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Jean M. Mosites

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Malice Necessary to Convict for Third-Degree
Murder in Pennsylvania Still Requires Wickedness
of Disposition and Hardness of Heart:
Commonwealth v. Santos

CRIMINAL LAW – THIRD DEGREE MURDER – MALICE – The Pennsylvania Supreme Court held that a defendant can be found to have acted with malice when the evidence shows that he recklessly used a gun in deliberate disregard of the danger posed to others.

Commonwealth v. Santos, 876 A.2d 360 (Pa. 2005).

On July 21, 1994, on a sidewalk in Philadelphia, Oscar Santos (hereinafter “Santos”) accidentally discharged a bullet into the head of a six-year old child, who died three days later.¹ Santos had been holding the loaded gun, pushing the slide back and forth, when the gun fired.² Gladys Soto (hereinafter “Soto”) was standing near Santos and warned him to stop playing with the gun because of the danger to the children nearby.³ Within a moment of Soto’s warning, the deadly accident occurred.⁴

In December of 2001, the police arrested and charged Santos with murder,⁵ among other lesser crimes.⁶ At the preliminary hearing in the Municipal Court of Philadelphia County, the judge found evidence sufficient to support all of the charges brought by the Commonwealth of Pennsylvania (hereinafter “the Commonwealth”).⁷ The judge relied upon testimony from Soto, who had

1. *Commonwealth v. Santos*, 876 A.2d 360, 361 (Pa. 2005).

2. *Santos*, 876 A.2d at 361. Santos and a friend had just returned from a short search for a vehicle that had sideswiped Santos’ car minutes earlier. *Id.*

3. *Id.*

4. *Id.* Santos fled to the Dominican Republic and was not apprehended until seven years later. *Id.*

5. The murder charge was general, under 18 PA. CONS. STAT. § 2502, not charging Santos with a first, second or third degree murder. *Id.* at 361 n.1. Under current Pennsylvania law, murder is divided into three degrees – intentional killing, felony murder, and “all other kinds of murder.” See 18 PA. CONS. STAT. § 2502(a)–(c) (1978).

6. *Santos*, 876 A.2d at 361. Other charges included possession of an instrument of crime, reckless endangerment, and violation of certain provisions of the Uniform Firearms Act. *Id.*

7. *Id.*

witnessed all events leading up to the shooting,⁸ as well as a statement by Santos, in which he admitted to accidentally shooting the child.⁹

Santos filed a Petition for Writ of Habeas Corpus¹⁰ and the hearing was held in the court of common pleas in March 2002.¹¹ The Commonwealth submitted additional testimony from a ballistics expert who stated that the gun did not appear to have any malfunctions and would only have fired if Santos had pulled the trigger.¹² Applying the prima facie standard,¹³ Judge Lerner granted the Petition for Writ of Habeas Corpus as to the murder charge¹⁴ and directed that Santos be charged instead with involuntary manslaughter.¹⁵

In the trial court opinion,¹⁶ Judge Lerner explained that no evidence had been presented to establish either first or second-degree murder, and that Santos could not be tried for third-degree murder because “no reasonable juror could find a specific intent to kill or malice from these facts.”¹⁷ Referring to Pennsylvania Standard

8. *Id.* at 361 n.2.

9. *Id.* at 361.

10. Habeas Corpus is defined as a “writ employed to bring a person before a court, most frequently to ensure that the party’s imprisonment or detention is not illegal.” BLACK’S LAW DICTIONARY 569 (7th ed. 2000). In Philadelphia, the common practice is to file a Petition for Writ of Habeas Corpus and/or a Motion to Quash Return of Transcript. *Santos*, 876 A.2d at 361 n.3.

11. *Santos*, 876 A.2d at 361.

12. *Id.* at 361-62.

13. “A prima facie case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes sufficient probable cause to warrant the belief that the accused committed the offense.” *Santos*, 876 A.2d at 363 (citing *Commonwealth v. Huggins*, 836 A.2d 862, 866 (Pa. 2003)). A writ of Habeas Corpus can be granted where the Commonwealth fails to present a prima facie case against the defendant. *Santos*, 876 A.2d at 363.

14. *Santos*, 876 A.2d at 362.

15. *Id.* at 362 n.4. Under Pennsylvania law, a person is found “guilty of involuntary manslaughter when as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, or the doing of a lawful act in a reckless or grossly negligent manner, he causes the death of another person.” See 18 PA. CONS. STAT. § 2504(a) (1995). When the victim is under twelve years of age, involuntary manslaughter is a felony of the second degree. See 18 PA. CONS. STAT. § 2504(b) (1995).

16. This opinion was written according to PA. R.A.P. 1925(a), which states:

Upon receipt of the notice of appeal the judge who entered the order appealed from, if the reasons for the order do not already appear of record, shall forthwith file of record at least a brief statement, in the form of an opinion, of the reasons for the order, or for the rulings or other matters complained of, or shall specify in writing the place in the record where such reasons may be found.

PA. R.A.P. 1925(a) (2005).

17. *Commonwealth v. Santos*, No. 1129, slip op. at 3 (C.C.P. Phila. County October 7, 2002). See 18 PA. CONS. STAT. § 2502. Malice is a common law concept that is incorporated into the statutory requirements of murder as the *mens rea*, or mental state element of the

Suggested Criminal Jury Instruction 15.2502C,¹⁸ the judge stated that under Pennsylvania law, malice can be shown where “a killer acts with a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences and a mind regardless of social duty, indicating an unjustified disregard for the probability of death or great bodily harm and/or extreme indifference to the value of human life.”¹⁹ Judge Lerner discounted the Commonwealth’s argument of “transferred malice”²⁰ as imaginative but inapplicable because the facts could not support any finding of malice in the horrible accident that had occurred.²¹ The trial judge concluded that “reckless stupidity is not the same as malice.”²²

Upon challenge by the Commonwealth, a panel of the Pennsylvania Superior Court affirmed the trial court order in a three-to-two decision.²³ Judge Bender, author of the opinion, applied principles of malice derived from Pennsylvania case law,²⁴ the Model Penal Code,²⁵ and court decisions of other states.²⁶ The judge concluded that the Commonwealth had failed to establish malice because the conduct, although reckless, did not pose “an extremely high likelihood of death or serious bodily injury.”²⁷ Although Judge Montemuro dissented and would have found that the *prima facie* case had been presented where the facts showed that Santos

crime. *Commonwealth v. McGuire*, 409 A.2d 313, 315 (Pa. 1979) (the new Crimes Code that created the offense of third-degree murder incorporated common law malice as an element). *See also* *Commonwealth v. Ludwig*, 874 A.2d 623, 630 (Pa. 2005) (the law is clear and well settled regarding the *mens rea* for third-degree murder, incorporating common law malice as an element); *Commonwealth v. Drum*, 58 Pa. 9, 15 (1868) (common law malice aforesought is the distinguishing criterion of murder).

18. PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTION 15.2502C (1988).

19. *Santos*, No. 1129, slip op. at 5-6.

20. *Id.* at 6. The Commonwealth had offered a theory of transferred malice, and argued that because Santos had not been able to find and shoot the person who had sideswiped his car, his lingering anger caused him to intentionally shoot the gun in the direction of the victim. *Id.*

21. *Id.*

22. *Id.* at 7.

23. *Santos*, 876 A.2d at 362.

24. *Commonwealth v. Santos*, No. 1322, slip op. at 4-6 (Pa. Super. Ct. Sept. 3, 2003) (citing *Commonwealth v. Taylor*, 337 A.2d 545 (Pa. 1975); *Drum*, 58 Pa. at 9; *Commonwealth v. Seibert*, 622 A.2d 361 (Pa. Super. Ct. 1993)).

25. Model Penal Code § 210.1 defines criminal homicide as “purposely, knowingly, recklessly or negligently caus[ing] the death of another human being.” MODEL PENAL CODE § 210.1, A.L.I. (2001). Comment to Model Penal Code § 210.2 discusses “depraved-heart murder” as a category of murder where malice is shown by “extreme recklessness regarding homicidal risk.” *See* MODEL PENAL CODE § 210.2 Comment at 15, A.L.I. (2001).

26. Other states’ decisions discussed by Judge Bender included Alabama, Georgia, and New York. *Santos*, No. 1322, slip op. at 6-7, 9-10.

27. *Id.* at 7-8.

"intentionally engage[ed] in a clearly reckless and malicious course of conduct,"²⁸ the majority opinion of the superior court panel asserted that the dissent misapprehended the facts, relying upon an intentional, rather than an accidental, firing of the gun.²⁹ Judge Bender's analysis considered the continuum of the crime of homicide, from the intentional through the grossly negligent, and placed the conduct of this case at the lowest end of that range, the involuntary manslaughter end of the continuum.³⁰

The Pennsylvania Supreme Court granted allocatur³¹ to consider whether the trial court had erred when it found no evidence of malice.³² The court held that the Commonwealth had clearly presented evidence sufficient to support the prima facie finding of malice, defined as a "conscious disregard of an unjustified and extremely high risk that [the conduct] might cause death or serious bodily injury."³³ Reversing the order granting the writ of habeas corpus, the supreme court remanded the case for further proceedings.³⁴

Writing for the unanimous court, Justice Nigro first focused upon the reasoning in the appellate court decision.³⁵ According to Justice Nigro, the opinion below relied upon a view of malice required for third degree murder where the state of mind is "nearly equivalent" to intentional homicide.³⁶ Citing language from the superior court, Justice Nigro emphasized that the decision below had been based upon a conception of malice that required a "conscious disregard" of the danger that is "essentially the same as intending the result."³⁷

After illustrating how the court viewed the appellate court's analysis of malice, the Justice stated the standard and scope of review of an order granting a writ of habeas corpus.³⁸ The court

28. *Santos*, 876 A.2d at 363 (Montemuro, J. dissenting).

29. *Santos*, No. 1322, slip op. at 16 n.5.

30. *Id.* at 16.

31. Granting allocatur in the Commonwealth allows appeal to the Pennsylvania Supreme Court, and "[t]he Commonwealth may appeal from a trial court order dismissing a felony charge based on a pre-trial petition for writ of habeas corpus." *Santos*, 876 A.2d at 362 n.6 (citing *Huggins*, 836 A.2d at 865; *Commonwealth v. Hess*, 414 A.2d 1043, 1047 (Pa. 1980); *Commonwealth v. Hughes*, 364 A.2d 306 n.2 (Pa. 1976)).

32. *Santos*, 876 A.2d at 363.

33. *Id.* at 364 (quoting *Commonwealth v. Young*, 431 A.2d 230, 232 (Pa. 1981)).

34. *Santos*, 876 A.2d at 365.

35. *Id.* at 362-63.

36. *Id.* at 362.

37. *Id.* at 363.

38. *Id.*

noted that the Commonwealth need not prove guilt beyond a reasonable doubt in a prima facie case against the defendant, but merely “sufficient probable cause to warrant the belief that the accused committed the offense.”³⁹ In this type of review, evidence will be viewed in the light most favorable to the Commonwealth.⁴⁰

Justice Nigro then began his analysis of malice by contrasting the requirements to convict a defendant of first-degree murder with the elements of third-degree murder.⁴¹ The Justice stated that under Pennsylvania law, first-degree murder requires that the accused killed another person with the specific intent to kill the person and with malice, while third-degree murder requires that the accused killed another with malice, but does not require a specific intent to kill.⁴² Stating the rule of law in language that has been quoted in murder cases for over one hundred years, the court recognized that it has “long held that malice ‘comprehends not only a particular ill will, but . . . [also a] wickedness of disposition, hardness of heart, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured.’”⁴³

To emphasize where the superior court went wrong, Justice Nigro then restated the law of malice required for third degree murder in different language, as where there is “wanton and reckless conduct [that] manifests . . . extreme indifference to the value of human life,”⁴⁴ or where there is no intent to kill but a defendant “displayed a conscious disregard for ‘an unjustified and extremely high risk that his actions *might* cause death or serious bodily harm’”⁴⁵

Justice Nigro’s first illustration of such malice was *Commonwealth v. Taylor*.⁴⁶ In *Taylor*, the supreme court affirmed the finding of malice when the defendant killed a child with his car while he was driving under the influence at a high rate of speed on a road where he knew children were likely to be.⁴⁷ The court’s next example was a Pennsylvania Superior Court case, *Commonwealth*

39. *Santos*, 876 A.2d at 363.

40. *Id.*

41. *Id.*

42. *Santos*, 876 A.2d at 363 (citing *McGuire*, 409 A.2d at 315-16).

43. *Santos*, 876 A.2d at 363 (quoting *Ludwig*, 874 A.2d at 632).

44. *Santos*, 876 A.2d at 364 (quoting *Taylor*, 337 A.2d at 548).

45. *Santos*, 876 A.2d at 364 (quoting *Young*, 431 A.2d at 232).

46. 337 A.2d 545 (Pa. 1975).

47. *Santos*, 876 A.2d at 364 (citing *Taylor*, 337 A.2d at 548-49).

v. Scales,⁴⁸ where the defendant killed a child as a result of driving at high speeds in a busy residential neighborhood.⁴⁹ The final case the court cited was a Pennsylvania Superior Court decision from 1993, *Commonwealth v. Urbanski*,⁵⁰ where a collision caused by a drunk driver killed his wife, who had repeatedly asked him to slow down.⁵¹

After reciting the facts of three reckless driving cases where malice was found to be sufficient to sustain convictions of third degree murder, the court concluded that the *Santos* evidence supported a prima facie showing of malice⁵² and reversed both courts' decisions below.⁵³

The requirement of malice for third degree murder in Pennsylvania has been incorporated from the common law and is not defined by statute.⁵⁴ The law of malice required for third degree murder has consistently relied upon a formulation provided in 1868 in *Commonwealth v. Drum*.⁵⁵

The evidence of *Drum* showed that the defendant had killed a man during a fight outside of a saloon by thrusting a knife into the man's side.⁵⁶ Pennsylvania Supreme Court Justice Agnew⁵⁷ explained the legal principles that the jury must apply to the facts, including the distinction between murder and manslaughter and the meaning of malice.⁵⁸ According to Justice Agnew, malice "comprehends not only a particular ill-will, but every case where there is wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured."⁵⁹ *Drum* was convicted of first degree murder, but the *Drum* malice formula encompasses unintentional killings where the facts indicate a depraved heart.⁶⁰

48. 648 A.2d 1205 (Pa. Super. Ct. 1994).

49. *Santos*, 876 A.2d at 364.

50. 627 A.2d 789 (Pa. Super. Ct. 1993).

51. *Santos*, 876 A.2d at 364.

52. *Id.*

53. *Id.* at 365.

54. *McGuire*, 409 A.2d at 315. See also 18 PA. CONS. STAT. § 2502.

55. 58 Pa. 9 (1868).

56. *Drum*, 58 Pa. at 21.

57. Justice Agnew was assigned to preside at the trial level because the common pleas judge was related to the defendant. *Id.* at 11.

58. *Id.* at 15.

59. *Id.*

60. *Id.* at 14 (murder of the second degree includes "killing under circumstances of depravity of heart," but manslaughter is a killing without malice or depravity of heart). See also MODEL PENAL CODE § 210.2, Comment at 15, A.L.I. (2001).

Applying the *Drum* malice formula in 1946 to an accidental shooting case, the Pennsylvania Supreme Court found the evidence sufficient to sustain a conviction for third degree murder in *Commonwealth v. Malone*.⁶¹ In *Malone*, a seventeen-year-old boy accidentally shot and killed a thirteen-year-old friend while playing Russian Poker.⁶² The evidence showed that the defendant carried a revolver, loaded one cartridge into it, put it to the side of his companion, and pulled the trigger three times.⁶³ The *Malone* court first cited to Blackstone's *Commentaries* to illustrate that under the common law, malice may be found in "any evil design in general; the dictate of a wicked, depraved and malignant heart."⁶⁴ The court then used the *Drum* definition of malice to explain malice under Pennsylvania law and examined the charge of the lower court.⁶⁵ In recognition that the Pennsylvania definition of legal malice is neither simple nor immediately clear, the court stated that:

[A] charge may be technically correct and yet be to the jury meaningless and useless. Many trial judges employ concrete illustrations to help make clear to the jury what the issues are which the jury is to decide and how to apply legal principles to the facts so as to reach a just verdict.⁶⁶

The *Malone* court held that malice could be found in the acts intentionally done by the defendant, in "reckless and wanton disregard of the consequences which were at least sixty percent certain," even though the defendant had thought that there were three empty cartridges in the gun.⁶⁷ In *Malone*, the accidental killing was murder without motive, demonstrating malice without any particular ill will of the defendant toward the victim.⁶⁸

61. 47 A.2d 445 (Pa. 1946).

62. *Malone*, 47 A.2d at 446. The court describes Russian Poker as:

[A] game in which the participants, in turn, place a single cartridge in one of the five chambers of a revolver cylinder, give the latter a quick twirl, place the muzzle of the gun against the temple and pull the trigger, leaving it to chance whether or not death results to the trigger puller.

Id. at 446 n.1.

63. *Id.* at 447.

64. *Id.* (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES *199).

65. *Malone*, 47 A.2d at 447-49 (quoting *Drum*, 58 Pa. 9).

66. *Malone*, 47 A.2d at 449 (internal footnote omitted).

67. *Id.*

68. *Id.*

In a pivotal 1975 case, *Commonwealth v. Taylor*, the Pennsylvania Supreme Court considered whether the facts of a drunk driving case established malice as necessary to convict for second-degree murder.⁶⁹ Quoting the language of *Drum*,⁷⁰ the *Taylor* court reiterated the requirement of malice for a murder conviction, as well as the point that "malice may be inferred and found from the attending circumstances of the act resulting in the death."⁷¹

The *Taylor* court found that malice was established beyond a reasonable doubt in the attending circumstances where the driver was intoxicated, driving at excessive speed, on a regular route home from work, in an area between a pool and a park where children played, and did not stop immediately after striking two children on bicycles who were propelled some distance after impact.⁷² The court provided an elaboration of the crime of second (now third) degree murder as follows:

[B]etween the recklessness or culpable negligence necessary to support the charge of involuntary manslaughter . . . and the specific intent to kill which is a prerequisite of murder of the first degree, there is a class of wanton and reckless conduct which manifests such an extreme indifference to the value of human life which transcends the negligent killing and reaches the level of malice which supports a verdict of murder in the second degree.⁷³

Shortly after *Taylor*, in an effort to depart from the *Drum* malice formulation, Justice Roberts wrote the majority opinion for the Pennsylvania Supreme Court in *Commonwealth v. Hare*.⁷⁴ In *Hare*, the sole issue on appeal was whether counsel had been ineffective for not challenging the trial court's guilty plea colloquy, which omitted any reference to the element of malice required for

69. *Taylor*, 337 A.2d 545. Under current law, this charge would be third degree murder, with no change in the elements required. 18 PA. CONS. STAT. § 2502(c).

70. *Taylor*, 337 A.2d at 546 (citing *Commonwealth v. Coleman*, 318 A.2d 716, 717 (Pa. 1974); *Commonwealth v. Charmansky*, 242 A.2d 237 (Pa. 1968); *Commonwealth v. Carroll* 194 A.2d 911 (Pa. 1963)).

71. *Taylor*, 337 A.2d at 546 (citing *Commonwealth v. Bowden*, 309 A.2d 714 (Pa. 1973)).

72. *Taylor*, 337 A.2d at 548.

73. *Id.*

74. 404 A.2d 388 (Pa. 1979). Justice Roberts had previously authored a concurring opinion in *Taylor* (joined by three other justices) that agreed that malice could be found where "the appellant consciously disregarded an unjustified and extremely high risk that his actions might cause death or serious bodily harm to another." *Taylor*, 337 A.2d at 549 (Roberts, J., concurring).

murder.⁷⁵ The court concluded that the colloquy did not inform the defendant of the nature of malice, which must be explained before a guilty plea can be accepted for murder under Pennsylvania law.⁷⁶ Without any citation to *Drum*, Justice Roberts stated that malice will be found if an “actor consciously disregarded an unjustified and extremely high risk that his actions might cause death or serious bodily harm.”⁷⁷ Justice Roberts’ definition of malice has since been included in the Pennsylvania Suggested Standard Criminal Jury Instructions, alongside the *Drum* formulation, and is commonly cited in opinions.⁷⁸

In 2005, the Pennsylvania Supreme Court reaffirmed its reliance on the *Drum* formulation of malice in *Commonwealth v. Ludwig*.⁷⁹ In *Ludwig*, the defendant was charged with third-degree murder by drug delivery resulting in death.⁸⁰ The evidence showed that the teenage defendant sold a double dose of Ecstasy to a teenage girl without knowing how she would react to it, and the teenage girl died as a result.⁸¹ In its review of the grant of Writ of Habeas Corpus, the court stated that “the law is clear and well settled regarding the *mens rea* for third degree murder,”⁸² even when a separate statute had been adopted to create this crime.⁸³ After quoting the *Drum* formulation in its entirety, the *Ludwig* court found no indication of wickedness, ill-will, cruelty or extreme indifference to human life in the factors presented.⁸⁴ Important to its analysis was the fact that the girls who bought the drugs had done so willingly and with knowledge that the pills were double dosages.⁸⁵ Among other failures of evidence, the court found no evidence that a “high probability of death” would result

75. *Hare*, 404 A.2d at 390.

76. *Id.* at 391.

77. *Id.*

78. PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS, 15.2501A (2) (1988). The 1988 Subcommittee Note states that the appellate courts treat the two definitions as equal. *Id.* at 3. *But see* 15.2501A (5) (2005). The 2005 Advisory Committee Note explains the reformulated malice instruction is offered to allow courts to abandon the *Drum* language, which it finds to be an ineffective instruction. *Id.*

79. 874 A.2d 623 (Pa. 2005).

80. *Ludwig*, 874 A.2d at 626. “Drug delivery resulting in death” is a separate criminal statute defining a distinct form of murder in the third degree. 18 PA. CONS. STAT. § 2506 (1998).

81. *Ludwig*, 874 A.2d at 632-34.

82. *Id.* at 630.

83. *Id.* at 631-32.

84. *Id.* at 634.

85. *Id.* at 633.

from taking Ecstasy.⁸⁶ The order of the court of common pleas was affirmed.⁸⁷

The cases reviewed here on the issue of malice are within a subclass of third degree murder in which the defendant had no ill will toward the victim and the act that caused the death was not inherently vicious.⁸⁸ Malice in such cases is to be inferred from the particular circumstances of the accidental killing. In *Malone*, evidence was sufficient to show malice beyond a reasonable doubt where the shooter intentionally placed a gun with one cartridge in it against the side of his friend's abdomen and pulled the trigger three times, thinking there were three blanks.⁸⁹ In *Taylor*, evidence was sufficient to show malice beyond a reasonable doubt where the intoxicated driver drove at excessive speeds at three p.m. on a summer day near a park, struck two boys on bicycles, killing one, without stopping.⁹⁰ But in *Ludwig* the evidence was not sufficient to support even a prima facie showing of malice where the mere sale of illegal drugs to a willing teenage buyer, who knew of the double dosage, resulted in her death.⁹¹

Would a reasonable juror find malice in *Santos*, as the unanimous supreme court here believed probable, where the defendant handled a loaded gun in a reckless manner, causing it to fire and kill a young child nearby? Although clearly a tragic death, neither the trial court nor the appellate court found *any* evidence of malice in these facts and concluded that *no reasonable juror* could find malice either.

In spite of the starkly different conclusions that the courts reached in this case, the Supreme Court of Pennsylvania continues to assert that the law of malice is clear and well settled, and comfortably looks at facts to discern "wickedness of disposition" or

86. *Ludwig*, 874 A.2d at 633.

87. *Id.* at 634. Justice Nigro's dissent, joined by Justices Saylor and Eakin, argued that the Commonwealth need not establish malice for every third degree murder and that the appropriate *mens rea* in this case is provided by the default provision of 18 PA. CONS. STAT. § 302(c) as recklessness. *Id.* at 635-37 (Nigro, J., dissenting).

88. Typical discussions of depraved heart murder run through a list of examples to illustrate the type of conduct that falls within that category. See WAYNE R. LAFAVE, CRIMINAL LAW 668 (3d ed., WEST GROUP 2000); ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 59-60 (3d ed., Foundation Press, Inc. 1982). Examples could include throwing a brick off a building downtown at lunchtime or shooting into a restaurant at dinner-time. In either case, the defendant has no intent to murder or cause serious bodily injury, but malice is inferred from grossly reckless conduct and obvious danger to others.

89. See *Malone*, 47 A.2d at 449.

90. See *Taylor*, 337 A.2d at 548.

91. See *Ludwig*, 874 A.2d at 634.

“hardness of heart.” The Pennsylvania Superior Court, on the other hand, tried to reconcile the *Drum* formula with how malice, as the *mens rea* component of murder, is currently understood in other states and in the Model Penal Code.⁹² These efforts outside of Pennsylvania discard the common law language of “depraved heart” murder and use formulas that look at the components of malice – 1. the nature of the conduct, 2. the type and degree of risk created, and 3. the defendant’s consciousness of that risk.⁹³ The Model Penal Code recognizes that the primary purpose of any malice formulation is to “communicat[e] to jurors in ordinary language the task expected of them.”⁹⁴ Simple and direct language is most likely to perform that function.

Evaluating the components of malice, the *Santos* trial court found no malice in the nature of Santos’ *conduct*; the appellate court found that the *degree of risk* created was too slight to imply a *conscious disregard* of the possibility of death or serious bodily injury. This elemental approach to malice is one that juries can easily understand and evaluate. Without offering analysis other than by example, however, the supreme court rejected both the reasoning and the conclusions of the lower courts.

This case is a self-contained demonstration of the unpredictable and inconsistent outcomes possible when applying the *Drum* formulation of malice in Pennsylvania. Unfortunately, after *Santos*, Pennsylvania judges and juries must continue to detect the presence of malice through an instinctive moral judgment of the “true” character of the defendant, of the hardness of his heart. Whether or not one agrees with the holding of the Pennsylvania Supreme Court in this particular case, one should have legal, intellectual, and moral concerns with the continued use of the *Drum* standard of malice in borderline cases like this one. Although well-settled in the law, “wickedness of disposition” is far from a satisfactory basis by which to convict anyone of murder in the twenty-first century.

Jean M. Mosites

92. See MODEL PENAL CODE § 210.2(1)(b) and Comment at 13.

93. *Id.* See also GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 264-74 (Little, Brown & Co. 1978).

94. MODEL PENAL CODE Comment following § 210.2 at 26.

