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## North Carolina's Unconstitutional Expansion of an Ancient Maxim: Using DWI Fatalities to Satisfy First-Degree Felony Murder

Graham T. Stiles

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# NORTH CAROLINA'S UNCONSTITUTIONAL EXPANSION OF AN ANCIENT MAXIM: USING DWI FATALITIES TO SATISFY FIRST DEGREE FELONY-MURDER

“[I]t is far worse to convict an innocent man than to let a guilty man go free. It is not a much more serious wrong if a person is convicted on a theory that does not even exist.”<sup>1</sup>

## INTRODUCTION

Drunk driving and the fatalities caused by driving under the influence (hereinafter “DWI”) have become a tremendous concern in the United States.<sup>2</sup> This heightened concern for the safety of others has prompted the creation of statutes decreasing a state’s burden of proof in DWI convictions<sup>3</sup> and increasing the severity of punishment.<sup>4</sup> North Carolina has been regarded as a leader in

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1. *Suniga v. Bunnell*, 998 F.2d at 669 (9<sup>th</sup> Cir. 1993) (holding that nonexistent theory of felony-murder during assault with a deadly weapon trial so infected entire trial that resulting conviction violated due process).

2. See The Associated Press, *Clinton Suggests Tougher Standard on Drunk Driving*, The Commercial Appeal, (Memphis, Tennessee), Dec. 27, 1998 at A-2; See also Editorial, *Seeks Higher Aiken Co. DUI Arrests*, The Augusta Chronicle, July 8, 1999 at A-4.

3. See Lee Davidson, *Drunken-driving arrests plummet 40% in Utah*, Desert News, June 14, 1999 at A-2. (Stating that drunk driving arrest rates are higher in states where drivers with just a 0.08 percent blood-alcohol level are considered drunk—making arrest and conviction easier than where the standard is 0.10.); See also M2 Presswire, *Vice President Announces \$57.4m in Incentive Grants to 17 States, with 0.08 BAC Laws*, July 28, 1999, page unavailable online. Grants are being awarded under provisions of the Transportation Equity Act for the 21st Century (TEA-21), which authorizes more than \$500 million in federal grants to states over 6 years as incentives to enact and enforce laws that make it a drunk driving offense per se to operate a motor vehicle with a blood alcohol concentration (BAC) of 0.08 or greater. The states receiving incentive grants include: Alabama, \$2.4 million; California, \$13.5 million; Florida, \$6.2 million; Hawaii, \$705,417; Idaho, \$924,560; Illinois, \$5.8 million; Kansas, \$2.1 million; Maine, \$705,417; New Hampshire, \$705,417; New Mexico, \$1.1 million; North Carolina, \$3.5 million; Oregon, \$1.9 million; Texas, \$9.4 million; Utah, \$1.1 million; Vermont, \$705,417; Virginia, \$3.1 million; and Washington, \$2.7 million. The District of Columbia will receive \$705,417.

4. See Ledyard King, *Laws on Lemons, Spam Among Several Hundred Taking Effect Thursday*, The Virginia-Pilot, June 29, 1999 at A-1. see also Mike

the movement for stricter penalties<sup>5</sup> and many of North Carolina's drunk driving statutes are on the forefront in terms of punishment.<sup>6</sup>

The greatest difference North Carolina has made regarding DWI prosecutions involves the convictions in *State v. Jones*<sup>7</sup> and *State v. Blackwell*,<sup>8</sup> where both defendants were charged with and found guilty of first degree felony-murder in accordance with G. S. 14-17.<sup>9</sup> Both defendants received a sentence of life in prison without parole for their actions,<sup>10</sup> and as such they are the only individuals in the United States to be punished with such severity.<sup>11</sup> While North Carolina has positively contributed toward a decline in DWI fatalities,<sup>12</sup> the charges and convictions of Jones and Blackwell are an over-expansion of the felony-murder rule. These convictions violate the United States Constitution and contravene the intent of the North Carolina General Assembly.<sup>13</sup>

This Comment begins with an overview of the facts and convictions in *Jones* and *Blackwell*, specifically the North Carolina appellate decision to uphold Jones' conviction for felony-murder. Section II will focus on the felony-murder rule, from historical beginning to modern day application. In particular, North Carolina's use of first degree felony-murder will be examined. Finally,

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Wagner *Drunken Driving; Bill Targets 'Hard-Core' Offenders*, Dayton Daily News, April 30, 1999 at 3-B. (Ohio lawmakers have passed legislation that increases punishment on hard-core drunk drivers.); See generally Editorial, *Smile for the camera*, Globe and Mail, May 26 1998 A-18.

5. See Herman Clark, *A Fix for Drunken Drivers: Interlock 'em Out*, The News & Observer (Raleigh, NC), May 13, 1998 page unavailable. (Stating that North Carolina has one of the toughest DWI laws in the nation.) See generally Christina Nifong, *Even Stricter on Drunk Driving Congress Blocks Tougher Drunk-Driving Law For Now. But State Efforts Gather Speed*, Christian Science Monitor, April 2, 1998 A-2.

6. *Id.* at A-2.

7. *State v. Jones*, 516 S.E.2d 405, 407 (N.C. App. 1999).

8. *State v. Blackwell*, 97 CRS 6391, Durham County, North Carolina (March 16, 1998).

9. See *supra* notes 7-8.

10. *Id.*

11. See *infra* note 293.

12. The percentage for alcohol fatalities has declined for years, in 1982 there were 25, 165 alcohol-related fatalities and in 1995 there were 17,274 fatalities attributable to alcohol. It is quite possible that North Carolina's strong punishments for DWI's has been an important factor in this 16.2 % decrease in alcohol fatalities. See Associated Press, *Alcohol and Traffic Fatalities*, USA Today, May, 7, 1997 at A-3.

13. See *infra* section III and accompanying notes 197-220.

Section III will explain the ramifications the *Jones* and *Blackwell* verdicts have on felony-murder convictions. Specifically, Section III explains how using DWI fatalities to satisfy felony-murder convictions is a violation of the Eighth and Fourteenth Amendments, and the intent of the North Carolina General Assembly.

This Comment argues that using a traffic fatality to satisfy the felony-murder rule is inappropriate. When the State prosecutes a DWI fatality under the felony murder rule, it diminishes the concept of an ancient doctrine. If it is the goal of the State to give life sentences or the death penalty for DWI fatalities, then it is the responsibility of the North Carolina General Assembly to enact a statute specifically dictating such punishment rather than the court judicially imposing the punishment through their interpretation of the felony-murder rule.

### I. *JONES* AND *BLACKWELL*: THE FACTS

#### A. *State v. Jones*

Thomas Richard Jones of Statesville, North Carolina, began drinking at age 12.<sup>14</sup> After having his leg amputated in a lawn mower accident, Jones began using pain killers in combination with alcohol.<sup>15</sup> Jones would frequently drive after combining drugs and alcohol and this behavior resulted in several convictions for driving while intoxicated.<sup>16</sup> On the night of September 4, 1996, Jones had been drinking at two different bars<sup>17</sup> and like many nights in the past, Jones took his pain medication while drinking alcohol before he began the drive home.<sup>18</sup> As Jones drove his truck down Polo road in Winston Salem, North Carolina, his automobile crashed into a Mazda hatchback carrying several students from Wake Forest University.<sup>19</sup> Although Jones received

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14. Ann Sjoerdsma, *Murder Conviction of Drunk Driver Sends Wrong Message, We Need to Do More to Educate - Not Scare Ourselves, Parents and Children About Alcoholism and Other Substance Abuse. We Need to Try Harder to Intervene In Lives Before it's Too Late.*, *Virginian Pilot and Ledger Star*, May 26, 1997, at A2.

15. *Id.*

16. *Jones*, 516 S.E.2d at 405.

17. *Id.*

18. *Id.* at 408.

19. *Id.*

minor injuries, two of the passengers in the Mazda were killed, specifically Mai Witz, age 19 and Julie Hanson, age 19.<sup>20</sup>

On the night of the accident Jones' blood alcohol level was .046,<sup>21</sup> almost half North Carolina's legal limit of .08.<sup>22</sup> Still, Jones was charged with driving while intoxicated.<sup>23</sup> Under G. S. 20-138.1, North Carolina's drunk driving statute, if the State can prove that an individual was sufficiently impaired as to be unfit to drive an automobile then the State can obtain a conviction for DWI even when a defendant's blood alcohol level is below the legal limit.<sup>24</sup> Thus, the use of pain killers in combination with the use of alcohol was enough to render Jones unfit to drive an automobile.<sup>25</sup>

Jones' DWI charge was elevated to habitual impaired driving because Jones had received three prior DWI convictions within a seven year period.<sup>26</sup> Jones was also charged with assault with a

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20. Associated Press, *Hunt Signs Tougher Drunken Driving Bill*, Greensboro News and Record, Aug. 8, 1997, at A2.

21. *Jones*, 516 S.E.2d at 408.

22. *State v. Crawford*, 125 N.C. App. 279, 480 S.E.2d 422 (1999) (Holding that under N.C. Gen. Stat. § 20-138.1(a) (1993) to be guilty of driving while impaired, a person must drive a vehicle upon a highway, street, or public vehicular area within this State while under the influence of an impairing substance or after having consumed sufficient alcohol to have a blood alcohol concentration of .08 or more at any relevant time after driving.).

23. *Jones*, 516 S.E.2d at 408.

24. *See State v. Harrington*, 78 N.C. App. 39, 336 S.E.2d 852 (1985). (Holding that under N.C. Gen. Stat. § 20-138.1 the State may prove that defendant was driving while impaired where defendant's blood alcohol content is entirely unknown or less than 0.10.); *See also State v. Sigmon*, 74 N.C. App. 479 (1985) (The court held that a blood alcohol content of 0.06 did not create the presumption that a defendant was not impaired and thus the court affirmed the conviction based on the opinion of the arresting officer.).

25. *See supra* note 21 at 405 (Also found in Jones' blood were several substances which have an effect of impairing an individual. Jones' blood specimen contained Barbiturates, Benzodiazepine, and Oxycodone. The barbiturate derivative detected was Butalbital. Butalbital causes drowsiness, sedation, and ataxia. Alpraxolam (Xanax) is a benzodiazepine which is effective at very low doses. Common side effects of Xanax include drowsiness and fatigue. Oxycodone is a DEA Schedule II controlled semi-synthetic narcotic. Oxycodone is used to control pain associated with injuries. Andrew Mason, Ph.D. a forensic Toxicologist, tested the specimen and stated with reasonable scientific certainty the subject's alertness, judgment, perception, coordination, and response time and sense of care and caution were impaired to and beyond the point of rendering him unfit to operate a motor vehicle safely.).

26. *See State v. Ellis*, 130 N.C. App. 596, 504 S.E.2d 787 (1998) (citing N.C. Gen. Stat. § 20-138.5(a) (1995 & Supp. 1998) which states that "A person

deadly weapon inflicting serious injury for each passenger who survived the accident.<sup>27</sup> For the death of Megan and Mai, the two Wake Forest students, Jones was charged with felony-murder under North Carolina's first degree murder statute, G. S. 14-17.<sup>28</sup> On May 7, 1997, a jury found Jones guilty on both counts of felony-murder.<sup>29</sup> Jones received two consecutive life sentences without parole,<sup>30</sup> becoming the first individual in the United States to be convicted of first degree felony-murder arising out of a DWI fatality.<sup>31</sup> Jones' conviction at trial was only the beginning. On June 15, 1999, the North Carolina Court of Appeals upheld the trial verdict in *Jones* in a two to one decision.<sup>32</sup>

In *Jones*, the majority opinion began with an analysis of North Carolina's first degree felony-murder statute, G. S. 14-17.<sup>33</sup> Specifically, the elements of assault with a deadly weapon inflicting serious injury, the underlying felony, was the focus of the majority opinion.<sup>34</sup> The court defined assault as "an overt act or attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to another person."<sup>35</sup> A deadly weapon was defined by the court as any "article, instrument or substance which is likely to produce

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commits the offense of habitual impaired driving if he drives while impaired and has been convicted of three or more offenses involving impaired driving within seven years of the date of the current offense."); See generally, Editorials, *Tougher DWI Should Save Lives, Too Many Repeat Offenders Are Allowed To Remain Behind The Wheel*, Greensboro News and Record, Aug. 2, 1997, at A3.

27. *Jones*, 516 S.E.2d at 405.

28. *Id.* at 406; See also N.C. Gen. Stat. § 14-17 (1995) stating that a homicide "committed in the perpetration or attempted perpetration of any arson, rape, or sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed murder in the first degree."

29. *Jones*, 516 S.E.2d at 406; See also Amanda Garrett and Dan Kane, *Jury Finds Blackwell Guilty of Murder in DWI Case*, Greensboro News and Record, April 17, 1998, at A2.

30. *Jones*, 516 S.E.2d at 407.

31. Sjoerdsma, *supra* note 14.

32. *Id.*

33. *Jones*, 516 S.E.2d at 405.

34. *Id.* at 407 (The Court defines assault with a deadly weapon as (1) An assault; (2) with a deadly weapon; (3) inflicting serious injury; and (4) not resulting in death. See N.C. Gen. Stat. § 14-32(b) (1993)).

35. *Id.* (citing *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967)).

death or great bodily harm.”<sup>36</sup> The court in *Jones* explained that an automobile which is driven in a dangerous manner can be a deadly weapon<sup>37</sup> and that a “driver who operates an automobile in such a manner that it is a deadly weapon can be convicted of assault with a deadly weapon inflicting serious injury if the driver . . . commits a culpably or criminally negligent act from which such intent may be implied.”<sup>38</sup> Culpable criminal negligence may be satisfied by “the violation of a safety statute which results in injury or death.”<sup>39</sup> With this analysis, the North Carolina Court of Appeals held that Jones’ actions clearly satisfied a conviction for assault with a deadly weapon inflicting serious injury.<sup>40</sup> By finding a valid conviction for the underlying felony, the court held that when applied to the language of North Carolina’s first-degree felony-murder statute, Jones’ actions also supported a conviction for felony-murder.<sup>41</sup>

*Jones* was the first case in the United States where first degree murder was charged in a traffic fatality. However, the *Jones* verdict is not an isolated case. Soon thereafter, North Carolina used a DWI fatality to satisfy first degree felony-murder in the case of *State v. Blackwell*.<sup>42</sup>

### B. *State v. Blackwell*

On the morning of March 6, 1997, Timothy Earl Blackwell of Durham County, North Carolina, was unexpectedly called into work after a night of drinking alcohol and little sleep.<sup>43</sup> Blackwell soon left the job site to consume more alcohol.<sup>44</sup> While driving down Guess Road in Durham, North Carolina, a truck driver noticed Blackwell’s inability to stay in his own lane of traffic.<sup>45</sup>

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36. *Id.* (citing *State v. Torain*, 316 N.C. 111, 120, 340 S.E.2d 465, 470 (1986) (quoting *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981))).

37. *Id.* (citing *State v. Sudderth*, 184 N.C. 753, 755, 114 S.E. 828, 829-30 (1922)).

38. *Id.* (citing *State v. Eason*, 242 N.C. 59, 65, 86 S.E.2d 774, 778 (1955)).

39. *Jones*, 516 S.E.2d at 407 (citing *State v. Hancock*, 248 N.C. 432, 435, 103 S.E.2d 491, 494 (1958)).

40. *Id.* at 409.

41. *Id.*

42. *State v. Blackwell*, 97 CRS 6391, Durham County, North Carolina (March 16, 1998)

43. *Id.* at 2.

44. *Id.*

45. Paul Bonner, *This Guy’s Going to Kill Somebody*, Durham Herald Sun, March 6, 1997, at A10. Tom Pruitt was driving directly behind Timothy

The truck driver quickly contacted the City of Durham police dispatch,<sup>46</sup> but officers were unable to intercept Blackwell until after he had collided with two automobiles.<sup>47</sup>

The first automobile Blackwell hit was driven by Sherry Dail.<sup>48</sup> After impact, Blackwell's truck then continued past Mrs. Dail's automobile until it collided with the car directly behind Mrs. Dail, a car driven by her husband Gregory Dail.<sup>49</sup> The Dail's three children Megan, age four, Austin, age two, and Joshua, age one were inside Mr. Dail's automobile.<sup>50</sup> Although Mrs. Dail and her husband received only minor injuries as a result of the accident,<sup>51</sup> two of the Dail children received more severe injuries and Megan, the oldest child, was killed.<sup>52</sup>

Blackwell was charged with DWI<sup>53</sup> for driving a vehicle with a blood alcohol level over the legal limit.<sup>54</sup> Like *Jones*, Blackwell's DWI charge was elevated to habitual impaired driving for having three prior DWI convictions within a seven year period.<sup>55</sup>

Blackwell when he saw Blackwell cross over the center lane and strike a mailbox. Blackwell then swerved back into his proper lane and continued to weave his automobile as he proceeded toward the Durham city limits.

46. *Id.* Pruitt used his cellular phone to contact police dispatch after seeing Timothy Blackwell cross the center line of the road.

47. *Id.* Because Blackwell crossed into county jurisdiction while driving down Guess Road, Pruitt's call was subsequently transferred from city police to county police. This switch took approximately two minutes.

48. Amanda Garrett, *Medical Testimony Offered*, *The News and Observer*, Raleigh, North Carolina, April 2, 1998 at B4.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* Joshua and Austin received lacerations to the head while Megan's spinal column was severed at the base of the neck. Medical testimony was offered that were it not for quick resuscitation by Megan's parents the child would have been pronounced dead at the scene of the accident.

53. N.C. Gen. Stat. § 20-138.1 (1995).

54. *State v. Blackwell*, 97 CRS 6391, Durham County, North Carolina (March 16, 1998) (Also found in Blackwell's blood alcohol were substances similar to Jones which have the effect of impairing one's ability to drive); *See also* Associated Press, *Verdict: 1<sup>st</sup>-Degree Murder In DWI Case Timothy Blackwell Was Found Guilty and Now Faces a Life Sentence After Driving Drunk and Killing a 4-Year-Old*, *Orlando Sentinel*, April 17, 1998 at A9.

55. *See State v. Blackwell*, 97 CRS 4860, Durham County, North Carolina (Feb. 23, 1996); *State v. Blackwell*, 93 CRS 4801, Durham County, North Carolina (Feb. 22, 1996); *State v. Blackwell*, 93 CR 5214, Durham County, North Carolina (Dec. 23, 1993); *State v. Blackwell*, 93 CR 287,88, Durham County, North Carolina (Dec. 31, 1992); *State v. Blackwell*, 92 CR 10248, Durham County, North Carolina (April 17, 1992) (each resulting in a DWI conviction).



Blackwell was charged with four counts of assault with a deadly weapon inflicting serious injury for the injuries sustained by the living members of the Dail family.<sup>56</sup> For the death of Megan Dail, Blackwell was charged with first-degree felony-murder.<sup>57</sup>

On April 16, 1998, a jury found Blackwell guilty of habitual DWI, one charge of assault with a deadly weapon inflicting serious injury, and felony-murder.<sup>58</sup> Blackwell became the second individual in the United States to receive a mandatory life sentence without the possibility of parole for a DWI fatality, approximately one year after the sentencing in the *Jones* case.<sup>59</sup> Currently, Blackwell's case is pending review by the North Carolina Court of Appeals.<sup>60</sup>

Factually, *Jones* and *Blackwell* are almost identical. Jones and Blackwell both received multiple convictions for driving while intoxicated and their consumption of prescription drugs and alcohol while attempting to drive resulted in a traffic accident where someone else was killed. At trial, both defendants were convicted of felony-murder where the underlying felony of assault with a deadly weapon inflicting serious injury was satisfied by the use of a motor vehicle. With little difference in the facts and charges, the appellate decision in *Blackwell* will likely be the same as that in *Jones*. The verdicts in *Jones* and *Blackwell* are cases of first impression in North Carolina as well as in the entire United States. As the North Carolina Supreme Court reviews the validity of these decisions, a proper examination of the history of the felony-murder rule must be undertaken. Specifically, the history and application of the felony-murder rule in North Carolina must be examined to determine the constitutionality of the convictions and subsequent sentences in *Jones* and *Blackwell*.

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56. See also Associated Press, *Verdict: 1<sup>st</sup>-Degree Murder In DWI Case Timothy Blackwell Was Found Guilty and Now Faces a Life Sentence After Driving Drunk and Killing a 4-Year-Old*, Orlando Sentinel, April 17, 1998 at A9.

57. *Id.*

58. State v. Blackwell, 97 CRS 6391, Durham County, North Carolina (March 16, 1998); See also Associated Press, *Verdict: 1<sup>st</sup>-Degree Murder In DWI Case Timothy Blackwell Was Found Guilty and Now Faces a Life Sentence After Driving Drunk and Killing a 4-Year-Old*, Orlando Sentinel, April 17, 1998 at A9.

59. See Associated Press, *Verdict: 1<sup>st</sup>-Degree Murder In DWI Case Timothy Blackwell Was Found Guilty and Now Faces a Life Sentence After Driving Drunk and Killing a 4-Year-Old*, Orlando Sentinel, April 17, 1998 at A9.

60. *Id.*

## II. FELONY-MURDER: AN OVERVIEW

The felony-murder rule states that if a death results in the course or commission or attempted commission of a felony, the defendant is guilty of homicide.<sup>61</sup> The felony-murder rule holds those who commit the most severe felonies responsible for the death of an individual as if the death was an intended act of the defendant.<sup>62</sup> The definition and application of the felony-murder rule has changed very little from its ancient roots in the English common law. Yet, the beginnings of this rule are on the fringe of legal jurisprudence.<sup>63</sup> Many states have reduced the scope of this ancient doctrine because the felony-murder rule may have been improperly created.<sup>64</sup> North Carolina, like the majority of the states in the U.S. has been a part of this movement.<sup>65</sup> However, *Jones* and *Blackwell* may represent a judicial trend toward increasing the scope of the felony-murder rule.<sup>66</sup> With this expansion comes criticism, forcing those in favor of the felony-murder rule to find additional reasons for its continued use.<sup>67</sup>

### A. History of Felony-Murder

The felony-murder rule has been traced to the 16<sup>th</sup> century case of *Lord Dacres*.<sup>68</sup> *Lord Dacres* involved the death of a gamekeeper by unlawful hunters.<sup>69</sup> Lord Dacres and his companions agreed to enter into a park, without permission, to hunt and to kill anyone who opposed their hunting.<sup>70</sup> While in the park, one of Lord Dacres companions killed a gamekeeper.<sup>71</sup> Even

61. Wayne R. Lafave and Austin W. Scott, *Criminal Law* § 7 (Student ed. 2nd. 1986).

62. See *State v. Casper*, 219 N.W.2d 226 (Neb. 1974).

63. See *infra* note 86. The early form of the felony-murder rule probably went unchallenged because during the 18<sup>th</sup> century virtually all felonies were punishable by death.

64. *Id.*

65. See *infra* notes 99-105. Today North Carolina's felony-murder rule can only be satisfied with the use of rape, robbery, kidnapping, burglary, arson, or any felony committed with the use of a deadly weapon.

66. *Jones* and *Blackwell* are cases of first impression in the United States.

67. See *infra* notes 133-136. The justifications for the continued existence of the felony-murder rule include deterrence, retribution, transferred intent, and prosecutorial efficiency.

68. *Lord Dacres*, 72 Eng. Rep. 458 (K.B. 1535). See George P. Fletcher, *Reflections on Felony-Murder*, 12 Sw. U. L. Rev. 413 (1981).

69. *Dacres* at 458.

70. *Id.*

71. *Id.*

though Lord Dacres was not present when the killing occurred, he, along with his companions, was convicted of murder and was subsequently hanged.<sup>72</sup> While this case has been recognized as the first use of the felony-murder rule, the case actually has little if anything to do with the concept.<sup>73</sup> Indeed, it has been stated that “[t]he holding was not that Lord Dacres and his companions were guilty of murder because they had joined in an unlawful [act] in the course of which a person was killed, but rather that those not present physically at the killing were held liable as principles on a theory of constructive presence.”<sup>74</sup>

A second case cited as a foundation for the felony-murder rule is *Mansell & Herbert’s* case.<sup>75</sup> *Mansell* involved the death of an unarmed woman, who was an innocent bystander during a quarrel between Herbert and Mansell.<sup>76</sup> Specifically, Herbert and a large group of followers went to Sir Mansfield’s house to seize goods that Herbert lawfully owned.<sup>77</sup> At Sir Mansell’s home, one of Herbert’s servants intentionally threw a stone at one person, but accidentally hit a woman who was coming out of Mansell’s house.<sup>78</sup> The innocent woman later died from head injuries resulting from the stone throw.<sup>79</sup> Like Lord Dacres, Herbert received the death penalty. The majority held that if one deliberately performed an act of violence to third parties, and a person unintentionally hurt died, it was murder regardless of any mistake or misapplication of force.<sup>80</sup> Again, this case can not be used to justify the felony-murder rule. *Mansell* involved a deliberate act of

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72. *Id.*

73. *People of Michigan v. Aaron*, 299 N.W. 2d 304, 307 (Mich. 1980).

74. *Id.*

75. *Mansell*, 73 Eng.Rep. 279 (KB 1558). See generally James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 Wash. & Lee L. Rev. 1429 (1994); Michael J. Roman, “Once More Unto the Breach, Dear Friends, Once More”: A Call to Re-Evaluate the Felony-Murder Doctrine in the Wake of *State v. Oimen* and *State v. Rivera*, 77 Marq. L. Rev. 785 (1985); and Larry Kramer, *Jurisdiction Over Interstate Felony Murder*, 50 U. Chi. L. Rev. 1431 (1983).

76. See generally James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 Wash. & Lee L. Rev. 1429 (1994).

77. Tomkovicz, 51 Wash. & Lee L. Rev. at 1442.

78. *Id.*

79. *Id.*

80. See J. M. Kaye, *The Early History of Murder and Manslaughter*, Part II, 83 L. Quarterly Rev. 569, 578-579, 593 (1967); see also, *King v. Borthwick*, 1 Dougl. 207, 212; 99 Eng.Rep. 136, 138-139 (KB, 1779).

violence against a person which resulted in an unintended person being the recipient of a violent act, not an unintended death in the commission of a felony.<sup>81</sup>

Sir Edward Coke, often considered the greatest jurist of the seventeenth century,<sup>82</sup> served as the Attorney General of England for twelve years.<sup>83</sup> During his period of service, Coke used *Dacres* and *Mansell* as the basis for his decree regarding the felony-murder rule.<sup>84</sup> Despite a lack of authority Coke's decree has evolved into common law felony-murder.<sup>85</sup> Perhaps Coke's early form of the felony-murder rule went unchallenged because virtually all felonies were punishable by death in the 18<sup>th</sup> century.<sup>86</sup>

As case law evolved into the Nineteenth Century, English courts began to limit the use of the felony-murder rule<sup>87</sup> and in 1957, England abolished the felony-murder rule altogether.<sup>88</sup> Yet, the abolishment of the felony-murder rule had no effect on the

81. See Kaye, 83 L. Quarterly Rev. at 578 (Noting that the throwing of the stone was not a careless act because the servant who threw the stone intended to hit at least, if not kill some person on Mansfield's side.)

82. See Brian P. Levack, *Possession, Witchcraft, and the Law in Jacobean England*, 52 Wash. & Lee. L. Rev. 1613 (1995).

83. See Edward Foss, *A Biographical Dictionary of the Judges of England from the Conquest to the Present Time 1066-1870*, at 178 (London, John Murray 1870).

84. Coke, *Third Institutes* at 56 (1797) (stating that "[i]f the act be unlawful it is murder. As if A meaning to steale a deere in the park of B, shooteth at the deer, and by the glance of the arrow killeth a boy that is hidden in a bush: this is murder, for that the act was unlawful, although A had no intent to hurt the boy, nor new not of him. But if B the owner of the park had shot at his own deer, and without any ill intent had killed the boy by the glance of his arrow, this had been homicide by misadventure and no felony. So if one shoot at any wild fowle upon a tree and the arrow killeth any reasonable creature afar off, without any evil intent in him, this is per infortuniam (misadventure): for it was not unlawful to shoot at the wilde fowle: but if he had shot at a cock or hen, or any tame fowle of another mans, and the arrow by mischance had killed the man, this had been murder, for the act was unlawful.").

85. 3 Stephen, *A History of the Criminal Law of England* at 58 (London, Macmillan, 1883) (stating "[t]his is not distinguished by any statute but is the common law only of Sir Edward Coke.").

86. See Rollin M. Perkins, *A Reexamination of Malice Aforethought*, 43 Yale L. J. 537, 542-543 (1934).

87. Sidney Prevezer, *The English Homicide Act: A New Attempt to Revise the Law of Murder*, 57 Colum. L. Rev. 624, 635 (1957).

88. Section 1 of England's Homicide Act, 1957, 5 & 6 Eliz. 2, c.11, § 1. The act states that "a killing occurring in a felony-murder situation will not amount to murder unless done with the same malice aforethought as is for all other murder." *Id.*

United States who borrowed the felony-murder rule from England in 1776.<sup>89</sup>

In the United States, only four states have abolished the felony-murder rule. Those states are Hawaii,<sup>90</sup> Kentucky,<sup>91</sup> Ohio,<sup>92</sup> and Michigan.<sup>93</sup> All states though have limited the rule in some form. The Model Penal code lists several generalized limitations imposed by American courts on the use of the felony-murder rule.<sup>94</sup> Indeed, courts have noted that “[t]he modifications and

89. See generally, *People v. Burroughs*, 678 P.2d 894, 903-04 (Cal. 1984).

90. In Hawaii’s murder statute, Hawaii Rev. Stat. § 707-701 (1998), the commentary speaks of why Hawaii abolished felony murder. It states;

Even in its limited formulation of the felony-murder rule [it] is still objectionable. It is not sound principle to convert an accidental, negligent, or reckless homicide into a murder simply because, without more, the killing was in furtherance of a criminal objective of some defined class. In recognition of the trend toward, and the substantial body of criticism supporting the abolition of the felony-murder rule, and because of the extremely questionable results which the rule has worked in other jurisdictions, the Code has eliminated from our law the felony-murder rule.

91. Ky. Rev. Stat. § 507.020 (1998).

92. Ohio Rev. Code Ann. § 2903.04 (1999). The code states that “[m]anslaughter by definition does not require malice. As the primary purpose of the felony-murder rule is to supply malice from the underlying felony, the rule has no usefulness as such in Ohio.” *Id.*

93. *People v. Aaron*, 299 N.W.2d 304 (Mich. 1980) (Stating that “[w]hatever reasons can be gleaned from the dubious origin of the felony-murder rule to explain its existence, those reasons no longer exist today. Today we exercise our role in the development of common-law by abrogating the common-law felony-murder rule.”).

94. The first limitation to felony-murder is that the felonious act must be dangerous to human life. See *Commonwealth v. Bowden*, 309 A.2d 262 (Pa. 1967); *Jenkins v. State*, 230 A.2d 262 (Del. 1967); *State v. Moffitt*, 431 P.2d 879 (Kan. 1967), *overruled by State v. Underwood*, 615 P.2d 153 (Kan. 1980); and *People v. Pavlic*, 199 N.W. 373 (Mich. 1978). Second, the homicide must be a natural and probable consequence of the felonious act. See *State v. Glover*, 50 S.W.2d 1049 (Mo. 1932); *People v. Scott* 185 N.W.2d 576 (Mich. App. 1971); and *State v. Muldin*, 529 P.2d 124 (Kan. 1974). Third, the felony must be *malum in se*, meaning a wrong in itself; an act or case involving the illegality from the very nature of the transaction, upon principles of natural, moral, and public law. *State v. Shedoudy*, 118 P.2d 280, 287 (N.M. 1941); and *Ginderstaff v. State*, 377 S.W.2d 921, 926 (Tenn. 1964). An act is said to be *malum in se* when it is inherently and essentially evil, that is, immoral in its nature and injurious in its consequence, without any regard to the fact of its being noticed or punished by the law of the state. Such are most of the offenses cognizable at common law (without denouncement of a statute). Fourth, the act must be a common-law felony. See e.g. *Commonwealth v. Exler*, 89 A. 968 (Pa. 1914); and *State v.*

restrictions upon the common law felony-murder doctrine . . . reflect a dissatisfaction with the harshness and injustice of the rule."<sup>95</sup> While the felony-murder rule continues to exist in most states, it has become less like the common law concept.<sup>96</sup> Most states have placed stringent limitations on the scope and importance of the felony-murder rule, which suggests that felony-murder may have no purpose in the United States.<sup>97</sup>

North Carolina used the common law form of the felony-murder rule for more than a hundred years.<sup>98</sup> In 1893, the General Assembly of North Carolina codified common law felony-murder into statutory felony-murder.<sup>99</sup> In *State v. Thompson*,<sup>100</sup> the North Carolina Supreme Court interpreted the statute narrowly,<sup>101</sup> holding it only applied to homicides that occurred during the commission of one of several enumerated felonies.<sup>102</sup> The enumerated felonies included arson, rape, robbery, burglary, and felonies creating a "substantial foreseeable human risk and actually

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Burrell, 199 A.2d 18 (N.J. Err. App. 1928). Fifth, the period during which the felony is in the process of commission must be narrowly construed. *See e.g.* *People v. Archie Smith*, 222 N.W.2d 172 (Mich. App. 1974); *People v. Walsh*, 186 N.E. 422 (N.Y. 1933) overruled in part by *People v. Rosario*, 173 N.E.2d 881 (N.Y. 1961); and *State v. Taylor*, 139 So. 463 (La. 1931). Lastly, the underlying felony must be independent of the homicide. *See e.g.* *State v. Garrett*, 573 S.W.2d 543 (Tex. Crim. App. 1978).

95. *People v. Aaron*, 299 N.W.2d 304, 316 (Mich. 1980).

96. *Id.*

97. *Id.*

98. *State v. Covington*, 117 N.C. 834, 865, 23 S.E. 337, 353 (1895) Under North Carolina's common-law form of felony-murder, a killing committed in the perpetration or attempted perpetration of a felony constituted murder.

99. *See* Act of Feb. 11, 1893, ch. 85, 1893 N.C. Sess. Laws 76, 76-77 (In 1893, the General Assembly divided murder into two degrees, felony-murder was placed in the first degree and was then treated as premeditated murder for punishment purposes.); *See State v. Davis*, 305 N.C. 400, 422, 290 S.E.2d 574, 588 (1982); *State v. Streeton*, 231 N.C. 301, 305, 56 S.E.2d 649, 652 (1949); (Under common law, murder was not classified in degrees, rather all killings with malice aforethought were treated as murder). After the 1893 statute was created, first-degree murder was used to single out the more atrocious killings. *See* Act of Feb. 11, 1893, ch. 85, 1893 N.C. Sess. Laws 76, 76-77 (1893) (codified as amended at N.C. Gen. Stat. §14-17 (Supp.1997)); Murder in the first degree was punishable by death while murder in the second degree was punishable by imprisonment. *See State v. Dalton*, 178 N.C. 779, 783, 101 S.E. 548, 549-550 (1919).

100. *State v. Thompson*, 280 N.C. 202, 185 S.E.2d 666 (1972).

101. *Id.* at 671.

102. *Id.*

resulting in the loss of life.”<sup>103</sup> In 1977, the North Carolina General Assembly further limited the scope of the felony-murder rule by amending G. S. 14-17.<sup>104</sup> In the 1977 amendments, kidnapping was added to the list of enumerated felonies and the broad category of felonies creating a “substantial foreseeable human risk and actually resulting in the loss of life” was replaced with “felonies committed or attempted with the use of a deadly weapon.”<sup>105</sup>

North Carolina, like the majority of states, has continually limited the felony-murder rule by statute;<sup>106</sup> however, *Jones* and *Blackwell* show that North Carolina is far from abolishing the felony-murder rule. In fact, the convictions of *Jones* and *Blackwell* have actually expanded the use of felony-murder, specifically in the area of DWI fatalities.<sup>107</sup> Arguably, this expansion is beyond the scope of North Carolina’s felony-murder statute. Proper interpretation of G.S.14-17 should give the North Carolina Supreme Court a viable reason to limit the scope of first-degree felony-murder. The North Carolina Supreme Court should limit the Court of Appeals’ interpretation of the scope of G.S. 14-17 by holding that a traffic fatality when prosecuted as assault with a deadly weapon cannot satisfy the elements of the felony-murder rule.

### B. *Felony-Murder: The Elements*

The elements of most crimes are divided into two categories, *mens rea* and *actus reas*.<sup>108</sup> *Mens rea* is the mental requirement necessary for the commission of the crime, generally stated as the “intent” requirement.<sup>109</sup> *Actus reas* is the wrongful act or “action”

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103. *State v. Swift*, 290 N.C. 383, 408, 226 S.E.2d 652, 699 (1976) (*Swift* lists several felonies that are considered inherently dangerous to life, this list includes breaking, entering, and larceny; robbery; escape from prison; kidnapping; and arson.). This inferred limitation ensured that murder liability could attach only to sufficiently violent acts involving the potential for loss of life. See also Erwin S. Barbre, Annotation, *What Felonies are Inherently Dangerous to Human Life for Purposes of Felony-Murder Doctrine*, 50 A.L.R.3d 397 (1973) (giving an overview of the various felonies which are inherently dangerous to human life in the context of felony-murder).

104. *Jones*, 516 S.E.2d at 409.

105. Act of May 19, 1977, ch. 406, § 1, 1977 N.C. Sess. Laws 407 (codified as amended at N.C. Gen. Stat. § 14-17 (1986)).

106. See *supra* note 88-90.

107. See *infra* section III and accompanying notes.

108. Wayne R. Lafave and Austin W. Scott, *Criminal Law*, § 6.7 at 586 (2<sup>nd</sup> ed. 1986).

109. *Id.*

necessary for the criminal commission.<sup>110</sup> Certain crimes require that a specific result accompany the *mens rea* and *actus reas* and when a specific result is necessary, the state prosecutor must also show causation.<sup>111</sup> These general principles do not apply to the felony-murder rule. Because felony-murder statutes may vary from state to state, the explanation of the elements of the felony-murder rule will focus on the common law form of felony-murder. In particular, North Carolina's use of common law felony-murder will be emphasized.

Common law felony-murder states that if a death results in the course or commission or attempted commission of a felony, a defendant is guilty of homicide.<sup>112</sup> Unlike other crimes dealing with homicide, there is no *mens rea* requirement for the resulting death.<sup>113</sup> The only required *mens rea* for felony-murder comes from the underlying felony.<sup>114</sup> However, to accomplish this transfer of intent there must exist a causal relationship between the homicide and the underlying felony.<sup>115</sup> This causal relationship is usually satisfied by a finding that death was a foreseeable result of the underlying felony.<sup>116</sup> Simply put, if an individual intends to commit a felonious act, conscious of the inherent risk of death to another, he will be held responsible under the felony-murder rule for a resulting death as if he intended the death.<sup>117</sup>

In North Carolina, the felony-murder rule functions like common law felony-murder by transferring the intent from the underlying felony to the murder charge; however, North Carolina has limited the felonies which may be used to base the murder conviction on,<sup>118</sup> which are rape, robbery, kidnapping, arson, burglary or any felony committed or attempted with the use of a deadly weapon.<sup>119</sup>

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110. *Id.*

111. *Id.* As an example, in crimes that require the death of an individual, the district attorney must also show that the defendant's actions are the cause of the homicide.

112. *Id.*

113. See Lafave and Scott, *Criminal Law* at 586.

114. See generally *United States v. Kayarath*, 962 F. Supp. 1399, 1401 (D. Ka. 1997).

115. See *State v. Price*, 344 N.C. 583, 588 (1996).

116. *Id.* See generally *State v. Casper*, 219 N.W.2d 226 (Neb. 1974); See also *State v. Amaro*, 436 So. 2d 1056 (Fla. Dist. Ct. App. 1983).

117. *Id.*

118. *Jones*, 516 S.E.2d at 409.

119. *Id.*



A final aspect of the felony-murder rule typically not codified in felony-murder statutes, is the merger doctrine.<sup>120</sup> The merger doctrine limits the charges that an individual can be sentenced for under a felony-murder conviction.<sup>121</sup> In its application, the merger doctrine prevents the state from giving an additional sentence for the underlying felony being used to satisfy the felony-murder conviction.<sup>122</sup> To illustrate, an individual who robs a bank and kills someone in the process of the robbery, if convicted of felony-murder, will not receive a separate sentence for the robbery.<sup>123</sup>

A second variation of the merger doctrine applies to *Jones* and *Blackwell* under the prohibition against double jeopardy.<sup>124</sup> Double jeopardy forbids twice charging or convicting an individual for the same offense.<sup>125</sup> When *Jones* and *Blackwell* were charged with felony-murder, the State could not charge them with assault with a deadly weapon inflicting serious injury for the death of each passenger killed. The assault upon the deceased victim merged into the felony-murder charge. If the State charged *Jones* or *Blackwell* with assault with a deadly weapon for each of the victims who died, it would have violated the rule against double jeopardy.<sup>126</sup> Applying double jeopardy to *Jones* and *Blackwell*, the assault on each of the deceased victims merged into the felony-murder charge. This is an important concept that directly effects the reckless motorist. For the reckless motorist, there must be a passenger in the victim's car for the state to attempt a felony-murder conviction. If there is no passenger in the deceased victim's car, there cannot be a separate assault with a deadly weapon

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120. In North Carolina the state may not punish both for the underlying felony which constitutes an essential element and the felony-murder. See *State v. Martin*, 309 N.C. 465, 308 S.E.2d 277 (1983); and *State v. Williams*, 284 N.C. 67, 199 S.E.2d 409 (1973); *State v. Thompson*, 280 N.C. 202, 185 S.E.2d 666 (1972). This result has been referred to as the "merger rule." See *State v. Silhan*, 302 N.C. 223, 262-63, 275 S.E.2d 450, 478 (1981); *State v. Jeffries*, 55 N.C.App. 269, 290, 285 S.E.2d 307, 320 (1982).

121. *State v. Silhan*, 302 N.C. 223, 262-63, 275 S.E.2d 450, 478 (1981).

122. *Id.*

123. *Id.*

124. See generally *State v. Lea*, 126 N.C. App. 440, 485 S.E.2d. 874 (1997).

125. *Id.*

126. See *Harris v. Oklahoma*, 433 U.S. 682 (1977) (holding that when one defendant was convicted of felony murder based on his co-defendant's killing in the course of an armed robbery, the Double Jeopardy Clause of the Fifth Amendment barred a separate prosecution of the defendant for the lesser crime of armed robbery).

charge. Without a separate assault to base the felony-murder on, second degree murder is the highest conviction the State can seek, no matter how egregious the death.<sup>127</sup> This appears disproportionate. Such disproportionality is an example of the criticism that surrounds the continued existence of the felony-murder rule. As the debate over the use of the felony-murder rule continues to flourish,<sup>128</sup> proponents of the rule are forced to find satisfactory legal justifications for a very old criminal doctrine.

### C. *Rationale for the Felony-Murder Rule*

Proponents of the felony-murder rule have espoused several justifications for its continued use. These justifications include retribution,<sup>129</sup> deterrence,<sup>130</sup> transferred intent,<sup>131</sup> and prosecutorial efficiency.<sup>132</sup> While each justification seems valid, a closer examination illustrates the inherent flaws surrounding each rationale.

#### 1. *Retribution*

Retribution, as a rationale for the felony-murder rule, means that when death is the result of a felonious criminal act that act should be punished more severely.<sup>133</sup> This justification focuses on

127. *Jones*, 516 S.E.2d at 423.

128. See generally Brian D. Roark, *State v. Lea: Attempt Plus Felony-Murder Does Not Equal Attempted Felony Murder*, 76 N.C. L. Rev. 2360 (1998); see also, James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 Wash. & Lee L. Rev. 1429 (1994).

129. See generally Brian D. Roark, *State v. Lea: Attempt Plus Felony-Murder Does Not Equal Attempted Felony Murder*, 76 N.C. L. Rev. 2360 (1998).

130. See generally James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 Wash. & Lee L. Rev. 1429, 1432 (1994).

131. *State v. Gardner*, 315 N.C. 444, 340 S.E.2d 701 (1986) (stating that the mens rea, or intent is transferred from the underlying felony and stating that “[a]s a result of the fictional transfer, the homicide is deemed committed with malice”).

132. See Joshua Dressler, *Understanding Criminal Law*, 467-477 (1987).

133. See David Crump & Susan Crump, *In Defense of the Felony Murder Doctrine*, 8 Harv. J. Law & Pub. Pol’y 359, at 367-368 (1985) (This article states that “[r]eaffirming the sanctity of human life” and showing “an expression of solidarity with the victims of the crime” are retributive reasons for the felony murder rule); See generally, Michael S. Simon, *Whose Crime Is It Anyway?: Liability For The Lethal Acts Of Nonparticipants In The Felony*, 71 U. Det. Mercy L. Rev. 223, 230 (1994).

the severity of the resulting harm,<sup>134</sup> not on the criminal's intent.<sup>135</sup> However, this rationale is not without criticism because North Carolina punishes felony-murder in the same way it punishes premeditated murder.<sup>136</sup> By statute a conviction for premeditated murder or felony-murder must result in a sentence of life in prison without the possibility of parole or a sentence of death by lethal injection.<sup>137</sup> In North Carolina, the punishments are the same despite the fact that premeditated murder is fundamentally worse than felony-murder. Indeed, premeditated murder requires the conscious reflection to kill another.<sup>138</sup> While felony-murder can be satisfied by mere reckless behavior resulting in death.<sup>139</sup>

## 2. Deterrence

Deterrence is a second justification for the existence of the felony-murder rule.<sup>140</sup> First, proponents argue that the felony-murder rule may deter killings that would occur during the commission of an underlying felony.<sup>141</sup> These proponents believe

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134. *State v. O'Blasney*, 297 N.W. 2d 797, 798 (S.D. 1980). See also Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* at 640; and William Michael Beasley and Joe Price Coleman, *Constitutional Limits Upon the Use of Statutory Presumptions and the Felony-Murder Rule*, 46 Miss. L. J. 1021, 1038 (1975).

135. William Michael Beasley and Joe Price Coleman, *Constitutional Limits Upon the Use of Statutory Presumptions and the Felony-Murder Rule*, 46 Miss. L. J. 1021, 1038 (1975).

136. *State v. Williams*, 350 NC 1, 510 S.E.2d 626 (1999) (felony murder conviction led to life sentence). See also *State v. DeCastro*, 342 NC 667, 467 S.E.2d 653 (1996) (felony murder conviction led to life sentence). But see *State v. White*, 509 S.E.2d 462, 464 (1998) (premeditated murder conviction resulted in life sentence without parole); and *State v. Anderson*, 513 S.E.2d 296 (1999) (holding that a "death sentence was not disproportionate . . . under premeditated murder [or] felony-murder").

137. See *Anderson*, 513 S.E.2d at 296 (holding that a "death sentence was not disproportionate . . . under premeditated murder [or] felony-murder").

138. See generally *State v. Thomas*, 332 NC 554, 560, 423 S.E.2d 75, 84 (1992).

139. See generally *State v. Richmond*, 347 NC 412, 495 S.E.2d 677 (1998).

140. See Brian D. Roark, *State v. Lea: Attempt Plus Felony-Murder Does Not Equal Attempted Felony Murder*, 76 N.C. L. Rev. 2360, 2364 (1998) (citing *United States v. Martinez*, 16 F.3d 202, 207 (7<sup>th</sup> Cir. 1994) (holding that "liability for felony murder serves the practical function of deterring felons from using lethal weaponry, more broadly from committing the kind of felony in which someone is likely to be injured").

141. The felonies are those specifically listed in a state's felony-murder statute. See N.C. Gen. Stat. § 14-17 (Supp. 1998). In North Carolina, these felonies include arson, rape, robbery, kidnapping, and burglary.

that criminals may be more likely to avoid such killings because of the strong penalties for deaths which occur during statutorily enumerated felonies.<sup>142</sup> This justification is misguided in that it is impossible to deter a killing that was never intentionally committed.<sup>143</sup> Specifically looking at DWI fatalities, the inebriated defendant may have intended to drink and drive, but not to take the life of another.<sup>144</sup>

A second effect of deterrence put forth in defense of the felony-murder rule is that the individual contemplating the commission of a felony may decide the gain from committing the felony is not worth the risk of the death penalty.<sup>145</sup> This would not only avoid accidental killings, but would also deter the specific felony associated with the unintentional death. Take for example a crime such as rape. If an assailant commits the offense of rape and the victim subsequently dies, the assailant can receive the death penalty under the felony-murder rule. The deterrence theory is that the possibility of the death penalty will hopefully deter the killing of the victim and may also deter the actual rape. However, few felons have any concept of the felony-murder rule,<sup>146</sup> and certainly most do not understand the level of punishment they could receive if a death resulted from their commission of the underlying felony.<sup>147</sup> For Mr. Jones and Mr. Blackwell, it may have been their intent to drink and drive, but it is unlikely they intended to commit an assault with a deadly weapon that would inflict serious

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142. See Nelson Roth & Scott Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 Cornell L. Rev. 446, 452 (1985). See also Joshua Dressler, *Understanding Criminal Law* 464 (1987); See Jonathan K. Van Patrick, *Merger and the Felony-Murder Rule*, 20 UCLA L. Rev. 250, 258-259 (1972).

143. See Nelson Roth & Scott Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 Cornell L. Rev. 446, 452 (1985).

144. See generally *Enmund v. Florida*, 458 U.S. 782 (1982) and *State v. Gaines*, 345 N.C 647, 483 S.E.2d 396 (1997).

145. *Aaron*, 299 N.W.2d at 307.

146. *Enmund*, 458 U.S. at 799-800 nn. 23-24 (citing that there is no statistical evidence which tends to show that the felony-murder rule has any deterrent effect on would be criminals).

147. See generally James J. Tomkovitz, *The Endurance of the Felony Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 Wash. & Lee L. Rev. 1429, 1448-58 (1994). See also Philip D. Zelickow, *The Constitutionality of Imposing The Death Penalty for Felony-Murder*, 15 Hous. L. Rev. 356, 376-378 (1978); and *Enmund*, 458 U.S. at 799-800 nn 23-24 (1982) (citing that there is no statistical evidence which tends to show that the felony murder rule has any deterrent effect on would be criminals).

injury or kill another person. Arguably, few individuals would see a connection between a DWI and first degree murder.

### 3. *Transferred Intent*

Transferred intent is another justification for the felony-murder rule.<sup>148</sup> Transferred intent means that the individual accused of felony-murder need not intend the death of a person.<sup>149</sup> Instead, the individual must intend only to commit the underlying felony.<sup>150</sup> The intent to commit the felony is then transferred to satisfy the *mens rea* required for a murder conviction.<sup>151</sup> By transferring the intent, the felony-murder rule holds those who commit felonies to a higher degree of responsibility.<sup>152</sup>

This justification may appear valid, but it is unjust to use transferred intent to support the continued use of felony-murder. In *Jones* and *Blackwell*, the *mens rea* is twice removed. Both *Jones* and *Blackwell* intended to drink and drive.<sup>153</sup> Because their actions were reckless, their behavior satisfied the *mens rea* for the assault with a deadly weapon charge.<sup>154</sup> Once the State has an underlying felony, here assault with a deadly weapon inflicting serious injury, the State may then borrow the underlying *mens rea* for the underlying felony to satisfy the *mens rea* for a homicide conviction. The *mens rea* for a DWI felony-murder is double bootstrapped, from drinking and driving to assault with a deadly weapon, then from assault with a deadly weapon to a felony-murder conviction.

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148. See W. J. Roarty, *An Assault Resulting in Homicide May be Used to Invoke the Felony-Murder Rule*, 13 Gonz. L. Rev. 268, 271 (1977); and *State v. Carson*, 337 N.C. 407, 445 S.E.2d 585 (1994).

149. Roarty, 13 Gonz. L. Rev. at 271.

150. *Id.*

151. See 2 Henry Brandis, Jr., *Brandis on North Carolina Evidence* at 215 (3d ed. 1988); and *State v. Swift*, 290 N.C. 383, 407; 226 S.E.2d 652, 669 (1976) (felony murder rule makes premeditation and deliberation immaterial). See generally, *Lewis v. U.S.*, 523 U.S. 155 (1998); and *Flanders v. Meacham*, 13 F.3d 600, 605 (2d Cir. 1994).

152. *Id.*

153. See 2 Henry Brandis, Jr., *Brandis on North Carolina Evidence* at 215 (3d ed. 1988).

154. *Jones* at 407. The *mens rea* for assault with a deadly weapon is culpable criminal negligence.

#### 4. *Prosecutorial Efficiency*

Prosecutorial efficiency is a final justification for the continued existence of the felony-murder rule.<sup>155</sup> Like deterrence, prosecutorial efficiency has two separate effects. First, prosecuting an individual under the felony-murder rule rather than premeditated murder increases the likelihood of a conviction.<sup>156</sup> Indeed, it is easier to obtain a conviction for felony-murder, because the State is relieved of having to show an intent to take the life of another.<sup>157</sup> The State must show the *mens rea* for the underlying felony, but this is something that is easier to accomplish than proving premeditation and deliberation, which are two elements required for a first-degree murder conviction.<sup>158</sup> The removal of the State's burden of having to show premeditation and deliberation may explain why the majority of inmates on death row were given their sentence under felony-murder convictions as opposed to first degree premeditated murder.<sup>159</sup>

A second way that the felony-murder rule makes it easier to obtain a conviction occurs during the plea bargaining process.<sup>160</sup> When an accused is faced with a felony-murder charge, the jury has three options: life in prison without parole; imposition of the death penalty; or acquittal.<sup>161</sup> Accepting a plea agreement of second degree murder will remove the possibility of receiving the death penalty.<sup>162</sup> The coercive nature of such an agreement gives the State a tremendous bargaining chip, one frequently used

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155. See Donald Baier, *Arizona Felony Murder: Let the Punishment Fit the Crime*, 36 Ariz. L. Rev. 701, 713 (1994) (prosecutorial efficiency is "perhaps the most compelling explanation for the resiliency of the felony murder rule.").

156. See generally William J. Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 74 J. Crim. L. & Criminology 1067 (1983).

157. *Id.*

158. See 2 Henry Brandis, Jr., *Brandis on North Carolina Evidence* at 215 (3d Student ed. 1988).

159. See W. Gordon, *Crime and Criminal Law: The California Experience 1960-1975*, 13 (1981), (A compilation of FBI data on all homicides committed in the United States in 1974). See also Marvin E. Wolfgang et al., *Comparison of the Executed and The Commuted Among Admissions to Death Row*, 53 Crim. L. & Criminology 301 (1962) (stating that 60% of all inmates on death row are there for felony-murder convictions; of this 60%, the majority of felony-murder convictions are for armed robbery).

160. See David Lat, *Sentencing and The Fifth Amendment*, 107 Yale L. J. 2673, 2678 (1998).

161. See N.C. Gen. Stat. § 14-17 (Cum. Supp. 1998).

162. See generally *State v. Brooks*, 113 N.C.App. 451, 439 S.E.2d 234 (1999).

when the evidence necessary for a first degree murder conviction is weak.<sup>163</sup> For example, in Durham, North Carolina, a third individual was charged with felony-murder for a DWI fatality approximately one year after Blackwell's conviction.<sup>164</sup> Rather than use assault with a deadly weapon as the underlying felony, habitual DWI was used to satisfy the underlying felony requirement.<sup>165</sup> Because the State realized that it would be difficult to obtain a conviction for felony-murder when the underlying felony was a strict liability offense,<sup>166</sup> the State offered the defendant a plea agreement of second degree murder.<sup>167</sup> In fear for his life, Wilson openly accepted the State's second degree plea agreement.<sup>168</sup>

### III. THE RAMIFICATIONS OF *JONES* AND *BLACKWELL*

On June 15, 1999, the North Carolina Court of Appeals upheld the conviction of Jones in a two to one decision.<sup>169</sup> Because *Jones* and *Blackwell* are virtually identical it is likely that the North Carolina Court of Appeals will also uphold the trial court's decision in *Blackwell*. The decision in *Jones* and the possible decision in *Blackwell* represent an over expansion of the boundaries of the felony-murder rule. These decisions will diminish well settled considerations in American jurisprudence and will broaden the scope of North Carolina's first-degree murder statute far beyond its intended scope. If the verdicts in *Jones* and *Blackwell* are upheld, the North Carolina Supreme Court will condone the State's violation of the Eighth and Fourteenth Amendments of the United States Constitution.

#### A. *Jones* and *Blackwell*: Jurisprudential Considerations

*Jones* and *Blackwell* adversely effect several concepts in American jurisprudence. First, *Jones* and *Blackwell* decrease the burden of proof for the State in a felony-murder trial. Second, the

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163. See *supra* note 167.

164. State v. Wilson, 98 CR 5214, Durham County, North Carolina (Jan. 23, 1998).

165. *Id.*

166. A strict liability offense is one that does not require a showing of intent. Rather, the criminal intent requirement may be satisfied by an action or *actus reus*. See generally State v. Anthony, 516 S.E.2d 195 (N.C. App. 1999).

167. State v. Wilson, 98 CR 5214, Durham County, North Carolina (Jan. 23, 1998).

168. *Id.* at 1.

169. *Jones*, 516 S.E.2d at 405.

*Jones* and *Blackwell* convictions over-expand the scope of North Carolina's felony-murder rule. Together, these concepts illustrate why the North Carolina Supreme Court should reverse the verdicts in *Jones* and *Blackwell*.

In *Jones* and *Blackwell*, the burden of proof for the underlying felony was satisfied with an action or *actus reas* rather than a specific intent.<sup>170</sup> This action is devoid of the requisite level of *mens rea* for a crime that can result in a sentence of death.<sup>171</sup> In North Carolina, the felony-murder rule has been limited to the enumerated felonies.<sup>172</sup> These include felonies susceptible to the death penalty at common law, which are arson, robbery, burglary, rape, and kidnapping.<sup>173</sup> These crimes belong within the scope of the felony-murder rule because they are crimes which require proof of a specific intent. *Jones* and *Blackwell* intended to drink and drive, not commit an assault. Thus, their intent was to commit a traffic violation. This traffic violation was used to satisfy the underlying felony. The underlying felony was then used to satisfy the murder conviction; thus, the intent of the DWI motorist has been twice removed. Twice removing the level of intent for a felony-murder conviction allows the state to prove its case by an action. This action can satisfy the underlying *mens rea*, which is culpable negligence.<sup>174</sup> Negligence is considerably easier for the state to prove in a murder trial; whereas, the normal *mens rea* for a first degree murder conviction requires a showing of premeditation and deliberation.<sup>175</sup>

A second effect of *Jones* and *Blackwell*, a direct result of decreasing the burden of proof for the state in a first-degree murder trial, is that these decisions will broaden the scope of the felony-murder rule to include individuals that should never receive the death penalty or life in prison without the possibility of parole.<sup>176</sup> In *Jones*, defense counsel Carroll Teeter and David Freedman illustrated how far DWI fatalities could broaden the scope of the felony-murder rule when they included two hypotheti-

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170. See *supra* Section III(A).

171. See generally *Enmund*, 458 U.S. at 825. (Stating that "[t]he type of *mens rea* of the defendant must be considered carefully in assessing the proper penalty for felony-murder.").

172. See *supra* note 112 and accompanying section.

173. See *supra* note 145.

174. *Jones*, 516 S.E.2d at 410.

175. *State v. Hamilton*, 1999 WL 799884, 7 (NC 1999).

176. *Id.*



cal scenarios in Jones' motion to preclude a trial on the theory of felony-murder.<sup>177</sup>

Scenario one involves an unimpaired motorist passing in a no passing zone which results in a collision with a multiple occupant vehicle.<sup>178</sup> The resulting collision causes the death of occupant A, while occupant B merely receives a fractured wrist.<sup>179</sup> Using the State's current theory of felony-murder, derived from an assault with a deadly weapon charge, the defendant in scenario one can receive life in prison without parole or the death penalty.<sup>180</sup>

Scenario two involves a drunk driver with a breathalyzer reading of .40, well above North Carolina's legal limit,<sup>181</sup> who is driving at 100 mph on the wrong side of the road in a 35 mph zone.<sup>182</sup> The drunk driver collides with a single occupant vehicle killing the occupant on impact.<sup>183</sup> In this scenario the highest conviction the state can obtain is second degree murder.<sup>184</sup>

The Attorney General for the State of North Carolina, in a reply brief to the defendant's motion to preclude a trial on a theory of felony-murder, addressed the hypothetical scenarios presented by Jones' counsel.<sup>185</sup> In his brief for the State, the Attorney General concedes that under the law of culpable or criminal negligence as applied to the felony-murder rule, the scenarios presented could be true,<sup>186</sup> but "[w]hether this or any District Attorney would pursue an 'unimpaired' motorist passing in a no passing zone is anyone's guess."<sup>187</sup> First it should be noted that the Attorney General, along with the dissent in *Jones*,<sup>188</sup> agree that an unimpaired motorist can be prosecuted under a theory of felony-murder. Second, when someone can receive the death pen-

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177. See Defendant's Brief to Preclude Trial on Felony Murder Theory, *State v. Jones*, 96 CRS 34278, 34279, 36858, 36861, Dec. 16, 1996 at 5.

178. *Id.*

179. *Id.*

180. *Id.*

181. In North Carolina, the legal blood alcohol limit is .08. See *State v. Crawford*, 125 N.C. App. 279, 480 S.E.2d 422 (1999).

182. See Defendant's Brief to Preclude Trial on felony Murder Theory, *Jones*, 96 CRS at 5.

183. *Id.*

184. See Defendant's Brief to Preclude Trial on felony Murder Theory, *Jones*, 96 CRS at 5.

185. Michael Easley, *State's Reply to Defendant's Brief on Felony-Murder Theory*, Dec. 17 1996 at 7.

186. *Id.*

187. *Id.*

188. *Jones*, 516 S.E.2d at 422.

alty or life in prison without parole for a negligent act, one should never guess as to who could receive such a punishment.

In the dissent of *Jones*, Judge Wynn used a similar scenario to illustrate how far a DWI felony-murder conviction will broaden the scope of North Carolina's first-degree felony-murder statute.<sup>189</sup> Judge Wynn created a scenario involving the speeding grandmother on her way to her grandchild's play.<sup>190</sup> In this scenario, the lady strikes a multiple occupant vehicle where one of the individuals dies.<sup>191</sup> This lady is now susceptible to the death penalty, whereas the extremely drunk driver who strikes a single occupant vehicle is susceptible only to second degree murder.<sup>192</sup>

These scenarios illustrate how the convictions of *Jones* and *Blackwell* will expand the scope of North Carolina's felony-murder rule. The *Jones* and *Blackwell* convictions show that in North Carolina the drunk driver and the unimpaired motorist can be held responsible for their actions under a theory of felony-murder. Overly expanding North Carolina's felony-murder rule will contravene the intent of the North Carolina General Assembly; specifically, the General Assembly's intended scope for the felony-murder rule. By examining the legislative history of North Carolina's felony-murder rule the North Carolina Supreme Court should reverse *Jones* and *Blackwell* as an over expansion of legislative intent.

### B. *Jones and Blackwell: A Violation of Legislative Intent*

A valid reason for reversing the holding of *Jones* and *Blackwell* is that prosecuting a DWI fatality as first degree felony-murder is beyond the North Carolina General Assembly's intended scope for the rule. An examination of the history of North Carolina's first degree felony-murder statute, specifically the statutory modifications throughout this century, reveals that using "the felony-murder rule [for traffic fatalities] was neither contemplated nor intended by our General Assembly."<sup>193</sup>

In 1977, the General Assembly of North Carolina amended statutory felony-murder to both limit and expand the coverage of the rule.<sup>194</sup> As previously discussed in Section II(a), prior to the

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189. *Id.*

190. *Id.*

191. *Id.*

192. *Jones*, 516 S.E.2d at 426 (Wynn, J., dissenting).

193. *Jones*, 516 S.E.2d at 424 (Wynn, J., dissenting).

194. *Id.*

statutory modifications of 1977, North Carolina's felony-murder statute encompassed a killing "committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or other felony."<sup>195</sup> After 1977, the statute was modified to cover a killing "committed in the perpetration or attempted perpetration of any arson, rape, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon."<sup>196</sup> This modification broadened the scope of the felony-murder rule to specifically include sex offenses and kidnapping as enumerated felonies.<sup>197</sup> Simultaneously, the "any other felony" language of the pre-1977 statute was replaced with "any felony committed or attempted with the use of a deadly weapon."<sup>198</sup> The statutory modification in the language of G.S.14-17 limited what felonies beyond those specifically listed could be used for a felony-murder conviction.<sup>199</sup> The purpose of this statutory modification was to limit the coverage of felony-murder to those committed with a deadly weapon.<sup>200</sup>

In reference to *Jones* and *Blackwell*, assault with a deadly weapon is within the scope of "any felony committed with a deadly weapon." However, the State's use of the felony-murder rule in cases like *Jones* and *Blackwell* was never contemplated by the North Carolina General Assembly.<sup>201</sup> In *Charlotte Housing Authority v. Patterson*,<sup>202</sup> the North Carolina Court of Appeals (in addressing statutory interpretation) held that "[w]hen a literal interpretation of the statutory language yields absurd results . . . or contravenes clearly expressed legislative intent, 'the reason and purpose of the law shall control and the strict letter thereof shall be disregarded'."<sup>203</sup> Further, "the General Assembly is not presumed to intend innovations upon the common law and accord-

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195. *Id.* See 1949 N.C. Sess. Laws Act of , Ch. 299, § 1 (1949 N.C. See. Laws).

196. See N.C. Gen. Stat. § 14-17 (Supp. 1998).

197. *Jones*, 516 S.E.2d at 425 (Wynn, J., dissenting).

198. See N.C. Gen Stat. § 14-17 (Supp. 1998).

199. *Jones*, 516 S.E.2d at 425 (Wynn, J., dissenting).

200. *Id.*

201. *Id.*

202. *Charlotte Housing Authority v. Patterson*, 120 N.C.App. 552, 556, 464 S.E.2d 68, 71 (1995).

203. *Id.* at 71. (quoting *Avco Financial Services v. Isbell*, 67 N.C.App. 341, 343, 312 S.E.2d 707,708 (1984))(quoting *Williams v. Williams*, 299 N.C. 174, 179-80, 261 S.E.2d 849, 853 (1980)).

ingly innovations not within the Assembly's intentions shall not be carried into effect."<sup>204</sup>

The purpose of the felony-murder rule "is to punish a bad person for a bad act with an even greater result, meaning the death of an individual."<sup>205</sup> Whether this applies to a drunken driver is debatable. However, the current use of the felony-murder rule broadens its scope to include all culpably negligent drivers.<sup>206</sup> It is well-established that a culpably negligent driver includes the unimpaired motorist.<sup>207</sup> Here, to include an unimpaired motorist within the scope of the felony-murder rule would contravene the legislative intent, reason and purpose of G.S.14-17.<sup>208</sup>

North Carolina case law further illustrates that the State's use of the felony-murder rule in *Jones* and *Blackwell* was inappropriate. In *State v. Beale*,<sup>209</sup> the Supreme Court of North Carolina was required to decide whether the "unlawful, willful and felonious killing of a viable but unborn child constituted felony-murder."<sup>210</sup> The Court held that the killing of an unborn viable fetus was outside the General Assembly's intended scope of G.S.14-17.<sup>211</sup> In *Beale*, the Court referred to G.S. §14-44 through §14-46 in support of their opinion which specifically deal with the killing of a viable fetus. According to the majority, when the General Assembly enacts a statute which specifically addresses a problem, here the killing of a viable unborn fetus, it can be assumed that such behavior would not be included in a more ambiguous statute such as the felony-murder rule where the action in controversy is never mentioned.<sup>212</sup>

The reasoning of *Beale* can be applied to DWI fatalities, in that the North Carolina General Assembly addressed the issue in its codification of G.S. 20-141.4, which covers misdemeanor and felonious death by motor vehicle.<sup>213</sup> DWI fatalities should be dealt with in death by motor vehicle statutes. In *Beale*, the court

204. *Jones*, 516 S.E.2d at 425 (Wynn, J., dissenting) (citing *Buck v. U.S. Fidelity & Guaranty Co.*, 265 N.C. 285, 290, 144 S.E.2d 34, 37 (1965).

205. *State v. Richardson*, 341 N.C. 658, 66-67, 462 S.E.2d 492, 498 (1995).

206. Michael Easley, *State's Reply to Defendant's Brief on Felony-Murder Theory*, Dec. 17 1996 at 7.

207. *Id.*

208. *Jones*, 516 S.E.2d at 425 (Wynn, J., dissenting).

209. 324 N.C. 87, 376 S.E.2d 1 (1989).

210. *Beale*, 376 S.E.2d at 1.

211. *Id.* at 4.

212. *Id.*

213. N.C. Gen. Stat. § 20-141.4 (Cum. Supp. 1998).

even used death by motor vehicle as an example of what crimes would be outside the scope of first degree felony-murder.<sup>214</sup>

The creation and expansion of criminal offenses is the prerogative of the legislative branch of the government. The legislature has considered the question of intentionally destroying a fetus and determined the punishment thereof. . . . It has adopted legislation dealing generally with the crimes of abortion and kindred offenses. . . . It has also created new offenses of felony and misdemeanor death by vehicle . . . . It has amended N.C. Gen. Stat. ' 14-44 and N.C. Gen. Stat. ' 14-17 on more than one occasion. Nothing in the statutes or amendments shows a clear legislative intent to change the common law [felony-murder].<sup>215</sup>

The North Carolina General Assembly has specifically codified the occurrence of DWI fatalities under vehicular homicide. Therefore, there is no reason to include such activities within the felony-murder rule, especially when such measures would unduly broaden the scope of North Carolina's most severe crime, a crime which may result in the imposition of the death penalty.

### C. *Jones and Blackwell: A Violation of the United States Constitution*

The appellate decision in *Jones* and the likely decision in *Blackwell* should be overturned by the North Carolina Supreme Court for violating the United States Constitution. The use of the felony-murder rule in DWI fatalities violates both the Fourteenth Amendment and the Eighth Amendment. As such, if *Jones* and *Blackwell* are upheld by the North Carolina Supreme Court, their convictions will represent an undermining of the United States Constitution.

#### 1. *Ex Post Facto: A Violation of the Fourteenth Amendment*

The application of the felony-murder rule in *Jones* and *Blackwell* operates as an ex post facto law in violation of the Due Process Clause of the United States Constitution.<sup>216</sup> As raised by *Jones*, the State of North Carolina failed to provide him with fair notice that his conduct would subject him to first-degree felony-murder.<sup>217</sup> It is a violation of the Ex Post Facto Clause of the Fourteenth Amendment to the United States Constitution if an

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214. *Beale*, 376 S.E.2d at 1.

215. *Id.*

216. *Jones*, 516 S.E.2d at 419 (Wynn, J., dissent).

217. *Id.*

individual becomes susceptible to a criminal law without adequate notice that his behavior is in violation of the statute.<sup>218</sup>

The prohibition against ex post facto laws can be found in Article I, Section 10 of the United States Constitution.<sup>219</sup> As interpreted by the United States Supreme Court, there are four basic categories where a law will be considered an ex post facto violation of the United States Constitution:<sup>220</sup> (1) making an action criminal which was done before the passing of a law and which was innocent when done;<sup>221</sup> (2) aggravating a crime or making the punishment greater than when it was committed;<sup>222</sup> (3) allowing the imposition of a different or greater punishment than was permitted when the crime was committed;<sup>223</sup> and (4) altering the legal rules of evidence to permit different or less testimony to convict the offender than was required at the time the offense was committed.<sup>224</sup>

Historically, the four ex post facto categories have been directed at legislative action. However, the United States Supreme Court has also extended the ex post facto clause to include judicial enactments.<sup>225</sup> In *Bouie v. City of Columbia*,<sup>226</sup> the Supreme Court held that “[a]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ‘ex post facto law’.”<sup>227</sup> Therefore, the United States

218. *Id.* (As clarified by the Judge Wynn in his dissent, the defendant does not argue that he did not have fair notice that his conduct was subject to murder in general because North Carolina has long prosecuted individuals for DWI fatalities as second degree murder. Jones’ specifically argues that he was not given fair notice that he was subject to a conviction of first degree murder for his conduct.)

219. *See Marks v. United States*, 430 U.S. 188, 191-92 (1977).

220. *Jones*, 516 S.E.2d at 420 (Wynn, J., dissent).

221. *See Collins v. Youngblood*, 497 U.S. 37, 42 (1990); *See Calder v. Bull*, 3 U.S. 386, 390 (1798); *See State v. Vance*, 328 N.C. 613, 620, 403 S.E.2d 495, 500 (1991).

222. *See Youngblood*, 497 U.S. at 42.

223. *Id.*

224. *Id.*

225. *See Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964) (“If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.”).

226. *Id.*

227. *Id.* at 353. Even were it not stated by the United States Supreme Court, to bar judicial enlargements like legislative enactments would make complete sense because the bulk of ex post facto claims are derived judicially rather than legislatively.

Supreme Court has stated that it is unconstitutional to have “judicially enforced changes in legal interpretations which unforeseeably expand the punishment accompanying a conviction beyond that which an actor could have anticipated at the time he committed the criminal act.”<sup>228</sup>

To raise a valid *ex post facto* claim; specifically, judicially enforced changes, the interpretation of the law must satisfy two requirements. First, the law in question must be applied retroactively.<sup>229</sup> A retrospective application of a law is one that has been applied to events that occurred prior to the enactment of the law in question.<sup>230</sup> Second, the law in question must have disadvantaged the person who has raised the claim.<sup>231</sup> For the *Jones* appeal, the initial requirements were satisfied.

In *Jones*, the central question regarding a judicial *ex post facto* application involves the issue of fair notice.<sup>232</sup> Simply put, “if an actor does not have fair notice that his conduct is proscribed by a statute or a judicial construction of a statute, then the actor may raise a Due Process claim that a later judicial construction operated like a quasi *ex post facto* law.”<sup>233</sup> Once an *ex post facto* issue has been raised, for the law to survive judicial review three requirements must be met. The first requirement involves the vagueness doctrine, which bars the enforcement of a “statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.”<sup>234</sup> The second requirement involves the canon of strict construction of criminal statutes which “ensures fair notice by resolving ambiguity in a criminal statute as to apply only to conduct clearly covered.”<sup>235</sup> Lastly, “Due Process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor

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228. *Bouie*, 378 U.S. at 353-354.

229. *See Weaver v. Graham*, 450 U.S. 24, 29 (1981).

230. As an example, an individual is arrested for driving under the influence because his blood alcohol level is .03. After this individual has been arrested, the North Carolina Legislature lowers the blood alcohol level necessary for a conviction for driving under the influence to .03 (currently the legal limit is .08). Here if the legislative action is applied to the defendant it would be an *ex post facto* violation of the United States Constitution.

231. *Graham*, 450 U.S. at 29.

232. *Id.*

233. *Id.*

234. *See Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

235. *See United States v. Lanier*, 520 U.S. 259, 266 (1997).

any prior judicial decision has fairly disclosed . . . [as] within its scope.”<sup>236</sup> All three requirements must be satisfied for any judicial or legislative law to satisfy a fair notice claim. In *Jones*, the majority held that each of the fair notice requirements were met.<sup>237</sup> However, a close examination will show that the majority improperly came to this conclusion.

The majority in *Jones* held that Jones’ ex post facto claim was without merit for two reasons.<sup>238</sup> First, the Court determined that according to North Carolina case law, the State’s use of second degree murder for DWI prosecutions provided Jones with adequate notice. Second, the Court held that Jones received adequate notice because he had received many DWI’s in his lifetime.<sup>239</sup> Both reasons given by the majority are misguided.

With regards to the first reason, that North Carolina’s second degree murder convictions constitute fair notice, the majority has considered all categories of murder as the same. Jones was very specific in his claim that he was not given fair notice. Jones stated that he was not given the appropriate notice for first degree murder, not murder as an entire category.<sup>240</sup> The majority ignored Jones’ distinction and “conclude[d] that Jones received constitutionally adequate notice that a culpably negligent driver in North Carolina could be subjected to the death penalty.”<sup>241</sup> Indeed, a reasonable person is provided with adequate notice that he is subject to a conviction of second degree murder for a DWI fatality,<sup>242</sup> but this does not satisfy the constitutional requirements of fair notice. Under North Carolina’s second degree murder statute, a defendant cannot receive the death penalty if convicted. The death penalty is strictly limited to first degree murder. When a defendant is now susceptible to the death penalty under the felony-murder rule, yet nobody in the history of North Carolina or

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236. *Id.*

237. *Jones*, 516 S.E.2d at 1.

238. *Id.* at 418.

239. *Id.* at 411.

240. *Id.*

241. *Id.*

242. See N.C. Gen. Stat. § 14-17 (Cum. Supp. 1995); N.C. Gen. Stat. § 20-141.4 (1995); *State v. Rich*, 512 S.E.2d 441 (1999) (affirming a second degree murder conviction for a driver who was speeding and veered out of his lane of travel); *State v. Snyder*, 311 N.C. 391, 317 S.E.2d 394 (1984) (affirming a second-degree murder in facts substantially similar to those in the case sub judice).



the United States as a whole has ever received such punishment for a DWI fatality,<sup>243</sup> fair notice has not been satisfied.

The second reason for the dismissal of Jones' Fourteenth Amendment claim involves his prior DWI convictions.<sup>244</sup> The Court of Appeals in *Jones* paid special attention to the large number of Jones' previous DWI convictions. In the majority opinion, it was determined that a first degree felony-murder conviction fell within the range of punishments expected, especially because Jones had received so many prior DWI's.<sup>245</sup> Stating that a past conviction for a DWI is fair notice that an individual is subject to the death penalty is improper. It is undisputed that Jones took serious risks by drinking and driving and naturally, such risks subjected Jones to serious consequences. However, serious consequences should not include any and all punishments available in the penal system, such as the death penalty. Arguably, only the District Attorney would have imagined that a DWI was within the scope of the felony-murder rule where the punishment could be the death penalty. Thus, having no recognition of the possible punishment for a DWI fatality is a legitimate claim.

It is possible that the majority avoided a proper examination of this case by looking only at the conviction and sentence as applied to a DWI fatality. In *Jones*, the charge of DWI was not part of the crime of felony-murder, nor was the underlying charge of assault.<sup>246</sup> In fact, the underlying assault was satisfied by culpable or criminal negligence. Therefore, the speeding grandmother, as presented by Judge Wynn in his dissent, is also subject to North Carolina's first degree felony-murder rule. After *Jones*, a driver can be culpably negligent even when he is sober.<sup>247</sup> Although Jones' "conduct is more egregious than the speeding driver, the egregiousness of that conduct did not provide the defendant with any more notice [that he was subject to the felony-murder rule] . . . than the person who drives over the speed limit who seriously injures one person and kills another."<sup>248</sup> After *Jones*, the negligent motorist is now susceptible to North Carolina's first degree murder statute without adequate notice.

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243. See *infra* note 293.

244. *Jones*, 516 S.E.2d at 411.

245. *Id.*

246. *Id.* at 420. (The underlying felony was assault with a deadly weapon inflicting serious injury, not felonious driving while impaired.).

247. *Id.* at 421.

248. *Jones*, 516 S.E.2d at 421 (Wynn, J., dissenting).

## 2. *The Possibility of the Death Penalty: A Violation of the Eighth Amendment*

The Eighth Amendment to the United States Constitution declares: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."<sup>249</sup> It "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed."<sup>250</sup> In *Jones*, an Eighth Amendment issue was never raised and it is unknown whether this issue will be raised in *Blackwell*. Two Supreme Court cases, *Enmund v. Florida*,<sup>251</sup> and *Solem v. Helm*,<sup>252</sup> can be contrasted with *Jones* and *Blackwell* to illustrate that *Jones*' and *Blackwell*'s sentences violate the Eighth Amendment for being cruel and unusual.

In *Enmund*, the defendant was convicted of first degree murder and robbery as the driver of a getaway car used during the killing of an elderly couple.<sup>253</sup> *Enmund* participated in neither the robbery nor killing of the couple, yet he received a sentence of death.<sup>254</sup> On appeal, the Supreme Court of Florida upheld *Enmund*'s death sentence.<sup>255</sup> However, in a plurality decision, the United States Supreme Court reversed the Florida decision.<sup>256</sup>

The majority opinion written by Justice White held that *Enmund*'s sentence must be reversed for two significant reasons.<sup>257</sup> First, to give a non-triggerman the death penalty served no penalogical purpose.<sup>258</sup> Second, retribution could not be satisfied by giving *Enmund* the death penalty.<sup>259</sup> When addressing the purposes of the United States penal system, Justice White focused

249. *Solem v. Helm*, 463 U.S. 277, 284 (1983).

250. *Id.* See also *Weems v. United States*, 217 U.S. 349, 371 (1910), (quoting *O'Neill v. Vermont*, 144 U.S. 323, 339-340 (1892)).

251. 458 U.S. 782 (1982). See *State v. McNeill*, 350 N.C. 657, 518 S.E.2d 486 (N.C. 1999) (following *Enmund*).

252. 463 U.S. 277 (1983).

253. *Enmund*, 458 U.S. at 782.

254. *Id.* at 798.

255. *Id.* at 786. Under Florida law, *Enmund*'s actions were enough to make him an aider and abettor to the death of the elderly couple. An aider and abettor to felony-murder made *Enmund* a principal and as a principal to felony-murder, *Enmund* was subject to the death penalty. *Id.*

256. *Id.* at 782. Justice Brennan filed a concurring opinion and Justice O'Connor filed a dissenting opinion in which Chief Justice Burger, Powell and Rehnquist joined.

257. *Id.*

258. *Id.* at 799.

259. *Enmund*, 458 U.S. at 798.

on the deterrence rationale as it applies to the felony-murder rule.<sup>260</sup> He stated "if a person does not intend that [a] life be taken . . . , the possibility that the death penalty will be imposed . . . will not 'enter into the cold calculus that precedes the decision to act'."<sup>261</sup> Because Enmund was a non-triggerman, actually the driver of the getaway car, at no time could Enmund have calculated the death of the victims.

A second reason given by Justice White involves retribution. Justice White stated that "it is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally'."<sup>262</sup> "American criminal law has long considered a defendant's intention . . . and therefore his moral guilt . . . to be critical to the degree of criminal culpability, and the court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing."<sup>263</sup> As Enmund did not intend the death of the victims, the Court stated that to give him the death penalty in the absence of any *mens rea*, would violate the Eighth Amendment.<sup>264</sup> Indeed, Enmund "had no intention of committing or causing [the victim's death; therefore,] the [death penalty] does not measurably contribute to the retributive end of ensuring that the criminal get his just desserts."<sup>265</sup>

Like Enmund, it would be wrong to subject Jones or Blackwell to the possibility of the death penalty for a murder conviction. Deterrence is not satisfied by the imposition of the death penalty on a drunk driver. Alcoholics, like any other addict, will not be deterred by the possibility of the death penalty.<sup>266</sup> Further,

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260. *Id.* at 799.

261. *Id.* (quoting in part from *Gregg v. Georgia*, 428 U.S. 153, 186 (1976)).

262. *Id.* at 798.

263. *Id.* at 800 (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 698, (1975)). The court also cited *Robinson v. California*, 370 U.S. 660, 667 (1962) (punishing narcotics addiction is a violation of the 8<sup>th</sup> Amendment) and *Weems v. United States*, 217 U.S. 349, 363 (1910) (the Court invalidated a statute making public official's false entry into public record a crime absent injury or intent to injure).

264. *Id.* at 801.

265. *Enmund*, 458 U.S. at 801.

266. See Brandon K. Applegate, "Public Support for Drunk Driving Countermeasures: Social Policy for Saving Lives", *Crime and Delinquency*, (April 1995) ("The relative ineffectiveness of existing deterrence-based countermeasures to fight drunk driving has prompted calls to consider alternative strategies based in a broader understanding of the roots of drinking and driving. In particular, commentators have suggested that drunk driving best be conceptualized not as a criminal justice problem but as a social problem. From a social problem's perspective, drunk driving and the annual toll it exacts are seen

Jones and Blackwell are being punished for an unintentional act. Clearly, one cannot deter an unintentional act.

Having no justifiable retributive reason for the strength of the sentence imposed was the second reason for the reversal of *Enmund*<sup>267</sup> and this reason also applies to *Jones* and *Blackwell*. The greater an individual's intent, the more severe the punishment should be in terms of retribution.<sup>268</sup> Neither the drunk driver nor the unimpaired motorist intends the death of another. However, the felony-murder rule is codified as first degree murder in North Carolina.<sup>269</sup> First degree murder usually requires premeditation and deliberation.<sup>270</sup> Arguably, an individual guilty of premeditated murder deserves life in prison without parole or the death penalty under a theory of retribution. As a result of *Jones* and *Blackwell*, someone guilty of DWI felony-murder will receive the same level of punishment for a traffic accident. Retribution in this case is not a justifiable reason for increasing the level of punishment to such a high degree.

The debate over the existence of the felony-murder rule through the use of justifications like retribution and deterrence has resulted in no clear cut test for determining the constitutionality of a criminal punishment. Such unsure results for *Jones* and *Blackwell* should be clarified by the examination of a second United States Supreme Court verdict regarding the Eighth Amendment.

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as the inevitable result of the intersection of American social institutions: transportation and recreation. This institutional approach refers to how the challenging paradigm leads to important policy implications. First, unlike the criminal justice approach, the main emphasis should not be on catching and punishing (or even reforming) drunk drivers. Instead, the focus should be on altering institutional patterns, especially those that foster the intersection of automobile use and alcohol consumption. Second, drunk driving is seen as a public health issue; and as with other health problems, the goal should be to devise policies that save lives and reduce injuries. Criminal justice sanctions can be applied only to the culpable (even if general deterrence is hoped for) and often are applied only after substantial harm has occurred. Lifesaving countermeasures, however, can be implemented across the population and are concerned with prevention.”).

267. *Enmund*, 458 U.S. at 798.

268. See *Wilbur*, 421 U.S. at 698. (“From the beginning of American history, this country has intended to punish according to one’s intent.”)

269. See N.C. Gen. Stat. § 14-17 (Cum. Supp. 1998).

270. *Id.*

*Solem v. Helm*<sup>271</sup> is also useful in an Eighth Amendment analysis of *Jones* and *Blackwell*. In *Helm*, the defendant was convicted in a South Dakota state court for using a "no account" check for \$100.<sup>272</sup> The maximum punishment for this crime was five years imprisonment and a \$5,000 fine.<sup>273</sup> However, the defendant was sentenced to life in prison without the possibility of parole because he qualified for South Dakota's recidivist statute.<sup>274</sup> Helm had received six prior felony convictions<sup>275</sup> and as a recidivist, was mandatorily sentenced to life in prison without parole.<sup>276</sup> On appeal, the Supreme Court of South Dakota affirmed Helm's life sentence.<sup>277</sup>

In 1981, Helm sought relief in United States District Court.<sup>278</sup> The District Court denied review, even though it considered Helm's punishment harsh.<sup>279</sup> The Court of Appeals reversed the District Court directing them to grant review, because Helm's sentence was "grossly disproportionate to the nature of the offense."<sup>280</sup> In 1983, the United States Supreme Court granted certiorari and held that the conviction of Helm was a violation of the Eighth Amendment to the United States Constitution.<sup>281</sup>

Justice Powell, writing for the majority, established a three prong test to determine whether a defendant's sentence was a violation of the United States Constitution.<sup>282</sup> First, the gravity of the offense should be weighed against the harshness of the penalty.<sup>283</sup> Second, the defendant's sentence should be compared to the sentences imposed on other criminals in the same jurisdiction. That is, whether "more serious crimes are subject to the same penalty, or, to less serious penalties."<sup>284</sup> Finally, the defendant's sentence should be compared to sentences imposed for the

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271. *Solem v. Helm*, 463 U.S. 277 (1983).

272. *Id.* at 281.

273. *Id.*

274. *Id.*

275. *Id.* at 279-280 (Helm had received three convictions for third-degree burglary, a conviction for obtaining money under false pretenses, grand larceny, and a conviction for driving while intoxicated).

276. *Id.* at 281.

277. *Helm*, 463 U.S. at 283.

278. *Id.*

279. *Id.*

280. *See Solem v. Helm*, 684 F.2d 582, 587 (8<sup>th</sup> Cir. 1982).

281. *Helm*, 463 U.S. 277.

282. *Id.* at 291.

283. *Id.*

284. *Id.*

commission of the same crime in other jurisdictions.<sup>285</sup> Powell applied this analytical framework to *Helm* and held that:

[Helm] received the penultimate sentence for relatively minor criminal conduct . . . [Helm] was treated more harshly than other criminals in the State who had committed more serious crimes. He ha[d] been treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single state. [Therefore], his sentence [was] significantly disproportionate to his crime, and [was] prohibited by the Eighth Amendment.<sup>286</sup>

Applying *Helm* to *Jones* and *Blackwell*, it is clear that the *Jones* and *Blackwell* verdicts should be reversed. First, while it is true that *Jones* and *Blackwell*'s offenses are worse than that of *Helm*, their sentences are still disproportionate in relation to their acts. Both convictions are based on criminal negligence, not an intentional act. Negligent conduct is less serious than intentional conduct and should be treated accordingly for sentencing purposes.<sup>287</sup> Further, felony-murder now applies to the speeding motorist as well as the drunk driver.<sup>288</sup> When someone is killed in a traffic accident it is truly tragic. However, it is Draconian<sup>289</sup> to think that such an unimpaired speeding motorist deserves life in prison without parole or the death penalty just because someone has been killed. It is equally Draconian to sentence an impaired motorist to life in prison without parole.

Second, a comparison of the conduct of *Jones* and *Blackwell* to other punishments in North Carolina shows that their punishments fail the *Helm* test. The actions of *Jones* and *Blackwell* are subject to the same sentence as the actions of a serial killer convicted of first degree murder.<sup>290</sup> Further, a defendant convicted of second degree murder, which requires a greater showing of *mens rea*<sup>291</sup> than that of assault,<sup>292</sup> can receive a sentence as low as ten

285. *Id.*

286. *Id.* at 303.

287. *Mullaney v. Wilbur*, 421 U.S. 684, 698, (1975).

288. *Jones*, 516 S.E.2d at 422.

289. See *Blacks Law Dictionary* at 1001 (West Publishing 1998) (A code of laws prepared by Draco, the celebrated lawgiver of Athens. These laws were exceedingly severe, and the term is now sometimes applied to any laws of unusual harshness.).

290. See N.C. Gen. Stat. § 14-17 (Cum. Supp. 1998) (Where premeditated murder and felony-murder are codified as equals under North Carolina's first-degree murder statute.).

291. *Jones*, 516 S.E.2d at 413. In North Carolina second degree murder requires a showing of malice.

years. This crime, while greater in statutory intent as well as moral culpability, is punished less severely than Jones or Blackwell.

Finally, Jones' and Blackwell's sentences violate the third prong of the *Helm* test. To date, with the exception of North Carolina, no state in this country has given an individual responsible for a DWI fatality, a conviction under first degree felony-murder with a sentence of life in prison without the possibility of parole.<sup>293</sup> No other state has attempted a felony-murder convic-

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292. *Id.* at 409. Felony-murder has no *mens rea*. It borrows the *mens rea* from the underlying felony. Here criminal negligence is the *mens rea* required for a conviction for assault with a deadly weapon inflicting serious injury.

293. The following cases are an example of how severe other states will punish an individual guilty of a DWI traffic fatality. *Fillmore v. State*, 668 So.2d 141 (Ala. Crim. App. 1995) (Defendant was convicted of homicide by motor vehicle and received a sentence of five years in prison.); *Lanni v. State*, 1999 WL 73745 (Alaska App. 1999) (Defendant was convicted of manslaughter and sentenced to five years in prison); *State v. Jansing*, 918 P.2d 1081 (Ariz. Ct. App. 1996) (Defendant was convicted of manslaughter and received a sentence of 15 years in prison.); *Walker v. State*, 1999 WL 407477 (Ark. App. 1999) (Defendant was convicted of manslaughter and given a sentence of 10 years); *People v. Gallardo*, 27 Cal. Rptr.2d 502 (Cal. App. 1994) (Defendant was convicted of gross vehicular manslaughter and received a sentence of six years.); *People v. Lucero*, 1999 WL 304377 (Colo. App. 1999) (Defendant was convicted of three counts of vehicular homicide and received a sentence of nine years.); *State v. Lonergan*, 548 A.2d 718 (Conn. App. 1989) (The defendant was acquitted of second-degree manslaughter with motor vehicle while intoxicated which carries a lesser sentence than first degree felony-murder.); *Moorehead v. State*, 638 A.2d 52 (Del. Supr. 1994) (Moorehead was found guilty of second degree murder and sentenced to 12 years in prison); *Euceda v. State*, 711 So.2d 122 (Fla. App. 1993) (Euceda was convicted of driving under the influence manslaughter which carries a lower sentence than first degree felony-murder); *Smith v. State*, 475 S.E.2d 715 (Ga. App. 1996) (Defendant was convicted of homicide by vehicle also carrying a substantially lower sentence than that of Blackwell or Jones); *State v. Lowe*, 815 P.2d 450 (Idaho 1998) (Defendant plead guilty to aggravated DUI and vehicular manslaughter and received a sentence of two years); *People v. Martin*, 640 N.E.2d 638 (Ill. App. 1994) (Defendant was sentenced to 14 years for each reckless homicide conviction); *State v. Hubka*, 480 N.W.2d 867 (Iowa 1992) (Defendant was found guilty on two counts of vehicular homicide and sentenced to two five year terms of imprisonment); *State v. Wright*, 948 P.2d 677, 679 (Kan. App. 1993) (Wright was sentenced to 120 months for an involuntary manslaughter conviction); *State v. Bradford*, 700 So.2d 1046 (La. App. 1997) (Defendant was convicted of vehicular homicide and received a 15 year sentence); *State v. Constantine*, 588 A.2d 294 (Me. 1991) (Defendant was sentenced to ten years imprisonment for vehicular manslaughter); *Cianos v. State*, 659 A.2d 291 (Md. 1994) (The court imposed concurrent five year sentences for each count of manslaughter); *Morris v. Registrar of Motor Vehicles for the State of*

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Massachusetts, 1994 WL 879838 (Mass. Supr. 1994) (Defendant was previously convicted of motor vehicle homicide where he received 3 years probation.); *People v. Lardie*, 551 N.W.2d 656 (Mich. 1996) (The defendant was subject to 15 years imprisonment for the charge of causing death by operating a vehicle while under the influence of intoxicating liquor); *State v. Condon*, 497 N.W.2d 272 (Minn. App. 1993) (Defendant convicted of criminal vehicular operation and received a sentence of five years); *State v. Pogue*, 851 S.W.2d 702 (Mo. App. 1993) (Defendant was convicted for involuntary manslaughter and given a three year sentence.); *Frambles v. State*, 1999 WL 228864 (Miss. App. 1999) (Defendant was convicted of felony driving under the influence of alcohol causing death and sentenced to a term of 15 years in prison); *State v. Gould*, 704 P.2d 20, 23 (Mont. 1985) (Gould was found guilty of negligent homicide and sentenced to three years imprisonment); *State v. Harrison*, 588 N.W.2d 556 (Neb. 1999) (Defendant was convicted of two counts of motor vehicle homicide and sentenced to consecutive terms of five years probation which was not considered too lenient on appeal); *Abitre v. State*, 738 P.2d 1307 (Nev. 1987) (Defendant was convicted of causing the death of another while driving a vehicle while intoxicated and was sentenced to considerably less than a first degree felony-murder conviction); *State v. Ebinger*, 603 A.2d 924 (N.H. 1992) (Defendant was sentenced to three and half years in prison); *State v. Saccone*, 72 A.2d 923 (N.J. 1950) (Defendant was sentenced to a non-custodial probationary term for committing third-degree death by auto.); *State v. Guerro*, 974 P.2d 669 (N.M. App. 1999) (Defendant was sentenced to 15 years in prison for five counts of homicide by vehicle.); *People v. MacDonald*, 675 N.E.2d 1219 (N.Y. 1996) (Defendant pled guilty to negligent homicide in which alcohol was involved and received five years in prison); *State v. Snyder*, 311 N.C. 391, 317 S.E.2d 394 (N.C. 1984) (Defendant was convicted of second degree murder for a DWI fatality and received a of considerably less than life in prison without the possibility of parole.); *State v. Shirk*, 1999 WL 503419 (Ohio App. 1999) (Defendant was sentenced to four years in prison for an involuntary manslaughter conviction); *Baker v. State*, 966 P.2d 797 (Okla. Crim. App. 1998) (Defendant was convicted of second degree felony murder and sentenced to thirty years in prison.); *State v. Boone*, 661 P.2d 917 (Or. 1983) (Defendant was convicted of assault in the second degree and sentenced to a term of imprisonment considerably less than a life in prison without parole); *State v. Petroll*, publication pages are unavailable, (Pa. 1998) (Defendant received a sentence of nine years for three counts of vehicular homicide.); *State v. Mattatall*, 603 A.2d 1098 (R.I. 1992) (Defendant was convicted of second-degree murder and sentenced to 30 years imprisonment.); *State v. White*, 428 S.E.2d 740 (S.C. App. 1993) (The defendant was convicted of felony driving under the influence and received a sentence of 21 years); *State v. Big Head*, 363 N.W.2d 556 (S.D. 1985) (Defendant was convicted of vehicular homicide where six-year prison sentence, with credit given for time served, was not cruel and inhuman punishment.); *State v. Hart*, 1999 WL 450221 (Tenn. Crim. App. 1999) (The defendant was convicted by a jury of criminally negligent homicide. He was sentenced for the criminally negligent homicide conviction as a Range I, standard offender to two years confinement in the Department of Correction.); *State v. Chavez*, 605 P.2d 1226 (Utah 1979) (Defendant was convicted of automobile homicide which carries a considerably lower sentence than first degree felony-murder.); *State v. Welch*, 376 A.2d 351 (Vt. 1977) (Defendant was convicted of driving while intoxicated,



tion for a DWI fatality because unintentional acts should never be susceptible to the death penalty.

Together, *Enmund* and *Helm* illustrate why North Carolina's use of the felony-murder rule for a DWI fatality is misguided. *Enmund* shows that deterrence and retribution are invalid reasons for using the felony-murder rule in DWI cases. Further, all three prongs of the *Helm* test are violated by convicting Jones and Blackwell under a theory of first degree felony-murder with a punishment of life without parole. Thus, these United States Supreme Court cases further illustrate why the verdicts in *Jones* and *Blackwell* should be overturned on appeal.

### CONCLUSION

Jones and Blackwell are two individuals who have received several DWI convictions and should be punished for their actions, specifically for the deaths of three innocent people. It should be stressed that this article does not assert that either defendant should not be placed in prison. However, the proper sentence is second degree murder which is permissible under the United States Constitution and not first degree felony-murder.<sup>294</sup> Further, it would be entirely appropriate for both individuals to receive a lengthy prison sentence under North Carolina's second degree murder statute.<sup>295</sup>

What this Comment does argue is that DWI fatalities should not be prosecuted under North Carolina's felony-murder statute.

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death resulting which also carries a lower sentence than felony-murder.); *State v. Davis*, 1999 WL 438909 (Wash. App. 1999) (Davis pleaded guilty to two counts of vehicular homicide by driving in a reckless manner with a standard range sentence of 36 to 48 months.); *State v. Knuckles*, 473 S.E.2d 131 (W. Va. 1996) (Defendant was convicted in the Circuit Court of three counts of vehicular homicide arising out of the alcohol-related deaths of three victims. The trial court sentenced the defendant to three consecutive terms of one-to-ten years in prison.); *State v. Cooper*, 344 N.W.2d 194 (Wis. App. 1983) (Defendant was properly convicted on two counts of homicide by negligent use of vehicle, and each count on which she was convicted carried maximum penalty of two years of imprisonment.); *State v. Appellee*, 922 P.2d 846 (Wyo. 1996) (Term of 18 to 20 years for offense of aggravated vehicular homicide was not abuse of discretion.).

294. *State v. Rich*, 512 S.E.2d 441 (1999) (affirming a second degree murder conviction for a driver who was speeding and veered out of his lane of travel); *State v. Snyder*, 311 N.C. 391, 317 S.E.2d 394 (1984) (affirming a second-degree murder in facts substantially similar to those in the case sub judice).

295. See Liz Marie Marciniak, *The Use of Day Reporting as an Intermediate Sanction: A Study of Offender Targeting and Program Termination*, Prison Journal, (Sage Publications, Vol. 79) (June 1, 1999).

*Enmund* and *Helm* illustrate that it is unconstitutional to use G.S.14-17 to convict someone responsible for a traffic fatality of felony-murder and that such convictions are also beyond the General Assembly's intended scope for this statute. The felony-murder rule is not without criticism; however it has served a useful purpose in the United States. Prosecuting a DWI fatality under a theory of felony-murder will diminish the validity of this rule.<sup>296</sup>

Drunk driving fatalities, often caused by alcoholism, can be changed through proper education. For those who are beyond education, their punishment should be reasonable.<sup>297</sup> When punishing an individual also results in the misuse of a law which has been a useful prosecutorial tool in North Carolina, then the punishment is unreasonable. Therefore, the verdicts in *Jones* and *Blackwell* should be reversed and the defendants should be retried under a proper criminal statute, such as death by motor vehicle or in the most severe situations, like *Jones* and *Blackwell*, under North Carolina's second degree murder statute.

*Graham T. Stiles*

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296. See generally Donald Baier, *Arizona Felony Murder: Let the Punishment Fit the Crime*, 36 *Ariz. L. Rev.* 701, 713 (1994)

297. See *Mullaney v. Wilbur*, 421 U.S. 684, 698, (1975).