Id.*

23 *See id.*

24 *See id.* at 305.

25 *See* 2 WHARTON'S CRIMINAL LAW § 147, at 305.

26 *See* People v. Aaron, 299 N.W.2d 304, 308-09 (Mich. 1980). The Michigan Supreme Court offering a detailed analysis of the history of the felony-murder rule, criticizing its authority and logic, the court announced, "the felony-murder doctrine is unnecessary and in many cases unjust in that it violates the basic premise of individual moral culpability upon which our criminal law is based." *Id.* at 309.

27 *See id.* at 310.

28 *See id.*

29 *See id.* at 312 (quoting Regina v. Serne, 16 Cox Crim.Cas. 311 (1887)).

30 *See id.*(citing Section 1 of England's Homicide Act, 1957) (providing that a killing occurring in a felony-murder situation will not amount to murder unless done with the same malice aforethought as is required for all other murder).

31 2 WHARTON'S § 147, at 296-97.

32 *See id.*

committed with malice is by common law definition "murder."[33] Modern felony-murder statutes of individual states seem to be patterned after the 1794 felony-murder statute of Pennsylvania, which was the first state to subdivide murder into degrees:[34] "All murder . . . which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary shall be deemed murder in the first degree."[35]

Although the enumerated felonies offered by the various states are not exactly the same, most of the enumerated felonies seem to share the element of danger or violence.[36] Some of the often offered felonies are: arson, rape, robbery, burglary, and kidnaping.[37]

A. The Purpose of the Felony-Murder Rule

The precise purpose of the felony-murder doctrine is greatly debated.[38] Is the doctrine based on deterrence of dangerous felonies or is it more narrowly based on deterring those who commit felonies from perpetrating them in a dangerous way? If the purpose is to merely deter dangerous felonies then why not simply make the punishments for those felonies severe enough to deter the felony itself? Some argue therefore that the real purpose of the felony-murder rule is the latter of the two possible approaches.[39] For example, the felony-murder doctrine may encourage a robber to use an unloaded gun, or for an arsonist to make sure that the building he is about to set ablaze is unoccupied.[40] This approach seems to coincide with the statutory schemes that list only those felonies which are likely to produce a great risk of violence or death.

B. Modern Limitations and Trends

The first of the limitations on the application of the felony-murder doctrine is that the underlying felony must be one that is inherently dangerous to human

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33 *See id.*

34 *See id.* at 299.

35 *Id.* (citing MODEL PENAL CODE § 201.6 cmt. at 66 (Tent. Draft No. 9, 1959)).

36 *See* 2 WHARTON'S § 147, at 300.

37 *See id.*

38 *See Aaron*, 299 N.W.2d at 309.

39 *See id.*

40 *See* Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 709-17 (1937).

life.[41] An example of this limitation is as follows: if the selling of liquor constitutes a felony and that by selling this liquor one dies by becoming drunk and dying of exposure and alcoholism, this selling of liquor cannot be used as the predicate felony as it is "an act not itself directly and naturally dangerous to life."[42]

The second limitation is that there must be some proximate or legal cause connection between the felonious act and the death.[43] This limitation is argued in terms of whether the death came about by some unforeseeable intervening cause.[44] An example is offered in the case of an arsonist who sets a building on fire which results in a fireman's death while fighting the fire. At least one court held that the death of the fireman, in this situation, was reasonably foreseeable and therefore the arson was linked as the cause of the death.[45]

A third limitation, also related to causal connection, is that the death must occur "in the commission or the attempted commission of the felony."[46] To make a determination of this vague statement courts look to the connection of time and distance between the felony and the death.[47]

Another modern limitation is not to hold the defendant criminally responsible for a death caused by someone other than himself or his co-felon.[48] However, not all jurisdictions have adopted this limitation. Some find an application of the felony-murder doctrine proper where, for example, a police officer causes the death of a co-felon or where a police officer kills a bystander by accident.[49]

Sentences involving capital punishment offers another limitation to the doctrine of felony-murder. A defendant who did not actually commit the killing, may not be sentenced to death absent a showing of major participation in the felony and a reckless indifference to human life.[50]

The felony-murder doctrine has come under considerable attack since its

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41 *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 547 (1972).

42 People v. Pavlic, 199 N.W. 373, 374 (Mich. 1924).

43 *See* LAFAVE, *supra* note 41, at 548.

44 *See id.* at 547.

45 *See* State v. Glover, 50 S.W.2d 1049, 1056 (Mo. 1932).

46 LAFAVE, *supra* note 41, at 555.

47 *See id.*

48 *See* 2 WHARTON'S § 147, at 316-17.

49 *See id.* at 317-18.

50 *See* Tison v. Arizona, 481 U.S. 137, 137-38 (1987).

inception.[51] As discussed above, it is argued that the doctrine is not solidly based on any historical authority and was not the result of rational judicial decision making. It seems to run against the modern trend of categorizing homicide by culpability.[52] Even its birthplace has rejected its usefulness in this century. So why does this illogical and archaic tool exist so prominently in American jurisprudence today? The answer may be crystal clear when studying its application in the *State of North Carolina v. Thomas Richard Jones*.[53] Its durability seems to be a result of both the public outcry for tougher penalties and the prosecutor's willingness to use the rule as an efficient way to give the public what they want.[54] Unfortunately, this is done at the expense of the criminal's rights.

IV. STATE'S THEORY OF FELONY-MURDER

The defendant in *State v. Jones*[55] was prosecuted pursuant to North Carolina's felony murder statute which provides that "[a] murder . . . which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, 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[.]"[56] At first blush the actions of the defendant in *Jones* do not seem to fall neatly into any of the enumerated felonies offered by the statute.[57] However, the state proceeded under the theory that the defendant's actions in this case should be construed as "any other felony . . . committed with the use of a deadly weapon[.]"[58] The "any other felony" element of the felony-murder statute was pursued under the alternative theories that the predicate felony was either assault with a deadly

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51 *See* James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Story of the Forces that Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429 (1994).

52 *See id.* at 1460-63 (discussing the role of law and politics as the main factor for the rule's endurance).

53 Forsyth County Superior Court (96 CRS 34278).

54 *See* Tomkovicz, *supra* note 51, at 1460-63.

55 Forsyth County Superior Court (96 CRS 34278).

56 N.C. GEN. STAT. §14-17 (1994).

57 A drunk driver who accidentally kills with his automobile does not seem to satisfy any of the enumerated felonies, until the State suggests that this accident can be classified as an assault with a deadly weapon.

58 STATE'S BRIEF ON FELONY MURDER FOR WATSON HEARING (AMENDED 12-12-96), State v. Jones, 96 CRS 34278, 34279, 36858, 36862, 36861, In the General Court of Justice Superior Court Division § 21 [hereinafter STATE'S BRIEF].

weapon or second degree murder committed with a deadly weapon.[59] The State then contended that an automobile constitutes a "deadly weapon," thereby arguably satisfying the necessary elements of the felony-murder statute.[60] Furthermore, the State argued that several aggravating factors under North Carolina's Capital Punishment Act[61] were present thereby making the defendant eligible for the sentence of death.[62] Under this theory, the State would be relieved of proving any premeditation or deliberation in obtaining a conviction of first degree murder.[63] In fact, the State could even win a death sentence without ever demonstrating that the defendant intended to inflict injury on any of the victims.[64] This is a demonstration of how the felony-murder rule works.

A. Assault With a Deadly Weapon Inflicting Serious Injury

Under the North Carolina assault statute, "[a]ny person who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a class E felon."[65] The State contended that when the defendant's automobile crashed into the victims' automobile causing serious injury to three of the passengers, this amounted to assault with a deadly weapon causing serious injury.[66]

The felony-murder rule works under the assumption that it is not necessary to demonstrate an intent to commit murder, because the intent is inferred or transferred from the intent to commit the enumerated and dangerous predicate felony.[67] In North Carolina, however, there is no requirement to prove an intent to harm to obtain a conviction for assault with a deadly weapon causing serious injury.[68] In fact, the State need only show that the assault arose from "culpable negligence" on the part of the actor.[69] In *State v. Lancaster*,[70] the court offered this

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59 *Id.*

60 *See id.* at 17-22.

61 N.C. GEN. STAT. §15A-2000 (1995).

62 *See* STATE'S BRIEF, *supra* note 58, at 8-11.

63 *See id.* at 5 (citing State v. Branch, 415 P.2d 766 (Or. 1966)).

64 *See* discussion infra.

65 N.C. GEN. STAT. §14-32(b) (1994).

66 *See* STATE'S BRIEF, *supra* note 58, at 5-6.

67 *See discussion infra*

68 *See* State v. Lancaster, 180 S.E. 577, 578 (N.C. 1935).

69 *See id.*

definition of culpable negligence:

> Culpable Negligence is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others. An intentional, willful, or wanton violation of a statute or ordinance designed for the protection of human life or limb, which proximately results in injury or death is culpable negligence.[71]

The State offered as proof of the culpable negligence element that the defendant drove his automobile in violation of North Carolina General Statute section 20-138.1 (Driving While Impaired),[72] or in the alternative, in violation of North Carolina General Statute section 20-140 (Reckless Driving),[73] both of which have been held to be statutes designed for "the protection of human life and limb."[74] In addition, the State presented North Carolina case law that held that a violation of the Driving While Impaired statute is "as a matter of law culpable negligence."[75]

As discussed above, the crime of assault with a deadly weapon is a general intent crime and does not require a showing of specific intent.[76] The North Carolina Court of Appeals has held that the driver of an automobile "may be convicted of an assault with a deadly weapon when . . . he strikes or injures a person, provided there is either (1) an actual intent to inflict injury, or (2) culpable or criminal negligence from which an intent may be implied."[77]

In effect, the State is not just borrowing the intent needed from the enumerated felony of assault with a deadly weapon. It is first taking the intent to violate one of the motor vehicle statutes and transferring that intent to assault with

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70 180 S.E. 577 (N.C. 1935).

71 *Id.* at 578.

72 N.C. GEN. STAT. §20-138.1 (1994).

73 N.C. GEN. STAT. §20-140 (1994).

74 State v. Weston, 159 S.E.2d 883, 886 (N.C. 1968) (holding the reckless driving statute to be a safety statute for the protection of human life or limb); *see also* State v. McGill, 336 S.E.2d 90 (N.C. 1985) (holding that the Driving While Impaired statute was designed for the protection of human life and limb).

75 STATE'S BRIEF, *supra* note 58, at 6.

76 *See Lancaster*, 180 S.E. at 578.

77 *See* State v. Eason, 86 S.E.2d 774, 778 (N.C. 1955) (citing State v. Sudderth, 114 S.E. 828 (N.C. 1922); State v. Agnew, 164 S.E. 578 (N.C. 1932); 5 Am. Jur. 914, Automobiles, §763).

a deadly weapon and then further transferring that intent to satisfy the first degree murder in accordance with the felony-murder rule.

B. *Automobile as a Deadly Weapon*

The general rule in North Carolina regarding deadly weapons is that "[a] deadly weapon is not one which must kill, but one which under the circumstances of its use is likely to cause death or great bodily harm."[78] The State relied on the holding of the North Carolina Court of Appeals in *State v. McBride*[79] that an automobile may be considered "a weapon or device which in its normal use is hazardous to the lives of more than one person."[80] Therefore, the State argued that the defendant's operation of his car while impaired and driving into the path of an oncoming vehicle "constitutes the use of a car in such a way that is likely to cause death or great bodily harm" therefore satisfying the standard set forth in *Strickland*.[81]

C. *Aggravating Circumstances*

North Carolina General Statute section 15A-2000 allows for the death sentence in those first degree murders where one or more statutory aggravating circumstances are found to be present and when they outweigh any mitigating circumstances also found to be present.[82] The relevant aggravating circumstances in the state's theory are (1) "knowing creation of a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person;"[83] and (2) "murder committed during a violent course of conduct towards others is present."[84]

The State contended that the analogous case of *McBride*, holding that an automobile can be found in its use to be a weapon which is dangerous to the lives of more than one person, allowed the State to submit to the jury the question of an

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78 State v. Strickland, 225 S.E.2d 531, 538 (N.C. 1976) (citing State v. Smith, 121 S.E. 737 (1924)).

79 425 S.E.2d 731 (N.C. Ct. App. 1993), *appeal after remand,* 454 S.E.2d 840 (N.C. Ct. App. 1995).

80 *Id.* (the court's holding was in context of deciding whether the automobile a dangerous device in its normal use threatening the lives of more than one person, thereby constituting an aggravating factor under N.C.G.S. 15A-1340.16(d)(8)). *See also* State v. Coffey, 259 S.E.2d 356 (N.C. 1979); *Eason*, 86 S.E.2d at 774.

81 STATE'S BRIEF, *supra* note 58, at 12.

82 N.C. GEN. STAT. § 15A-2000 (1994).

83 N.C. GEN. STAT. §15A-2000(e)(10) (1994).

84 N.C. GEN. STAT. §15A-2000(e)(11) (1994).

aggravating factor under section 2000(e)(10).[85] In addition, the State argued that the course of conduct of the defendant "ramming" into another vehicle moments prior to the crash should be considered by the jury as to whether this constituted a violent course of conduct.[86]

D. Defense Arguments against State's Theory of Felony-Murder

The strongest argument that the defendant raised is that for an enumerated felony to qualify under the felony-murder statute, it must be a specific intent felony and not merely a general intent felony.[87] "Simply put, a culpable negligence based felony cannot supply the malice necessary for felony-murder."[88] As discussed previously in the background section of this article, the malice for a felony-murder conviction is supplied by an intentional and violent felony.[89]

The defendant cited the jury instructions upheld by the North Carolina Appellate Court in *State v. Gunn*,[90] instructing that the jury, as to the finding of intent for the underlying felony of assault with a deadly weapon, "must find beyond a reasonable doubt that the defendant acted 'intentionally' and that this intent was a specific intent."[91]

In addition, the defendant argued that the state of North Carolina had never allowed a conviction in an analogous situation to rise beyond second degree murder.[92] And furthermore, when the court allowed a second degree murder conviction, the malice was provided by facts far more egregious than were present in *Jones*.[93]

The defendant finally asserted that prosecution under this theory of felony-murder was not within the purview of what the legislature intended when crafting the felony-murder statute.[94] The legislature had crafted a statute specifically dealing

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85 *See McBride*, 425 S.E.2d at 733-34.

86 *See* STATE'S BRIEF, *supra* note 58, at 8-11.

87 *See* DEFENDANT'S BRIEF, *supra* note 5, at 7.

88 *Id.*

89 *See supra* text accompanying notes 19-52.

90 211 S.E.2d 508 (N.C. Ct. App. 1975).

91 DEFENDANT'S BRIEF, *supra* note 5, at 6 (citing *Gunn*, 211 S.E.2d at 508).

92 *See id.* at 7 (citing State v. Snyder, 317 S.E.2d 394 (N.C. Ct. App. 1984)).

93 *See id.* (citing *Snyder*, 317 S.E.2d at 394 (facts included a Breathalyzer result of .24 to .32, passing in a no-passing zone, knocking a vehicle off the road and then reaching speeds of 70 M.P.H. while running a red light)).

94 *See* DEFENDANT'S BRIEF, *supra* note 5, at 7.

with driving while impaired causing death, North Carolina General Statute 20-141.4(a)(1), "a person commits the offense of felony death by vehicle if he unintentionally causes the death of another person while engaged in the offense of impaired driving[.]"[95] The annotations explain that the legislative intent of this statute was to create a lesser included offense where the crime is not dependant on criminal culpability.[96] Since this statute included the element of driving impaired it implied that the State was required to show something more than merely driving impaired to establish criminal culpability.[97] The defendant argued that had the State legislature wished to include the enumerated felony of driving impaired causing death, it would have done so after reviewing the criminal statutes; its absence was telling of their intent.[98]

The defendant offered an illustration of the absurdity of prosecuting under such a theory:

> [A]n unimpaired defendant, passing in a no-passing zone strikes a multiple occupant vehicle, causing a wrist fracture of occupant A and the death of occupant B — under the State's theory of [assault with a deadly weapon inflicting serious injury] by culpable negligence, the driver could be prosecuted capitally for B's death[.][99]

In conclusion, the State provided strong case law to back up each of its individual propositions in building its felony-murder case.[100] However, it was lacking precedent providing specifically that such a case can be tried under the felony-murder statute.[101] Admittedly, the fact that no analogous case exists is not fatal to the State, however, it should send strong cautionary signals to the appellate courts that such a theory should be examined with the utmost scrutiny.[102] This case demonstrates the unbridled power the State will enjoy if allowed to utilize the

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95 N.C. GEN. STAT. §20-141.4 (1994).

96 *See id.*

97 By including the word "unintentionally," the statute implied the State must show the driver intentionally caused the death of another.

98 *See* DEFENDANT'S BRIEF, *supra* note 5, at 7.

99 *Id.* at 5.

100 *See id.*

101 *See id.*

102 Arguably any theory that has never been sanctioned by an appellate court, will likely be received for review above.

felony-murder rule for vehicular homicides, where no intent to injure another is present.

V. SURVEY OF VEHICULAR HOMICIDE AS MURDER

A. Vehicular Homicide as Second Degree Murder

Courts have traditionally upheld prosecutions for vehicular homicide where a second degree murder conviction was sought.[103] In particular, convictions under the felony-murder theory have been allowed to supply the necessary malice for a conviction of second degree murder.[104] This application of the felony-murder rule, however, has generally been limited to murder in the second degree.[105] In *State v. Beal*,[106] for example, the Missouri Supreme Court held that the case was properly submitted under the felony-murder doctrine where the defendant killed another motorist while attempting to flee from officers following a robbery.[107] The Supreme Court of Virginia also sustained a conviction under felony-murder doctrine where the underlying felony was fleeing from an officer to avoid being apprehended for habitually driving while intoxicated.[108] These cases however were presented under second degree felony-murder rules. For example, the second degree felony-murder rule in Virginia defines felony homicide as the "killing of one accidentally, contrary to the intention of the parties, while in the prosecution of some felonious act other than those specified in (the first degree statute)."[109] The Virginia legislature seems to have drawn a distinction for murder committed in the perpetration of felonies that were not enumerated in the first degree felony-murder section.

Other prosecutions for second degree murder involving a vehicular homicide have been upheld without the use of the felony-murder doctrine.[110] For example, in those cases in which the facts support a finding of extreme indifference to human life, the common law elements of second degree murder are met by

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103 *See* H.C. Lind, Annotation, *Homicide By Automobile As Murder*, 21 A.L.R. 3d 116, 122 (1969).

104 *See id.*

105 *See* discussion infra.

106 470 S.W.2d 509 (Mo. 1971).

107 *See id.* at 512.

108 *See generally* Davis v. Commonwealth, 404 S.E.2d 377 (Va. 1991).

109 VA. CODE ANN. §18.2-33 (Michie 1975).

110 *See* Lind, *supra* note 103, at 136.

demonstrating malice.[111] In *Commonwealth v. Cherubin*,[112] the defendant actually pointed his vehicle at the victim and ran her down, thereby supporting an inference of malice necessary for a conviction of second degree murder.[113]

B. First Degree Felony-Murder

First degree murder has been upheld under the felony-murder doctrine in cases involving death by automobile, where the killing occurred in the commission or furtherance of the predicate felony that is offered by the state in its first degree murder statute.[114] Robbery is very often one of the enumerated felonies under the purview of a state's first degree felony-murder statute.[115] Therefore, in cases where the defendant, in an attempt to flee the scene following a robbery, causes the death of another with his vehicle, the felony-murder rule will support a first degree murder conviction.[116] In *Hall v. State*,[117] the Arkansas Supreme Court upheld a first degree murder conviction where the defendant in attempt to elude police following a theft, hit and killed a pedestrian with his car.[118] The Arkansas felony-murder statute provides, that a person commits murder in the first degree where he causes the death of another in the course of or in furtherance of *any* felony.[119] Therefore, because the death was caused during the furtherance of the felony of theft, the conviction was sustained.[120] These are demonstrations of how the felony-murder doctrines have been applied where the vehicular homicide falls squarely within the commission of an enumerated felony. However, turning a vehicular homicide, such as that in *Jones,* into the felony of assault with a deadly weapon stretches the predicate felony to consume more than its intended scope.

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111 *See id.* at 126.

112 620 N.E.2d 797 (Mass. 1993).

113 *See id.* at 798.

114 *See* Lind, *supra* note 103, at 133.

115 A general survey of all states that have some version of the felony murder rule, demonstrates robbery is nearly always included. *See* Section C, *infra* and notes.

116 *See* Whitman v. People, 420 P.2d 416, 418-19 (Colo. 1966) (holding that a defendant fleeing the scene of a robbery in an attempt to avoid being caught and colliding with and killing another motorist was justly prosecuted under the felony-murder rule).

117 772 S.W.2d 317 (Ark. 1993).

118 *See id.* at 320-21.

119 *See* ARK. CODE ANN. §5-10-102(a)(1) (Michie 1991).

120 *See Hall*, 772 S.W.2d at 319.

C. *Survey of State Enumerated Felonies*

In order to explore the possibility of this misuse[121] of the felony-murder rule in similar circumstances nationwide it is necessary to examine the felony-murder statutes of all fifty states and the District of Columbia. Fortunately, an examination of the enumerated felonies offered by the state legislatures will demonstrate that the likelihood of abuse outside of several isolated states is limited.

Of the fifty states and the District of Columbia, forty-nine have some version of the felony-murder rule.[122] Of those remaining jurisdictions, only seven[123] have statutes that are conducive to utilizing the felony-murder rule in cases of vehicular homicide.[124] As discussed earlier, North Carolina has as one of its enumerated felonies any "other felony committed or attempted with the use of a deadly weapon[.]"[125] This "any other felony" wording provides a narrow opening for the state to slide vehicular homicide into the purview of a plain reading of the statute. Similarly, the statutes of Alabama, Arizona, Georgia, New Mexico, and Texas each provide that the death caused during or in the furtherance of "any felony" may be used to support a conviction for first degree murder utilizing their respective felony-murder statute.[126] The result is that a vehicular homicide that occurs during an episode of drunk driving can be prosecuted under the felony-murder rule as a killing that occurred in the commission of "any felony."[127] Another example of the possible ramifications is a vehicular homicide that injures one passenger but kills another where no alcohol is involved. The defendant is open to a "battery causing serious injury" charge on the injured person as the predicate

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121 *See supra* text accompanying notes 19-52. The author's opinion of the use of the felony-murder rule under these circumstances is that it is an abuse of legislative intent.

122 The criminal statutes of Hawaii, Missouri, and Wisconsin do not contain a felony-murder provision. HAW. REV. STAT. § 707-701 (1998); MO. REV STAT. § 565.020 (1997); WIS. STAT. § 940.01 (1997).

123 The criminal statutes of Alabama, Arkansas, Delaware, Georgia, New Mexico, North Carolina, and Texas, have a provision under the felony-murder statute that may allow flexibility for the state to utilize the felony-murder rule in cases of accidental vehicular homicide. ALA. CODE §13A-6-2(a)(3) (1998); ARK. CODE ANN. § 5-10-101(a)(1) (1997); DEL CODE ANN. tit. 11, § 636 (a)(2) (1997); GA. CODE ANN. § 16-5-1(c) (1998); N.M. STAT. ANN. §30-2-1(A)(2) (1998); N.C. GEN. STAT. § 14-17 (1994); TEX. PENAL CODE ANN. §19.02(b)(3) (1997).

124 *See supra* text accompanying notes 53-79.

125 *See supra* note 54.

126 The criminal statutes of Alabama, Arizona, Georgia, New Mexico and Texas, provide that a death during the furtherance of "any felony" may be used as the basis for a first degree murder conviction. *See supra* note 123.

127 This result can only occur when driving under the influence is a felony.

felony for the murder of the individual who is killed.[128]

The good news is that forty-three states and the District of Columbia have not drafted first degree murder statutes that would allow for such convictions.[129] The bad news, of course, is that seven states are free to submit to an arguably sympathetic jury that the defendant deserves a sentence under first degree murder, regardless of his intent.[130] The news gets worse for those same defendants because these same seven states allow for the penalty of death for the offense of first degree murder.[131] Therefore, the possibility of utilizing the felony-murder rule in cases of vehicular homicide is arguably available beyond North Carolina.

VI. CONCLUSION

The practice of placing limits on the felony-murder doctrine is not only the modern trend but has been the norm since the felony-murder rule's inception in England.[132] However, the opposite end of the legal scale is weighted by a tremendous public outcry to administer severe punishments on wrongdoers.[133] There is no area of criminal law where this is more evident than in cases of drunk driving. Proponents of no mercy sentences for drunk drivers are well organized and therefore are to be reckoned with politically.[134] Prosecutors subject to this political pressure are encouraged to find novel ways to get those stiff sentences, even if it means circumventing the penalties already enacted by the state legislatures for particular crimes. Nowhere is this more evident than in the case of *State v. Jones*.

As discussed earlier, the dominant purpose of the felony-murder doctrine is deterrence in committing violent felonies or in committing felonies in a violent way.[135] Driving while intoxicated is unarguably a social evil requiring a punishment

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128 *See* discussion *infra*.

129 *See supra* text accompanying notes 122-23.

130 *See supra* note 123.

131 Alabama, Arkansas, Delaware, Georgia, New Mexico, North Carolina, and Texas, allow for the possibility of the death penalty under convictions for first degree murder, subject to the requirements of aggravating circumstances. *See supra* note 123.

132 *See supra* text accompanying notes 19-52.

133 Advocates supporting severe punishments for DUI related crimes are well-organized and are a strong political force. *See* Steven Grossman, *Sobriety Checkpoints: Roadblocks to Fourth Amendment Protections*, 12 AM. J. CRIM. L. 123, 163 (1984); Lance Rogers, *The Drunk-Driving Roadblock: Random Seizure or Minimal Intrusion?*, 21 CRIM. L. BULL. 197, at 202.

134 *See id.*

135 *See supra* text accompanying notes 38-40

severe enough to act as a deterrent. The harm of this act multiplies exponentially when the death of another human being occurs as a result. However, to allow the punishment of a drunk driver who kills accidentally to rise to the level of a rapist or a premeditated murderer is not at all consistent with this nation's ideals of equating the punishment with culpability.

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