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State v. Johnson: Taking A Strong Stance Against Murder by Poison in North Carolina

> *Of all species of deaths, the most detestable is that of poison; because it can, of all others, be the least prevented either by manhood or forethought.... And, therefore, by... statute... it was made treason, and a more grievous and lingering kind of death was inflicted on it than the common law allowed; namely, boiling to death.*[1]

No antidote cures murder by poison. Attractive because the crime often escapes detection, poisoning inflicts indescribable pain and illness on the victim.[2] The law reserves special treatment for the defendant who stifles life through poisoning. Although society no longer permits the boiling of criminals, deterrence takes comparable forms. In *State v. Johnson*[3] the North Carolina Supreme Court held that any murder perpetrated by means of poison automatically becomes first degree murder,[4] which is punishable by death or life imprisonment.[5] The *Johnson* court classified murder by poison and by other specified means into a separate category worthy of the law's maximum penalty.[6] Moreover, within this class, evidence normally required for first degree murder—proof of premeditation, deliberation, and the intent to kill—is irrelevant.[7] In singling out murder by poison, the *Johnson* court focused on the means used to commit the killing, making poisoning a primary element in the murder conviction.

This Note explores the *Johnson* court's treatment of murder by specified means as a separate category of first degree murder. Relying on statutory construction, the court ruled that premeditation, deliberation, and the intent to kill are not elements of murder by poison. These traditional elements of first degree murder are irrelevant because of the chosen modus operandi.[8] To support its rejection of the traditional components, the *Johnson* court cited the felony murder rule and its status as first degree murder.[9] This Note assesses the court's rationale and suggests an alternative construction of the statute that sets the degrees of murder. The proffered interpretation views murder by poison as a type of willful, deliberate, and premeditated murder, thus stressing the traditional requirements for a first degree conviction. This Note also suggests that analysis of murder by lying in wait and by means other than poisoning—all of

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1. 4 W. BLACKSTONE, COMMENTARIES *196.

2. *See* State v. Barfield, 298 N.C. 306, 332, 259 S.E.2d 510, 531 (1979), *cert. denied*, 448 U.S. 907 (1980) (account of victim struggling with medical personnel and screaming in agony); Zoldoske v. State, 82 Wisc. 580, 588, 52 N.W. 778, 781 (1892) (victim suffering convulsions throughout the night).

3. 317 N.C. 193, 344 S.E.2d 775 (1986).

4. *Id.* at 204, 344 S.E.2d at 782.

5. N.C. GEN. STAT. § 14-17 (1986).

6. 317 N.C. at 203, 344 S.E.2d at 781.

7. *Id.*

8. *Id.* For a discussion of the statutory construction of section 14-17, see *infra* notes 52-69 and accompanying text.

9. For an examination of the felony murder rule, see *infra* notes 70-78 and accompanying text.

which are enunciated in the statute—provides greater insight into the issues in *Johnson* than the supreme court's analogy to felony murder. Finally, the Note discusses the practical implications of the decision and concludes that although the court asserts a strong position, a first degree murder conviction directly responds to the public policy of deterring murder by poison.

Richard Johnson poisoned his five-year-old daughter Joyce on June 17, 1984.[10] Under the pretense of administering medicine for a urinary tract infection, defendant fed his child a teaspoon of white liquid that smelled like bug poison.[11] Joyce's doctor, however, had prescribed a dark-orange, sweet-odored antibiotic for her illness. As the child's body reacted to the toxin, white foam bubbled from her mouth and she became incoherent. Irreversible brain damage resulted. Within three days, Joyce died from the ingestion of an insecticide.[12]

The girl's death culminated the stormy separation of her parents. In a heated exchange that occurred prior to the murder, defendant threatened to kill his children and then commit suicide.[13] A few weeks before Joyce's death, Christopher, the defendant's son, received treatment for organophosphate poisoning, the same substance that later claimed his sister's life.[14] The jury convicted defendant of first degree murder.[15]

Exercising his statutory right,[16] defendant appealed the verdict directly to the North Carolina Supreme Court.[17] He contended that the trial court erred by refusing to instruct the jury that first degree murder requires a finding that he intended to kill his daughter when he administered the poison.[18] After reviewing section 14-17, which divides murder into two degrees,[19] the *Johnson* court

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10. *Johnson*, 317 N.C. at 195, 344 S.E.2d at 776.

11. *Id.* Diazinon, an insecticide, caused Joyce's death. *Id.* at 196-97, 344 S.E.2d at 777-78. The dosage needed to kill a human of Joyce's size and weight seems questionable, but the State's Chief Medical Examiner testified that one teaspoon of Diazinon would prove fatal to a similar child. *Id.* at 197, 344 S.E.2d at 777-78. The chemical's manufacturer, however, reported that six teaspoons of undiluted poison would be needed to kill Joyce. Defendant-Appellant's Brief at app. 1, *Johnson* (No. 124A85). If diluted for home use, the fatal dosage dramatically increased. *Id.* The State introduced testimony that defendant said a half teaspoon would kill a person. *Johnson*, 317 N.C. at 196, 344 S.E.2d at 777. In any event, Joyce died from the amount given to her that morning.

12. *Johnson*, 317 N.C. at 195-96, 344 S.E.2d at 777. After defendant administered the poison, he went into town to eat breakfast, leaving Joyce in her brother's care. While in town, defendant inquired about the location of the town ambulance, adding that he "might need it later." *Id.* at 195, 344 S.E.2d at 777.

13. *Id.* at 194, 344 S.E.2d at 776. A friend of defendant's testified that defendant told him that he "would rather see the kids in hell as his wife have them." *Id.* at 196, 344 S.E.2d at 777.

14. Hospital personnel applied an antidote and Christopher recovered. *Id.* at 194, 344 S.E.2d at 776. Defendant's father told the doctor that his grandson had gone into the family home immediately after it was sprayed for insects, thereby exposing the boy to the poison. *Id.* at 197, 344 S.E.2d at 778. Joyce's death, though, stemmed from oral ingestion of insecticide, not absorption through the skin. *Id.* at 196, 344 S.E.2d at 777.

15. *Id.* at 198, 344 S.E.2d at 778.

16. *See* N.C. GEN. STAT. § 7A-27(a) (1986). The law provides: "From a judgment of a superior court which includes a sentence of death or imprisonment for life, unless the judgment was based on a plea of guilty or nolo contendere, appeal lies directly to the Supreme Court." *Id.*

17. *Johnson*, 317 N.C. at 194, 344 S.E.2d at 776.

18. *Id.* at 201, 344 S.E.2d at 780.

19. N.C. GEN. STAT. § 14-17 (1986). The statute states:

A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or

held that in a prosecution for murder by poison, the State is not required to prove defendant's intent to kill the victim.[20] Thus, the trial judge properly refused to instruct the jury that the intent to kill is a prerequisite for convicting defendant of first degree murder by poison.[21] The supreme court upheld defendant's life sentence.[22]

Regardless of its degree, murder is the unlawful killing of a person with malice.[23] Malice may consist of one of several alternative mental attitudes: (1) the specific intent to kill; (2) the intent to cause serious bodily harm; (3) the intent to act knowing that it will probably produce death or serious injury; and (4) the commission of an act that evidences a depraved and malignant heart.[24] Traditionally, first degree murder consists of second degree murder—the unlawful killing of another with malice—plus premeditation, deliberation, and willfulness.[25] Premeditation means thought beforehand. Deliberation denotes a cool state of mind.[26] Willfulness is the specific intent to kill.[27] Once convicted of first degree murder, the defendant faces life imprisonment or death.[28]

Section 14-17 of the North Carolina General Statutes codifies the distinction between first and second degree murder:

> A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be 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 to be murder in the first degree . . . . All other kinds of murder . . . shall be deemed murder in the second degree . . . .[29]

The degree-setting statute expands traditional first degree murder through the

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which shall be 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 to be murder in the first degree, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life as the court shall determine pursuant to G.S. 15A-2000. All other kinds of murder, including that which shall be proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium when the ingestion of such substance causes the death of the user, shall be deemed murder in the second degree, and any person who commits such a murder shall be punished as a Class C felon.

Id.

20. *Johnson* 371 N.C. at 204, 344 S.E.2d at 782.

21. *Id.*

22. *Id.* at 206, 344 S.E.2d at 783.

23. State v. Duboise, 279 N.C. 73, 81, 181 S.E.2d 393, 398 (1971).

24. *See, e.g.*, 2 WHARTON'S CRIMINAL LAW § 137, at 171-72 (14th ed. 1979).

25. *See, e.g.*, State v. Duboise, 279 N.C. 73, 81, 181 S.E.2d 393, 398 (1971); State v. Benton, 276 N.C. 641, 657, 174 S.E.2d 793, 804 (1970); State v. Robbins, 275 N.C. 537, 542, 169 S.E.2d 858, 861 (1969).

26. R. PERKINS & R. BOYCE, CRIMINAL LAW 131 (3d ed. 1982).

27. *See, e.g., Johnson*, 317 N.C. at 202, 344 S.E.2d at 781; State v. Propst, 274 N.C. 62, 70-71, 161 S.E.2d 560, 566-67 (1968); *see also* R. PERKINS & R. BOYCE, *supra* note 26, at 130-32 (willfulness requires an intention to kill).

28. N.C. GEN. STAT. § 14-17 (1986).

29. *Id.*

inclusion of deaths resulting from certain felonies and from the use of a deadly weapon in a felony. In *Johnson* the court focused on the prefatory language in section 14-17 that refers to the specified modus operandi as first degree murder. *Johnson* viewed the legislative purpose behind the express enumeration of means as a signal to depart further from the traditional requirements of murder.

Historically, the basic language of section 14-17 has remained intact since 1893 when North Carolina initially adopted a degree-setting statute.[30] Under the statute the jury determines whether the homicide constitutes murder and then decides the degree of the crime.[31] In murder by poison prosecutions prior to *Johnson*, the court required the State to establish that (1) the victim died from poisoning and (2) the defendant administered the toxin with criminal intent.[32] If the evidence showed that the defendant unlawfully gave the poison that caused death, the jury could return a verdict for first degree murder.[33]

Usually, the degree of murder set in poison cases raised no theoretical problems. Because the nature of the act necessarily involved planning and purpose, the law presumed premeditation and deliberation; both of which are required for a first degree conviction.[34] This presumption was rebuttable. In *State v. Matthews*[35] defendant challenged the indictment charging him with second degree murder perpetrated by poison. Citing the predecessor to section 14-17,[36] Matthews claimed that the statute, by expressly referring to poison, permitted only first degree convictions in poisoning cases.[37] The court dismissed this argument saying that even though the statute enumerated certain means, the law

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30. The original degree-setting statute read:

> SECTION 1. All murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of wilful [sic], deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetuate [perpetrate] any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death.
>
> SECTION 2. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the penitentiary.

Act of February 11, 1893, ch. 85, §§ 1-2, N.C. Pub. Laws 76, 76 (codified as amended at N.C. GEN. STAT. § 14-17 (1986) (brackets in the original)).

A significant substantive change in the degree designation occurred in 1977 when the general assembly qualified the phrase "or other felony" through amendment. The phrase now reads "or other felony committed or attempted with the use of a deadly weapon." Act of May 19, 1977, ch. 406, § 1, 1977 N.C. Sess. Laws 407, 407 (codified as amended at N.C. GEN. STAT. § 14-17 (1986)); *see* State v. Davis, 305 N.C. 400, 423, 290 S.E.2d 574, 588 (1982). The general assembly enacted the change in response to the North Carolina Supreme Court's expansive definition of the original phrase. *Id.*

31. *See* N.C. GEN. STAT. § 15-172 (1986). For further discussion of the jury's role in murder cases, see *infra* notes 66-69 and accompanying text.

32. *See* State v. Hendrick, 232 N.C. 447, 61 S.E.2d 349 (1950); 6 N.C. INDEX 3D, Homicide § 14.2, at 557 (1977).

33. *See* State v. Hendrick, 232 N.C. 447, 61 S.E.2d 349 (1950).

34. *See* State v. Dunheen, 224 N.C. 738, 739-40, 32 S.E.2d 322, 324 (1944).

35. 142 N.C. 621, 55 S.E. 342 (1906).

36. *See supra* note 30.

37. *Matthews*, 142 N.C. at 623, 55 S.E. at 343. Matthews argued that the jury could only convict him of first degree murder because the indictment charged him with murder by poison. Given the inconsistency between the indictment and the verdict, his conviction for second degree murder was invalid, entitling him to a new trial. *Id.*

merely raised a presumption of first degree murder.[38] Recalling the common law, the *Matthews* court reasoned that the statute allowed a second degree murder conviction when an unintentional homicide by poisoning lacked premeditation and deliberation.[39]

The rebuttable presumption carried over into the modern law. Despite the heinous nature of the crime and the specific reference to poison in section 14-17, the North Carolina Supreme Court treated murder by poison like all other traditional first degree murders. Namely, the State had to establish, through evidence and presumptions,[40] that the killing was willful, premeditated, and deliberate.[41] Yet Justice Mitchell, concurring in *State v. Strickland*,[42] rejected the presumption rationale in murder by the enumerated means cases.[43] He as-

38. *Id.* at 625, 55 S.E. at 343.

39. *Matthews*, 142 N.C. at 624-25, 55 S.E. at 343-44. Although the *Matthews* analysis appeared in dicta, the court's interpretation bears on the issue in *Johnson*. *See infra* notes 66-69 and accompanying text (discussing the jury's role in murder cases).

40. Some confusion exists concerning the type of presumption that has operated in murder by poison cases. Referring to murder by the specified means, the court in State v. Strickland, 307 N.C. 274, 298 S.E.2d 645 (1983), stated, "[T]he law conclusively presumes that the murder was committed with premeditation and deliberation, and where the evidence produced at trial supports a finding that the murder was so perpetrated, a defendant can properly be convicted of first degree murder." *Id.* at 282, 298 S.E.2d at 652 (1983). However, prior murder by poison precedent indicates that the method of death only creates a rebuttable presumption. *See Matthews*, 142 N.C. at 625, 55 S.E. at 343 (1906). A conclusive presumption states a rule of law and cannot be disputed; a rebuttable presumption allows the defendant to disprove it through contradictory evidence. *See* MCCORMICK ON EVIDENCE § 342, at 966 (3d ed. 1984).

The discrepancy over rebuttable or conclusive presumption becomes even more clouded when cases cited by the *Strickland* court in support of its assertion are examined. *Strickland*, 307 N.C. at 282-83, 298 S.E.2d at 652. A 1944 case expressly reserved the question of whether the presumption in murder by the specified means could be rebutted. State v. Dunheen, 224 N.C. 738, 740, 32 S.E.2d 322, 324 (1944). In a 1982 case, the United States District Court for the Eastern District of North Carolina declined to review the question of irrebuttability in murder by poison cases because the evidence clearly showed premeditation by the defendant. Barfield v. Harris, 540 F. Supp. 451, 461, 468, (E.D.N.C. 1982), *affirmed*, 719 F.2d 58 (4th Cir. 1983) *cert. denied*, 467 U.S. 1210 (1984). The cases cited by *Strickland* did not take a definitive stance on the operation of presumptions.

In *Johnson* the supreme court rejected the conclusive presumption, stating that the " ' presence or absence of premeditation and deliberation is irrelevant.' " *Johnson*, 317 N.C. at 203, 344 S.E.2d at 781 (quoting *Strickland*, 307 N.C. at 306, 298 S.E.2d at 663 (Mitchell, J., concurring)). As a practical matter, though, conclusive presumptions and irrelevancy have the same effect: The accused cannot contest the existence of premeditation and deliberation. Thus, *Johnson* would merely represent a philosophical shift in the court's reasoning without changing the substantive impact of the law.

This Note acknowledges the unsettled state of the law concerning presumptions. *Johnson* clarifies any confusion: the defendant cannot rebut the existence of premeditation and deliberation, because those elements are irrelevant. Thus, *Johnson* culminates the move from the rebuttable presumption to the conclusive presumption to the irrelevancy standard. This Note examines the substantive change in the law as clearly stated in *Johnson*.

41. *See* State v. Strickland, 307 N.C. 274, 282-83, 298 S.E.2d 645, 651-52 (1983); State v. Barfield, 298 N.C. 306, 328, 259 S.E.2d 510, 529 (1979), *cert. denied*, 448 U.S. 907 (1980); State v. Hunt, 289 N.C. 403, 407, 222 S.E.2d 234, 238 (1976). The *Barfield* court noted that "homicide which is committed by use of poison does not differ in its substantive elements from homicide committed by other means." *Barfield*, 298 N.C. at 328, 259 S.E.2d at 529.

42. 307 N.C. 274, 298 S.E.2d 645 (1983).

43. *Id.* at 306, 298 S.E.2d at 663 (Mitchell, J., concurring). The *Strickland* court also analyzed murder by the specified means as a separate class in accordance with an earlier decision. *See*, State v. Davis, 305 N.C. 400, 290 S.E.2d 574 (1982). The *Strickland* opinion—written, as was the *Johnson* opinion, by Justice Meyer—cited the presumption of premeditation and deliberation in murder by poison cases. *Strickland* 307 N.C. at 283, 298 S.E.2d at 652. Justice Mitchell's concurrence took issue with that particular assertion by Justice Meyer. *Id.* at 306, 298 S.E.2d at 663 (Mitchell, J.

serted that the elements for murder by poison and other listed methods differed from the traditional first degree murder:

> When a homicide is perpetrated by means of poison, lying in wait, imprisonment, starving or torture, the law does not presume, conclusively or otherwise, that the murder was committed with premeditation and deliberation. Instead, the presence or absence of premeditation and deliberation is irrelevant . . . . Premeditation and deliberation are not . . . elements of murder in the first degree perpetrated by means of poison, lying in wait, imprisonment, starving or torture.[44]

Justice Mitchell concluded that when homicide involved the specified means, section 14-17 merely requires proof that the defendant intentionally killed the victim by such means.[45] Analysis of this separate class under the statute excluded an examination of the traditional elements needed for a first degree murder conviction.

The *Johnson* court accepted Justice Mitchell's position.[46] Discarding presumptions, the court held that premeditation, deliberation, and the intent to kill are equally irrelevant in murder by poison cases.[47] The *Johnson* opinion, like Justice Mitchell's concurrence in *Strickland*, relied on an interpretation of section 14-17 that considered murder by the enumerated methods as a distinct type of first degree murder.[48] Given the irrelevancy of the traditional requirements, the court approved the trial court's instruction requiring the jury to find three elements for murder by poison convictions: (1) the defendant intended to administer the poison; (2) the defendant acted with malice; and (3) the victim died from poisoning.[49] Unlike traditional first degree murder, malice in murder by

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concurring). *See also infra* notes 53-62 and accompanying text (examining the construction of § 14-17 that treats murder by specified means as a separate class).

44. *Strickland*, 307 N.C. at 306, 298 S.E.2d at 663 (Mitchell, J., concurring).

45. *Id.* Justice Mitchell described murder by poison as requiring proof of "intentional" action. Did he define "intentional" as the intent to kill or as the intent to poison? The *Johnson* court opted for the intent to poison interpretation. *See infra* notes 46-54 and accompanying text (discussing murder by poison under *Johnson*).

46. Justice Meyer, who authored the *Johnson* opinion, wrote the *Strickland* opinion, which asserted that presumptions operated in murder by the specified means cases. Justice Meyer apparently changed his views during the three-year interim between the cases. Justice Meyer justified his about-face by stating that "[w]e belatedly conclude that Justice Mitchell's *well-reasoned* view was correct . . . ." *Johnson*, 317 N.C. at 203, 344 S.E.2d at 781 (emphasis added). Was Justice Mitchell's concurrence "well-reasoned"? In only two paragraphs, Justice Mitchell concluded, without the benefit of any cited authority, that premeditation and deliberation were irrelevant. *Strickland*, 307 N.C. at 306-07, 298 S.E.2d at 663-64; *see also supra* text accompanying note 44 (quoting the bulk of Mitchell's argument). Perhaps unsympathetic facts, rather than sound legal reasoning, enlightened Justice Meyer.

47. 317 N.C. at 203, 344 S.E.2d at 781.

48. *Id.* at 202, 344 S.E.2d at 781.

49. *Id.* at 200-01, 344 S.E.2d at 780 (quoting the trial judge's instructions to the jury). The instruction approved in *Johnson* differs from the historical requirements for a murder by poison conviction in one key respect. Earlier precedent called for a criminal intent on the defendant's part. *See supra* text accompanying note 32 (discussing requirements for murder by poison prior to the *Johnson* decision). Did the *Johnson* court, by permitting a murder by poison conviction without a showing of criminal intent, examine the relevant law out of historical context? *See* State v. Hendrick, 232 N.C. 447, 455-56, 61 S.E.2d 349, 355-56 (1950) (reversing murder by poison conviction for failure to establish, among other things, criminal administration by defendant). Moreover, *John-*

poison cases is not limited to the specific intent to kill.[50] Evidence showing a depraved heart or the intent to cause serious injury, normally sufficient only for a second degree conviction, supports the automatic conviction for first degree murder when the defendant uses poison to kill.[51]

The *Johnson* court analyzed murder by poison in accordance with a four-part construction of section 14-17.[52] Divided along the proof requirements, the four classes of first degree murder are: (1) murder perpetrated by means of poison, lying in wait, imprisonment, starving or torture; (2) willful, deliberate, and premeditated killings; (3) felony murder, limited to specified felonies; and (4) homicide committed during any felony when the accused uses a deadly weapon.[53] Consistent with this splitting of section 14-17, the *Johnson* court separated murder by poison from the willful, deliberate, and premeditated category. In essence, the court assumed that by enumerating certain methods, the general assembly intended this type of murder to receive special treatment—a first degree conviction irrespective of whether the evidence establishes a willful, deliberate, and premeditated homicide.[54] The means employed by the accused are the essential element of the offense.

The result in *Johnson* squares with the court's prior interpretation of the degree-setting statute and reasonably follows from statutory construction rules.[55] Section 14-17, though, is susceptible to another interpretation. Drawing from the history of degree-setting statutes, this alternative construction views the means specified in the statute as examples of willful, deliberate, and premeditated killings.[56] Deemphasizing the methods mentioned at the beginning of the statute, section 14-17 divides into two sections: (1) willful, deliberate, and premeditated murders, including killings perpetrated by means of poison; and (2) felony murder encompassing homicides during the commission of specified felonies and during felonies involving a deadly weapon.[57] By their nature poison, lying in wait, imprisonment, starving, and torture illustrate first

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son cited murder by poison decisions from other jurisdictions to support its analysis, but in each case the presiding court concentrated on the coupling of poison with a crime. *See* State v. Thomas, 135 Iowa 717, 109 N.W. 900 (1906) (citing the felonious administration of poison); State v. Wagner, 78 Mo. 644 (1883) (defendant poisoned victim as part of fraudulent scheme); Rupe v. State, 42 Tex. Crim. 477, 61 S.W. 929 (1901) (poison slipped into drink to effectuate theft). For problems with the lack of criminal intent in *Johnson* and the court's analogy to felony murder, see *infra* notes 70-78 and accompanying text.

50. *Johnson*, 317 N.C. at 201, 344 S.E.2d at 780.

51. *Johnson* prohibits second degree murder by poison. *See infra* notes 96-99 and accompanying text (discussing *Johnson*'s stance against lesser included offenses).

52. *Johnson*, 317 N.C. at 202, 344 S.E.2d at 781 (citing State v. Strickland, 307 N.C. 274, 298 S.E. 645 (1983)).

53. The supreme court has viewed the degree-setting statute as creating distinct categories within first degree murder. State v. Strickland, 307 N.C. 274, 282, 298 S.E.2d 645, 651 (1983); *see also* State v. Davis, 305 N.C. 400, 423, 290 S.E.2d 574, 588 (1982) (use of a three-part categorization of § 14-17 before the general assembly added the deadly weapon clause).

54. *See* Comment, *Lying in Wait Murder*, 6 STAN. L. REV. 345, 348 (1954).

55. *See* cases cited *supra* note 53.

56. *See* Houlton v. State, 254 Ala. 1, 48 So. 2d 7 (1950); BLACKSTONE, *supra* note 1, at *199-200; R. PERKINS & R. BOYCE, *supra* note 26, at 130; Comment, *supra* note 54, at 348-50.

57. Defendant argued that § 14-17 split into two parts. Defendant-Appellant's Brief at 7, *Johnson*.

degree murders because the defendant commits such acts after thought and in a cool state of mind.[58] If one of these actions causes death, the State must still comply with the requirements of proving premeditation, deliberation, and the intent to kill.[59] A first degree murder conviction is appropriate, but not mandated; no sanction is automatic. The statutory list is merely illustrative of the kind of homicide involving the first degree murder states of mind.[60]

The bifurcated reading of section 14-17 adheres to the statute's language and grammatical structure. After listing poison and the other means, section 14-17 denotes "any *other* kind of willful, deliberate, and premeditated killing" as first degree murder.[61] By employing the word "other," the statute expressly refers back to the previous listing, implying that the specified methods are subject to the same analysis as willful, deliberate, and premeditated killings.[62] Thus, the traditional proof required for a first degree murder conviction applies to poison cases.

Further, the clauses introducing the categories of first degree murder logically separate into two parts. The statute starts by describing murders "which shall be perpetrated by" the specified means and willful, deliberate, and premeditated killings. Then, shifting gears, section 14-17 addresses murders "which shall be committed in the perpetration" of certain felonies, and gives special attention to felonies involving a deadly weapon.[63] These introductory clauses grammatically group first degree murder into two types.[64] Therefore, the stat-

58. *See, e.g.*, People v. Steger, 16 Cal. 3d 539, 546 P.2d 665, 128 Cal. Rptr. 161 (1976) (torture); People v. Thomas, 41 Cal. 2d 470, 261 P.2d 1 (1953) (lying in wait); State v. Wells, 61 Iowa 629, 17 N.W. 90 (1883) (poison).

59. Because the specified means illustrate willful, deliberate, and premeditated killings, proving first degree murder will usually amount to a formality. Further, the presumption operates in the State's favor, shifting the burden to the defendant. *See supra* notes 34-41 and accompanying text, and *infra* text accompanying note 65 (operation of presumptions in murder by poison cases). The defendant may contest the presumption, but the court may dismiss such a claim as meritless. *See* Barfield v. Harris, 540 F. Supp. 451, 468 (E.D.N.C. 1982), *affirmed*, 719 F.2d 58 (4th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984).

A third construction of degree-setting statutes exists. This interpretation breaks the statute into (1) murder by the specified means excluding lying in wait; (2) willful, deliberate, and premeditated killings including murder by lying in wait; and (3) felony murder. R. PERKINS & R. BOYCE, *supra* note 26, at 129. Lying in wait receives special treatment under this view because this means does not necessarily involve aggravated circumstances. For a discussion of lying in wait, see *infra* notes 80-86 and accompanying text. In North Carolina, though, the three-part construction would twist Section 14-17's language. The statute puts lying in wait after poison and before torture. N.C. GEN. STAT. § 14-17 (1986). Therefore, the extraction of lying in wait would violate the letter of the law.

60. The bifurcated construction also properly connects two related strands of felony murder—killings committed during specified felonies and homicides occurring during a felony involving a deadly weapon. Precedent supports this pairing. *See* State v. Davis, 305 N.C. 400, 290 S.E.2d 574 (1982). The phrase "felony murder" covers both killings committed during the enumerated felonies and homicides resulting from felonies committed with a deadly weapon. *Id.* at 423-425, 290 S.E.2d at 588-89. Further, the amendment adding the deadly weapon qualification to "other felonies" supports one category of felony murder. *See supra* note 30 (discussing the recent change in section 14-17).

61. N.C. GEN. STAT. § 14-17 (1986) (emphasis added).

62. *See* State v. Farmer, 156 Ohio St. 214, 102 N.E.2d 11 (1951).

63. *See* N.C. GEN. STAT. § 14-17 (1986).

64. Statutory construction necessarily involves speculation over the legislative intent behind the choice of words. Even though the two-part construction finds support in history and in the statute's language, the supreme court reads § 14-17 to have four divisions. Before *Johnson*, would a person

ute requires proof of premeditation, deliberation, and the intent to kill for first degree convictions when the State relies on the first category.

The alternative construction of section 14-17 offers two advantages. First, even though the State must establish the traditional elements of first degree murder in poisoning cases, the law presumes, from the nature of the modus operandi, that the defendant acted with premeditation, deliberation, and the intent to kill. As in the cases before *Johnson*, the presumption operates until the defendant introduces rebuttal evidence.[65] Thus, the prosecution benefits from the shifting burden. This construction thereby acknowledges the special attention given to murder by poison in section 14-17 without violating the statute's grammatical structure.

Second, the two-part interpretation also respects the jury's role in murder cases. By statute, the jury must fix the degree in murder convictions.[66] Generally, North Carolina recognizes the jury's function in murder prosecutions, but qualifies the jury's duty when the evidence does not support instructions on lesser offenses.[67] The *Matthews* court cited the jury's statutory obligation as a strong factor in permitting a conviction for second degree murder by poison.[68]

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have known that § 14-17's mention of murder by poison created a special category of first degree murder that did not require proof of premeditation, deliberation, and the intent to kill? At least one court has hinted that a due process claim might exist if the state's definition of first degree murder precludes the defendant from contesting the existence of the traditional elements with legitimate arguments. *See* Barfield v. Harris, 540 F. Supp. 451, 468 (E.D.N.C. 1982), *cert. denied*, 467 U.S. 1210 (1984).

65. *See supra* notes 34-41 and accompanying text (discussing the use of presumptions in earlier cases).

66. N.C. GEN. STAT. § 15-172 (1983). The statute provides:

> Nothing contained in the statute law dividing murder into degrees shall be construed to require any alteration or modification of the existing form of indictment for murder, but the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree.

Id.

67. The supreme court has acknowledged, but restricted, the jury's role in murder cases. If the evidence supports an instruction on lesser included offenses, the trial court must give the instruction and leave the question to the jury. *See Johnson*, 317 N.C. at 204-05, 344 S.E.2d at 782-83; *Strickland*, 307 N.C. at 284-85, 298 S.E.2d at 653. Otherwise, the trial judge should not instruct the jury on an offense not justified by the evidence. *Johnson*, 317 N.C. at 204-05, 344 S.E.2d at 782-83. This Note does not examine the court's previous decisions limiting the role of the jury. The court's position requires the judge to make an evidentiary ruling that closely resembles a finding of fact.

In an early decision under the jury statute, the court upheld the jury's exclusive right to decide the degree of murder. State v. Gadberry, 117 N.C. 811, 23 S.E. 477 (1895). *Gadberry* wholly adopted the position announced in Lane v. Commonwealth, 59 Pa. 371 (1868). The Pennsylvania Supreme Court held in *Lane* that the jury alone can decide the degree in murder convictions. The *Lane* court, dealing with a murder by poison case, reversed the conviction because the judge charged the jury that if they returned a murder verdict, the law mandated a first degree conviction. *Lane*, 59 Pa. at 375-76. Thus, by implication, *Gadberry* protects the jury's right to determine the degree even in murder by poison prosecutions. *See infra* notes 96-99 and accompanying text (explaining *Johnson*'s stance against lesser included offenses in relation to the jury's function). The supreme court views *Gadberry* as overruled. *See* State v. Strickland, 307 N.C. 274, 289 n.3, 298 S.E.2d 645, 655 n.3 (1983).

Other jurisdictions dealing with statutes similar to §§ 15-172 and 14-17 have held that the degree-setting statute yields to the jury's right to fix the degree in murder by poison cases. *See* Houlton v. State, 254 Ala. 1, 48 So. 2d 7 (1950); State v. Dowd, 19 Conn. 388 (1849); State v. Phinney, 13 Idaho 307, 89 P. 634 (1907). Thus, the two-part construction avoids a collision between the two statutes.

68. 142 N.C. at 624-25, 55 S.E. at 343.

By mandating a first degree murder verdict in all murders in which the defendant uses poison, the *Johnson* court invades the province of the jury. The alternate construction avoids this conflict.[69]

Content with the four-part construction and with the separate treatment of murder by poison, the *Johnson* court pointed to the felony murder rule to bolster its stance.[70] Under section 14-17 felony murder includes homicides that occur during the commission of listed felonies and during any felony that involves the use of a deadly weapon.[71] The defendant's guilt of the underlying felony or attempted felony furnishes the grounds for the first degree murder conviction; premeditation, deliberation, and the intent to kill are not elements of felony murder.[72] Because the law dismisses the traditional requirements for first degree murder when the defendant commits a felony as well as a killing, the *Johnson* court reasoned that the specified means category also excepted evidence of a willful, deliberate, and premeditated homicide.

The *Johnson* court's analogy to felony murder is only partially correct. The inclusion of the felony murder rule in section 14-17 indicates the general assembly's willingness to expand first degree murder beyond homicides resulting from willful, premeditated, and deliberate acts. On the other hand, felony murder differs in substance from murder by the specified means. In felony murder cases the law transfers the defendant's intent to commit the underlying felony, a crime separate from the homicide, when finding the *mens rea* for murder.[73] The first degree designation rests on that transfer. In murder by poison cases, however, the necessary mental state cannot be derived from any underlying crime. Unless the defendant commits another crime along with the poisoning, the felony murder analogy suffers from a substantive defect.[74] Murder by poison requires that (1) the defendant intended to administer the poison; (2) the defendant acted with malice; and (3) the poison caused death.[75] Criminal intent is noticeably absent.

The following hypothetical illustrates the fundamental difference between

69. *Compare* N.C. GEN. STAT. § 15-172 (1983) (explicitly affirming the jury's role despite the existence of the degree-setting statute) *with* § 14-17 (enumerating murder by poison, lying in wait, imprisonment, starving, and torture as first degree murder).

70. 317 N.C. at 202-04, 344 S.E.2d at 781-82.

71. *See* State v. Davis, 305 N.C. 400, 424-25, 290 S.E.2d 574, 588-89 (1982).

72. *See Johnson*, 317 N.C. at 202, 344 S.E.2d at 781; *Strickland*, 307 N.C. at 291-92, 298 S.E.2d at 657 (citing State v. Wall, 304 N.C. 609, 613, 286 S.E.2d 68, 71 (1982)); State v. Davis, 305 N.C. 400, 424-25, 290 S.E.2d 574, 588-89 (1982); *see also* R. PERKINS & R. BOYCE, *supra* note 26, at 135 (prosecution must establish guilt for felony or attempted felony as precondition in felony murder); 2 WHARTON, *supra* note 24, § 137, at 171 (intent to commit felony evidences malice aforethought); Karpel & Wilson, *Imputing Act and Intent in Felony Murder Cases: An Elaborate Fiction*, 40 CONN. B.J. 107, 107 (1966) (imputation of malice from intent in underlying felony).

73. *See* Karpel & Wilson, *supra* note 72, at 107; 2 WHARTON, *supra* note 24, § 145, at 204.

74. The *Johnson* court cited decisions from other jurisdictions to support its analysis of murder by poison. *Johnson*, 317 N.C. at 203, 344 S.E.2d at 781. In those cases, unlike *Johnson*, the ruling court viewed the defendant's criminal intent as a key factor. *See* State v. Thomas, 135 Iowa 717, 109 N.W. 900 (1906) (felonious purpose accompanying poisoning); State v. Wagner, 78 Mo. 644 (1883) (fraudulent scheme included poisoning); Rupe v. State, 42 Tex. Crim. 477, 61 S.W. 929 (1901) (poison used in robbery); *see also supra* note 49 (discussing the absence of criminal intent in the *Johnson* court's position on murder by poison). *But cf.* Bechtelheimer v. State, 54 Ind. 128 (1876) (intent to commit rape through poisoning not sufficient for first degree murder by poison).

75. *Johnson*, 317 N.C. at 200-01, 344 S.E.2d at 780.

felony murder and murder by poison. Suppose defendant spikes a drink as a practical joke. Although the defendant only intended to injure the person, death results. Under *Johnson* the unfortunate prankster automatically faces death or life imprisonment: the defendant intended to administer the poison, the lethal dosage evidenced a depraved heart, and the victim died from poisoning. Unlike the felony murder rule, the intent to kill becomes an essential inquiry in such a case. Should the felony murder rule, which concentrates on transferred intent, preclude a conviction for a lesser crime? Because of the situation from which it arises, the felony murder rule is a unique legislative exception to traditional first degree murder doctrine; its rationale cannot extend to an unrelated form of murder.[76] The substantive problems inherent in the analogy raise the question whether the *Johnson* court should have moved away from the conventional analysis of first degree murder.[77] Although the felony murder rule justifies ignoring traditional principles, *Johnson*'s mixing of concepts effectively blends oil and water.[78]

Instead of relying on the felony murder rule, the *Johnson* court should have examined lying in wait, imprisonment, starving, and torture—the other methods expressly grouped with murder by poison.[79] In particular, section 14-17 lists lying in wait directly after poison. "Lying in wait" connotes concealment for the purpose of surprising the victim.[80] Premeditation and deliberation are presumed because the physical act of lying in wait embodies a preconceived plan.[81] Yet in a first degree murder prosecution, the intent to kill becomes the key question.[82] An illustration provides insight into the issues surrounding lying in wait cases. Suppose two men brawl in a tavern. Removed from the premises by the bouncer, the defendant, still full of rage, hides outside in the bushes. The victim walks past the bushes. The defendant springs from the darkness. The victim

76. Of course, if the defendant unsuccessfully poisons another, the law punishes the poisoning as criminal assault and battery. *See* State v. White, 208 N.C. 537, 181 S.E. 558 (1935). Yet the intent to commit criminal assault and battery does not strengthen the felony murder analogy. The same poisoning could result in criminal assault and battery, or manslaughter, or first degree murder. The defendant's act directly relates to the injury; the requisite intent comes from the defendant's intent during the poisoning, not from a separate act. Unlike felony murder, two distinct crimes do not merge to form the mental element.

77. The grammatical structure of § 14-17 also differentiates between felony murder and murder by the specified means. *See supra* notes 63-64 and accompanying text. The statutory language indicates the legislative intent to separate the two types of homicide.

78. The *Johnson* court's simple reference to felony murder is deceptive. The court should have compared the public policy incorporated into the felony murder rule with the similar social interests implicated in murder by poison cases. For a discussion of the heinous nature of murder committed by the specified means, see *infra* notes 87-92 and accompanying text. Thus, *Johnson*'s analogy would have been strengthened by an examination of the policy issues.

79. N.C. GEN. STAT. § 14-17 (1986). *Johnson* lumped poisoning, lying in wait, imprisonment, starving, and torture under the same analysis. 317 N.C. at 203, 344 S.E.2d at 781. Thus, the automatic first degree murder rationale extends to all means specified in § 14-17.

80. *See* R. PERKINS & R. BOYCE, *supra* note 26, at 130; 2 WHARTON, *supra* note 24, § 141, at 190; Comment, *supra* note 54, at 345-46.

81. *See* State v. Allison, 298 N.C. 135, 149, 257 S.E.2d 417, 426 (1979); State v. Dunheen, 224 N.C. 738, 739-40, 32 S.E.2d 322, 324 (1944).

82. *See* R. PERKINS & R. BOYCE, *supra* note 26, at 130; 2 WHARTON, *supra* note 24, § 141, at 190. Presumptions operate in lying in wait cases to establish premeditation and deliberation. *See* State v. Allison, 298 N.C. 135, 149, 257 S.E.2d 417, 426 (1979); State v. Dunheen, 224 N.C. 738, 739-40, 32 S.E.2d 322, 324 (1944).

clutches his chest, suffering a fatal heart attack. For his role in the death, the defendant faces an automatic first degree murder conviction: the defendant physically concealed himself, the act evidenced malice because the defendant intended to inflict serious bodily injury in the fight, and the victim's death resulted from the act.[83]

Because the defendant hid in the shrubs rather than openly confronting his nemesis, the presence or absence of the intent to kill is irrelevant. The means used to commit the crime is the essential element of first degree murder under *Johnson*. Application of traditional principles yields a different result. Even though the law presumes premeditation and deliberation from the physical aspect of the concealment, the defendant lacked the intent to kill. The maximum penalty imposed by the jury would be second degree murder.[84] Murder by poison poses the same analytical quandary.[85] Even though poisoning evidences premeditation and deliberation, the defendant may only intend to inflict injury or to cause illness.[86]

On the other hand, starving, torture, and imprisonment join poisoning as means enumerated in section 14-17. As a group, these methods of death include some of the most heinous crimes known to man and inflict terrible suffering on the victim.[87] Public policy justifies a decision that the defendant's cold-blooded and calculated conduct deserves first degree status.[88] Also, the intent to commit

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83. In the hypothetical the key question before the jury would be the existence of the specific intent to kill. Because *Johnson* defines malice in murder by the enumerated means as including ill-will or hatred toward the victim, however, the jury could convict the defendant of first degree murder without finding the specific intent to kill. *See Johnson*, 317 N.C. at 203, 344 S.E.2d at 781; *see also infra* note 94 (discussing the *Johnson* definition of malice). *But see* People v. Thomas, 41 Cal. 2d 470, 478-79, 261 P.2d 1, 6 (1953) (Traynor, J., concurring) (finding that first degree murder exists on the grounds that it was committed by lying in wait, but without establishing that it was willful, deliberate, and premeditated leads to "absurd results").

A twist in the hypothetical leads to the same result. Suppose the defendant fights with the victim outside the bar and accidentally kills him. Normally, the defendant faces an involuntary manslaughter charge. *See Thomas*, 41 Cal. 2d at 479, 261 P.2d at 6 (Traynor, J., concurring). The defendant should not receive an automatic first degree conviction just because he concealed himself in the bushes. The State would have to prove the willful, deliberate, and premeditated nature of the killing if the accused stood out in the open, but the irrelevancy standard permits the prosecution to rely wholly on the modus operandi because the killing occurs after the defendant hid himself. Is a first degree murder conviction mandated by § 14-17 just because the defendant's lying in wait minimally contributed to the victim's death?

84. *Johnson* implicitly precludes a second degree murder for a lying in wait conviction. 317 N.C. at 203, 344 S.E.2d at 781. For *Johnson*'s impact on a defendant's ability to have the jury instructed on lesser offenses, see *infra* notes 96-99 and accompanying text.

85. *See supra* text accompanying notes 75-76.

86. The *Johnson* court expressly rejected defendant's argument that poisoning with the intent only to injure precludes a first degree murder conviction. 317 N.C. at 204, 344 S.E.2d at 782. Arguably, the defendant could have intended to make his daughter ill, especially since the same toxin had rendered the defendant's son sick in an earlier incident. *See id.* at 194, 344 S.E.2d at 776.

87. *See supra* note 2 (cases describing victim's painful reaction to toxin); *see also* People v. Steger, 16 Cal. 3d 539, 546 P.2d 665, 128 Cal. Rptr. 161 (1976) (torture as morally deplorable killing).

88. The Court of Criminal Appeals of Texas summarized the policy considerations in murder by poison cases:

> So utterly revolting to every sense of humanity is the use of poisons as a means of injury to and for the destruction of human life, because of the cool, calculating fiendishness, the deliberate craftiness, with which they are administered, and the unsuspecting confidence with which they are necessarily taken by the innocent victim, that the law, in its efforts to

the act—starve, imprison, torture, or poison—evidences aggravated malice, if not the intent to kill.[89] Because the probable consequences of these specified acts is death, the law reserves first degree murder for these types of killings and punishes the perpetrator with death or life imprisonment. Arguably, lying in wait belongs in this category of detestable crimes.[90] Hiding from view and pouncing on the unsuspecting prey, the defendant strikes fear and confusion in the victim. Mental anguish accompanies death.[91] By explicitly addressing such revolting crimes in section 14-17, the general assembly, as a policy formulation, determined that this category warranted unique treatment without reference to the traditional elements of first degree murder.[92] Thus, the means used to kill the victim become the primary focus of the prosecution.

Ultimately, public policy justifies the result in *Johnson*. Although the decision raises statutory construction and analytical problems, the court correctly singled out murder by poison. *Johnson* produces two consequences for future murder by specified means cases: (1) when the defendant kills through one of the enumerated methods, the State will focus on the defendant's modus operandi rather than premeditation, deliberation, and the intent to kill; and (2) if the jury finds that the defendant committed murder with poison or other specified means, the law requires the jury to convict the defendant of first degree murder.

The *Johnson* court approved the trial court's instruction directing the jury to determine whether defendant intended to poison, defendant acted with malice, and poison caused the victim's death.[93] Medical facts establish the cause of death. Therefore, the State's evidence will concentrate on defendant's state of

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> suppress it entirely as one of the foulest of all crimes, denounces no halfway penalties against it after it has accomplished the destruction of a reasonable creature in being.

Rupe v. State, 42 Tex. Crim. 477, 491, 61 S.W. 929, 933 (1901) (quoting Tooney v. State, 5 Tex. Crim. 163, 191 (1878)).

One can only imagine the agony suffered by the helpless victim who realizes death is coursing through the veins. Similar policy considerations exist in the other enumerated means. Starving, torture, and imprisonment slowly squeeze life from the victim. Moreover, in these types of cases, the defendant has exclusive control over the torment. It would be hard to argue, for example, that starving someone for days or weeks does not necessarily involve a willful, premeditated, and deliberate act.

89. *See* People v. Steger, 16 Cal. 3d 539, 546 P.2d 665, 128 Cal. Rptr 161 (1976); *see also* R. PERKINS & R. BOYCE, *supra* note 26, at 129 (torture and poison as aggravated modes of murder).

90. *See* People v. Thomas, 41 Cal. 2d 470, 261 P.2d 1 (1953); Note, *Murder By Lying in Wait in California*, 8 HASTINGS L.J. 100 (1956).

91. The instantaneous infliction of mental anguish in lying in wait cases does not equal the prolonged physical discomfort that accompanies poison, torture, starving, or imprisonment. Unlike the other means specified in § 14-17, lying in wait rarely inflicts a slow death. Given this significant difference between lying in wait and the other modus operandi, the general assembly, in light of *Johnson*, might amend the degree-setting statute to link lying in wait to willful, premeditated, and deliberate killings. For a statutory construction that connects lying in wait with traditional first degree murder, see *supra* note 59.

92. In light of the public policy implicated in murder by poison, the *Johnson* court's analogy to felony murder becomes stronger. Section 14-17 gives special treatment to those types of homicide that demand severe punishment: Felony murder and murder by the enumerated means. For the substantive problems with *Johnson*'s analogy to felony murder, see *supra* notes 73-78 and accompanying text. The underlying question of statutory construction still remains: Is section 14-17's listing of modus operandi merely illustrative or a conscious choice by the general assembly that these methods constitute first degree murder irrespective of the intent to kill? For a discussion supporting the illustrative nature of the specification, see *supra* notes 56-64 and accompanying text.

93. 317 N.C. at 200-01, 344 S.E.2d at 780.

mind—why did the accused administer poison? The State will argue that a defendant acts with a depraved heart or the intent to inflict serious injury when he administers poison.[94] The same evidence will support both the requisite malice and the intent to administer. If a defendant knows the dangerous qualities of a substance and then gives it to another, that conscious act implies callous disregard for human life. Thus, the only relevant inquiry in murder by poison cases will be whether the defendant intentionally administered the toxin.[95]

As a matter of law, the jury must render a first degree conviction after finding the defendant guilty of murder by poisoning. In such cases the defendant cannot be convicted of second degree murder.[96] Further, the *Johnson* court restricted the possibility of instructing the jury on lesser offenses. Defendant in *Johnson* requested, and the trial court refused, an instruction on involuntary manslaughter. The supreme court upheld the denial.[97] The *Johnson* court ruled that no evidence supported a finding of criminal negligence.[98] The State's evidence proved each element of murder by poison, although defendant vehemently denied giving his daughter the poison at all. The *Johnson* court saw no room for a middle ground: defendant either did or did not commit first degree murder.[99]

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94. For malice, the trial court instructed the jury:

> . . . the State must prove that the Defendant, did [intentionally administer poison] with malice. Malice means not only hatred, ill-will or spite as it is ordinarily understood, to be sure that is malice, but it also means that condition of mind which prompts a person to take the life of another intentionally or to intentionally inflict serious injury upon another, which proximately results in her death without just cause, excuse or justification. Or to wantonly act in such a manner as to manifest depravity of mind, a heart devoid of sense of social duty and a callous disregard for human life.

Johnson, 317 N.C. at 201, 344 S.E.2d at 780.

Legally, the instruction sufficiently incorporates the mental states embodied in malice. *See* NORTH CAROLINA PATTERN JURY INSTRUCTION FOR CRIMINAL CASES § 206.12, at 2 (1978). But the malice instruction should be clearer, especially in murder by the enumerated means cases, in which malice becomes a central inquiry. Under the *Johnson* instruction, the jury might find malice based on a defendant's simple dislike for the victim. Perhaps if the trial court separated the interrelated aspects of malice into categories with accompanying explanations, the instruction would provide a proper guideline. For example, the court could charge the jury that malice includes any of these mental states: (1) the specific intent to kill; (2) the intent to inflict serious bodily injury; and (3) a depraved and malignant heart. Further, the court could explain each category of malice.

95. Under *Johnson* only accidental poisoning cases would escape from first degree murder treatment. The decision, however, leaves open the question of how to deal with mentally impaired defendants. Arguably, the defendant should receive special consideration in murder by poison cases because of a mental handicap. The issue could arise in a number of circumstances—for example, if the defendant administers the poison while under the influence of drugs, or if a retarded defendant believes that poisons can only injure, not kill. *See*, State v. Dunheen, 224 N.C. 738, 740-41, 32 S.E.2d 322, 324-25 (1944); State v. Matthews, 142 N.C. 621, 625, 55 S.E. 342, 343-44 (1906). If the defendant is incapable of forming the intent to kill, but the poisoning evidences an abandoned heart, a strict application of *Johnson*'s analysis would prohibit leniency under the law.

96. *Johnson*, 317 N.C. at 204, 344 S.E.2d at 782. Other jurisdictions, citing the jury's duty to set the degree of murder, permit convictions for second degree murder by poison. *See* Houlton v. State, 254 Ala. 1, 48 So. 2d 7 (1950); State v. Dowd, 19 Conn. 388 (1849); State v. Phinney, 13 Idaho 307, 89 P. 634 (1907); *see also* State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906) (allowing second degree murder by poison in North Carolina).

97. *Johnson*, 317 N.C. at 205-06, 344 S.E.2d at 782-83.

98. *Id.* at 205, 344 S.E.2d at 783.

99. Given the choice between acquittal and the first degree punishments of life imprisonment or death, future juries might hesitate to condemn the defendant. Ultimately, the jury's perception of the defendant's motive might result in the murder conviction. *Johnson* involved unsympathetic facts. For a summary of the facts in *Johnson*, see *supra* notes 10-15 and accompanying text. If the

The full weight of the law bears down on the defendant who murders by poison. Instead of perpetuating the legal fiction presuming the traditional elements of first degree murder, the *Johnson* court made the modus operandi the essential element of the crime. The jury's attention will focus on the act. By taking a strong stance against murder by poison, the *Johnson* court advanced the compelling state interest in deterring killings perpetrated by heinous means. Defendants who choose an aggravated mode of murder invite special treatment under the law. Even though criminals can no longer be boiled to death, the possibility of death or life imprisonment provides a legal antidote for murder by poison.

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Johnson court correctly perceived the social condemnation of murder by the enumerated means, jury nullification should not be a problem. Moreover, by excluding lesser offenses in the instruction, the *Johnson* decision prevents jury sympathy. For discussion of the jury's duty in murder cases, see *supra* notes 66-69 and accompanying text.

The heinous nature of the crime justifies the absolute choice put to the jury. In cases in which the accidental nature of the poisoning is seriously contended by the defendant and legitimately supported by the evidence, the court should be more willing to instruct the jury on lesser offenses. In *Johnson*, defendant absolutely denied giving poison, but the jury found that defendant fed his daughter insecticide. *Johnson*, 317 N.C. at 197-98, 344 S.E.2d at 778. The earlier poisoning of Christopher and the conflicting properties of the medicine and the insecticide effectively precluded defendant from arguing that Joyce's death resulted from an accident. *See id.* at 194-96, 344 S.E.2d at 776-77. *But cf.* Defendant-Appellant's Brief at app. 1, *Johnson* (raising the possibility that Joyce ingested the poison by herself). If the irrelevancy standard adopted in *Johnson* prohibits the defendant from raising valid defenses, the court might find a denial of due process. *See* Barfield v. Harris, 540 F. Supp. 451, 468 (E.D.N.C. 1982), *affirmed*, 719 F.2d 58 (4th Cir. 1983) *cert. denied*, 467 U.S. 1210 (1984) (noting the potential for a due process claim in the state's definition of first degree murder).