
Volume 85
Issue 1 *Dickinson Law Review - Volume 85,*
1980-1981

10-1-1980

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Recommended Citation

Arthur A. Murphy, *Suggested Standard Jury Instructions on Criminal Homicide*, 85 DICK. L. REV. 1 (1980).
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Suggested Standard Jury Instructions On Criminal Homicide

Arthur A. Murphy*

Introduction

In 1968 the late Chief Justice Bell with the concurrence of the other Justices of the Pennsylvania Supreme Court established a Committee for Proposed Standard Jury Instructions. He directed the member judges and lawyers to formulate pattern jury instructions for Common Pleas trials. From that date a criminal instructions subcommittee has worked at preparing form charges for criminal cases. The individual instructions have been made available to all Common Pleas Judges as soon as approved by the subcommittee. By 1979, the subcommittee had finished a comprehensive collection of pattern instructions. They were published late that year by the Pennsylvania Bar Institute in a single loose-leaf volume.¹ The individual instructions and their companion notes must be kept up-to-date. The author as reporter to the criminal instructions subcommittee recently completed drafts of a revised set of murder and manslaughter charges. They are reprinted here with the permission of the subcommittee. The drafts may be of general interest for their own content and as examples of the work being done by the subcommittee.

There is another reason for publishing these nascent criminal homicide instructions. The members of the Committee for Proposed Standard Jury Instructions and its subcommittees welcome the comments of the judges and lawyers who read or use their handiwork. It is hoped that dissemination at this time will not only lead to useful criticism of the murder and manslaughter charges themselves, but will also encourage future suggestions about other instructions.²

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1. Pennsylvania Suggested Standard Criminal Jury Instructions. Available through FBI, P.O. Box 1027, Harrisburg, PA 17108.

2. Criticism and suggestions may be addressed to the author at Dickinson School of Law, Carlisle, PA 17013.

It has always been understood that the instructions produced by the Committee for Proposed Standard Jury Instructions are intended to be a resource. They are not to be regarded as officially adopted by the Pennsylvania Supreme Court. The instructions and the accompanying subcommittee notes are meant to save the time of trial judges and attorneys, to reduce the need for legal research and drafting and to facilitate the preparation of legally correct and easily understood jury instructions in every case. The individual instructions are building blocks, each dealing with one or more matters. In routine cases all a judge who chooses to use them should have to do is select the correct blocks, make simple changes to shape each block to the facts of the particular case and his personal style and put the blocks together to form a coherent jury charge. In unusual cases the court, with the help of counsel, has to do more research and be more creative when shaping, assembling and supplementing the instructional blocks.

The criteria for a good pattern instruction are implicit in the preceding description of the purposes and use of the suggested jury instructions.³ Each instruction should be legally correct. It should be objective, not unduly slanted towards either the Commonwealth or the defendant. The instruction should be complete. This does not mean that every instruction must be complete in itself. It is often convenient to refer the judge, through the subcommittee notes, to other instructions or to the statute for infrequently used definitions and defenses. The instruction should be brief. It should concentrate on essentials, covering the subject simply and lucidly. It should generally be left to the judge to tailor the charge to the facts, to elaborate, reiterate and provide examples. All instructions should employ a sufficiently uniform vocabulary and style so that each of them can readily be combined with others. Finally, the language used should be suitable to the occasion. The choice of language should be one that holds the jurors' attention and is readily comprehended yet does not detract from the dignity of the proceedings. Obviously, every one of these criteria cannot be fully realized in every instruction. For example, when writing pattern instructions for murder and manslaughter, the complexity of the subject may require some sacrifice of brevity and perhaps lucidity in favor of an accurate statement of the law. *Quaere* whether the draft murder-manslaughter instructions come as close as they might to satisfying the subcommittees' own criteria for good pattern instructions?

The subcommittee experimented with commentary of differing

3. For the history, merits and demerits of pattern instructions generally and for practical advice on carrying out a pattern drafting project, see McBRIDE, *THE ART OF INSTRUCTING THE JURY*, §§ 9.01-11.07 (1969).

scope before settling on the current form of subcommittee note. The note to each instruction typically explains how and when the instruction is to be used and includes a limited amount of basic information about the area of law to which the instruction relates. The citation and discussion of legal authority are intended to identify the statutory and case law sources of the instruction and to provide guidance and research leads that may be helpful in framing additional instructions, ruling on evidence questions, and dealing with other common issues in the area involved.

Where important legal questions are unsettled or the merits of particular practices are debatable the subcommittee notes will often identify the issues and indicate the alternative answers. See for example (i) the treatment of the jury's power to convict of a lesser crime in the subcommittee note to Instruction 15.2501B, (ii) the handling of malice as an element of second degree murder in the subcommittee note to Instruction 15.2502B, and (iii) the discussion of whether an intent to seriously injure is sufficient for voluntary manslaughter in the subcommittee note to Instruction 15.2503A.

It should be emphasized that the instructions and subcommittee notes that follow are still at the reporter's draft stage. They have not yet been refined and approved by the subcommittee.

15.2501A (Crim) CRIMINAL HOMICIDE—INTRODUCTION

(1) The defendant is charged with a criminal homicide, that is, with taking the life of _____ without lawful justification or excuse. There are (five) (___) types of criminal homicide that you might possibly find in this case. They are (murder of the first degree) (murder of the second degree) (murder of the third degree) (voluntary manslaughter) (involuntary manslaughter). It will be your duty to decide whether or not to find the defendant guilty of any of these crimes.

(2) The term "malice" is a word which I shall use frequently. Malice when used in the law of criminal homicide has a special meaning. It does not mean simply hatred, spite or ill-will. The word malice is a shorthand way of referring to any of various bad mental states or attitudes which a person who kills must have for the killing to be murder. The difference between murder and manslaughter lies in the presence or absence of malice. A killing with malice is murder. A killing is with malice and is therefore murder if it is without lawful justification, excuse or circumstances mitigating the killing to manslaughter, and the killer acted with one of the following states of mind: an intent to kill or an intent to inflict serious bodily harm or a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences and a mind regardless of social duty, indicating an un-

justified disregard for the probability of death or great bodily harm and an extreme indifference to the value of human life.

(3) I shall now instruct you on the elements of each type of criminal homicide that you might possibly find in this case.

Subcommittee Note

This instruction should serve as an appropriate introduction to criminal homicide charges in many cases. The court should list in subdivision (1) the degrees of murder and manslaughter for which the jury may properly convict the defendant taking into account the formal accusation and the law of lesser offenses. On the question of when should the court instruct on a lesser type homicide not specifically alleged in the charges, see Subcommittee Note to Instruction 2501B. Subdivision (2) which defines malice is only needed when murder is a permissible verdict.

This introduction is a good place for general observations. Crime Code § 2502 as amended by Act 39 (1978), § 2503 and § 2504 which define murder, voluntary manslaughter and involuntary manslaughter have made few changes in the law of criminal homicide. Much of the pre-Crimes Code Pennsylvania case law remains relevant. *See, e.g., Commonwealth v. Allen*, 475 Pa. 165, 379 A.2d 1335 (1977) (felony murder case); *Commonwealth v. Polimeni*, 474 Pa. 430, 378 A.2d 1189 (1977) (involuntary manslaughter case; general discussion of criminal homicide under Crimes Code).

Subdivision (2) of this instruction is based on long established Pennsylvania case law. Crimes Code § 2502(c), by defining third degree murder as “all other kinds of murder,” imports the traditional concept and definition of malice into the Crimes Code. For cases supporting the definition of malice in subdivision (2) see, e.g., *Commonwealth v. Drum*, 58 Pa. 9 (1868); *Commonwealth v. Chermansky*, 430 Pa. 170, 242 A.2d 237 (1968). A briefer definition may be found in the case of *Commonwealth v. Hare*, 486 Pa. 123, 404 A.2d 388 (1979): “Malice will be found if the actor committed a killing with an intent to kill or to inflict serious bodily harm, or consciously disregarded an unjustified and extremely high risk that his actions might cause death or serious bodily harm.”

15.2501B (Crim) CRIMINAL HOMICIDE—FINDING LESSER TYPE

(1) I have defined the elements of the (five) (____) types of criminal homicide that you might possibly find in this case. Beginning with the most serious, they are in order of seriousness (first degree murder) (second degree murder) (third degree murder) (voluntary manslaughter) (involuntary manslaughter).

(2) If you intend to hold the defendant fully accountable for his conduct then you should find him guilty of the most serious kind of criminal homicide, if any, which you are satisfied has been proven beyond a reasonable doubt. However, you do have the power to be lenient. You may find the defendant guilty of any one of the lesser types of criminal homicide so long as you are satisfied beyond a reasonable doubt that he is guilty of a more serious type.

Subcommittee Note

This instruction is appropriate when there are more than two possible types of criminal homicide open to the jury. The instruction would be somewhat stilted and should be reworded for a case with only two possible guilty verdicts. This instruction should be given immediately after the court defines the various types of homicide. The question of when the court should instruct on each of the various types of homicide as a permissible finding is dealt with later in this note.

In many jurisdictions, including Pennsylvania, the courts seem to be ambivalent about the jury's power to return a verdict of a lesser homicide when a greater one has been proven. Some judges regard this mercy power as highly desirable—one of the safeguards and glories of the Anglo-American system of justice. Others see the power as a troublesome incident of the jury's ultimate control of the verdict. Judges have differed accordingly on when and how the jury should be apprised of its power. This judicial disagreement underlies the difficulties that the Pennsylvania Supreme Court has had in settling questions of when juries should be charged on lesser offenses in homicide trials. *See, e.g., Commonwealth v. Williams*, — Pa. —, 415 A.2d 403 (1980); *Commonwealth v. Whitfield*, 474 Pa. 27, 376 A.2d 617 (1977).

Subdivision (2) confronts the jury squarely with its options—to hold the defendant strictly accountable or to be lenient. The instruction is neutral; it does not favor either alternative. The subcommittee believes that this straightforward approach is understandable to jurors and supportable under the case law. The court can let counsel argue the relative merits of the jury's two options. Some judges may hesitate to use an instruction which leaves the impression that strict accountability and leniency are equally worthy alternatives. In the opinion of the subcommittee it would be legally acceptable for the trial court to add the following remarks:

In my opinion the ends of justice are best served when juries make it a general practice to hold defendants fully accountable for their crimes and save their power to return lenient verdicts for exceptional cases. A general practice of full accountability promotes observance of the law and respect for the law. It helps as-

sure equal treatment for all defendants. Verdicts do not depend upon the chance attitude of each jury. Mind you, I am only giving my opinion about accountability. You are not bound to follow it.

When should the court instruct on a lesser homicide not specifically charged in the indictment or information? It seems clear that the court should instruct on third degree murder when the defendant is charged with murder of the first or second degree regardless of whether there is a rational basis in the evidence for finding that degree, *see, e.g., Commonwealth v. McNeal*, 456 Pa. 394, 319 A.2d 669 (1974); *Commonwealth v. Collins*, 436 Pa. 114, 259 A.2d 160 (1969); *Commonwealth v. Meas*, 415 Pa. 41, 202 A.2d 74 (1964). It has been held that the court should charge on voluntary manslaughter whenever a defendant who is charged with murder requests such a charge regardless of whether there is a rational basis in the evidence for finding voluntary manslaughter, *see Commonwealth v. Scaramuzino*, 485 Pa. 513, 403 A.2d 82 (1979) and cases cited therein. It has also been held that in a murder prosecution, an involuntary manslaughter charge shall be given only when requested, and where the offense has been made an issue in the case and the trial evidence reasonably would support such a verdict, *Commonwealth v. Williams, supra; Commonwealth v. White*, — Pa. —, 415 A.2d 399 (1980). It appears that this rule should extend to cases where the defendant is charged with voluntary manslaughter, *see Commonwealth v. Terrell*, 482 Pa. 303, 393 A.2d 1117 (1978).

15.2501C (Crim) CRIMINAL HOMICIDE—CAUSATION

(1) You cannot find that the defendant killed _____ unless you are satisfied beyond a reasonable doubt that the defendant's conduct was a direct cause of his death.

[(2) In order to be a direct cause of a death, a person's conduct must be a direct and substantial factor in bringing about the death. There can be more than one direct cause of a death. A defendant who is a direct cause of a death may be criminally liable even though there are other direct causes.]

[(3) A defendant is not a direct cause of a death if (the actions of the victim) (the actions of a third person) (the occurrence of another event) () plays such an independent, important and overriding role in bringing about the death, compared with the role of the defendant, that the defendant's conduct does not amount to a direct and substantial factor in bringing about the death.]

[(4) A defendant's conduct may be the direct cause of a death even though his conduct was not the last or immediate cause of the death. Thus a defendant's conduct may be the direct cause of a

death if it initiates an unbroken chain of events leading to the death of the victim.]

[(5) A defendant whose conduct is a direct cause of a death cannot avoid liability on the grounds that the victim's pre-existing physical infirmities contributed to his death.]

Subcommittee Note

Subdivision (1) of this instruction is appropriate whenever there is an issue of whether the defendant's conduct killed the victim, *i.e.*, was the legal cause of the victim's death. The other subdivisions may be used singly or in combination when the kind of causation problems to which they are addressed are present. Where the evidence indicates that the act of an accomplice rather than of the defendant himself may have killed the victim, *e.g.*, in a felony murder case, these instructions will have to be modified to make the defendant's liability turn on whether the accomplice's conduct was the direct cause of death, *see Commonwealth v. Smith*, 480 Pa. 524, 391 A.2d 1009 (1979) (in murder prosecution proof that defendant was accomplice and principal caused death is sufficient for proof of defendant's causation). The causation instruction should be tailored and related to the facts of the case rather than merely stated as a set of abstract legal propositions.

Both before and after the enactment of the Crimes Code "direct cause" was and continues to be the basic test for determining legal cause in all types of criminal homicide cases, *see, e.g., Commonwealth v. Root*, 403 Pa. 571, 170 A.2d 310 (1961) (involuntary manslaughter; direct cause compared with proximate cause); Crimes Code § 2504(a); *Commonwealth v. Kingsley*, 480 Pa. 560, 391 A.2d 1027 (1978) (voluntary manslaughter; legal cause requires direct cause which is more than "but-for" cause; causation must be proven beyond reasonable doubt); *Commonwealth v. Allen*, 475 Pa. 165, 379 A.2d 1335 (1977) (felony murder requires showing that slayer's act was direct cause of death, at footnote 4). Subdivision (1) of the instruction requires that the jury find direct cause.

For cases supporting subdivision (2), *see Commonwealth v. Matthews*, 480 Pa. 33, 389 A.2d 71 (1978) (direct and substantial factor) and *Commonwealth v. Skufca*, 222 Pa. Super. 506, 294 A.2d 787 (1972) (defendant's locking her children in room and a subsequent fire which suffocated children were both direct causes of their death).

Underlying subdivision (3) is the idea that an independent intervening cause, *i.e.*, a supervening cause, is antithetical to direct cause, *see, e.g., Commonwealth v. Robinson*, 468 Pa. 575, 364 A.2d 665 (1976) (Commonwealth not required to prove that a merely hypothetical supervening event did not take place); *Commonwealth v.*

Wright, 445 Pa. 480, 317 A.2d 271 (1974) (defendant was not cause where death resulted from victim's independent actions). The language of subdivision (3) while not taken from any case appears to be consistent with the case law. Although subdivision (3) does not use the term intervening or supervening cause it gives the jury some useful guidance for deciding a direct cause-supervening cause issue.

For cases supporting subdivision (4) see *Commonwealth v. Robertson*, 485 Pa. 586, 403 A.2d 544 (1979) (defendant was cause of death where victim eventually died of pneumonia while hospitalized following beating by defendant); *Commonwealth v. Robertson, supra*.

The rule stated in subdivision (5) can be found in *Commonwealth v. Graves*, 484 Pa. 29, 398 A.2d 644 (1979).

It should be recognized that these instructions and the Pennsylvania case law from which they are derived, allow the jury substantial leeway in deciding causation issues. The jury is in effect called on, while operating within very general guidelines, to make a moral and social judgment whether the defendant should be held accountable for the death. It should also be noted that Crimes Code § 303(b) and (c) contain some nice principles for determining causation, which so far as the subcommittee is aware have not been utilized in homicide cases.

15.2502A (Crim) FIRST DEGREE MURDER

(1) You may find the defendant guilty of first degree murder if you are satisfied that the following three elements have been proven beyond a reasonable doubt:

First, that _____ is dead;

Second, that the defendant killed him; and

Third, that the killing was with specific intent to kill and with malice. A killing is with specific intent to kill if it is willful, deliberate and premeditated, that is, if it is committed by a person who has a fully formed intent to kill and who is conscious of his own intent. [More particularly a killing is with specific intent to kill if it is (by means of poison) (by lying in wait).] As my earlier definition of malice indicates a killing with the specific intent to kill is also with malice if it is committed without lawful justification or excuse or circumstances mitigating the killing to manslaughter.

[(2) You will note that although a defendant must premeditate in order to have a specific intent to kill, premeditation does not require planning or previous thought. Premeditation can be very brief. All that is necessary is that there be time enough so that the defendant has a fully formed intent to kill the victim and is conscious of that intention.]

[(3) If you believe that the defendant intentionally used a deadly weapon on a vital part of the victim's body you may regard that as an item of circumstantial evidence permitting you to infer, if you choose, that the defendant had the specific intent to kill.]

Subcommittee Note

This instruction is appropriate for use when the defendant is charged with first degree murder in violation of Crimes Code § 2502(a). Subdivision (1) comprises a basic instruction of general applicability. Subdivision (2) may be used when because of the "quickness" of the killing there is an issue of whether the defendant premeditated. Subdivision (3) may be used along with a general instruction on proof of intent or state of mind by circumstantial evidence, Instruction 7.02B, when there is evidence tending to show intentional use of a deadly weapon. Additional instructions may be needed when there is evidence of certain conditions tending to negate specific intent to kill, such as drunkenness or drugged condition, Instruction 8.308B, diminished capacity, 5.01B, or strong emotions, *Commonwealth v. Stewart*, 461 Pa. 274, 336 A.2d 282 (1975) (terror may negate mens rea for first degree murder).

This entire instruction is based on Crimes Code § 2502(a) (definition of "intentional killing") and on long established Pennsylvania case law. For cases supporting subdivision (1) see, e.g., *Commonwealth v. O'Searo*, 466 Pa. 224, 352 A.2d 30 (1976) (the judicially developed phrase "specific intent" to kill may be used interchangeably with the statutory language "willful, deliberate and premeditated" to express the same concept; requirements of premeditation and deliberation are met whenever there is a conscious purpose to bring about death); *Commonwealth v. Stewart, supra*, (murder is willful, deliberate and premeditated if murderer is conscious of own purpose and intends to end life of victim). Subdivision (1) is based on the premise that although malice remains an element of first degree murder under the Crimes Code, see *Commonwealth v. Johnson*, 484 Pa. 545, 400 A.2d 583 (1979), *Commonwealth v. Butcher*, 451 Pa. 57, 304 A.2d 150 (1973) cited with approval in footnote 6 of *Commonwealth v. O'Searo, supra*, it is desirable for the judge to limit his definition of malice relevant to first degree murder.

For a case supporting subdivision (2) see *Commonwealth v. Robinson*, 468 Pa. 574, 364 A.2d 665 (1976) (premeditation may be brief, three minutes). For cases supporting the idea that specific intent to kill is a permissible inference from intentional use of a deadly weapon on a vital part or from comparable intentional acts of the defendant, see *Commonwealth v. O'Searo, supra*, (deadly weapon, vital part); *Commonwealth v. Jackson*, 481 Pa. 426, 392 A.2d 1366

(1978) (deadly weapon in general area of vital part); *Commonwealth v. Kingsley*, 480 Pa. 560, 391 A.2d 1027 (1978) (repeated kicks to head of downed victim, *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed. 2d 39 (1979) (inference of intent is constitutional providing it is permissive and not mandatory). Of course, the jury should consider all relevant evidence, including the words and conduct of the defendant and attending circumstances in deciding whether or not to infer a specific intent to kill, *Commonwealth v. Ash*, 482 Pa. 590, 394 A.2d 479 (1978).

15.2502B (Crim) SECOND DEGREE MURDER

(1) Second degree murder is often called felony murder because it involves a killing incidental to a felony. You may find the defendant guilty of second degree murder if you are satisfied that the following five elements have been proven beyond a reasonable doubt:

First, that _____ is dead;

Second, that (the defendant) (or) (an accomplice of the defendant) killed him;

Third, that the killing was committed while the defendant was (engaged) (or) (an accomplice) in (the commission of) (an attempt to commit) (flight after committing or attempting to commit) the felony of (robbery) (rape) (deviate sexual intercourse by force or threat of force) (arson) (burglary) (kidnapping);

Fourth, that the act of (the defendant) (or) (the defendant's accomplice) that killed _____ was done in furtherance of that felony; and

Fifth, that the killing was with malice on the part of the defendant. Like all murders, second degree murder requires malice but malice may be inferred if a defendant (engages) (or) (is an accomplice) in the commission or attempted commission of a felony dangerous to human life such as _____. No other proof of malice is necessary.

(2) For persons to be accomplices in committing or attempting to commit a felony they must have a common design, in other words, a shared intent, to commit that felony.

(3) [I shall define (the felony of _____) (an attempt to commit _____) for you shortly.] [(The felony of _____) (an attempt to commit _____) may be defined as follows: _____] [To be guilty of (_____) (attempt to commit _____) a defendant must _____.]

Subcommittee Note

This instruction is appropriate when the defendant is charged

with second degree murder in violation of Crimes Code § 2502(b). The parenthetical choices in subdivision (1) should be made in accordance with whether the defendant acted alone or with an accomplice and, if with an accomplice, the nature of their respective involvement in the underlying felony and in the killing. The definition of “accomplice” in subdivision (2) should be sufficient for many cases. However, elaboration may be needed in some cases, e.g., where the evidence raises questions about whether complicity ever existed between the defendant and putative cofelon or was abandoned before the killing. For ideas, see Instruction 8.306A (liability for conduct of accomplice); *Commonwealth v. Lee*, 484 Pa. 335, 399 A.2d 104 (1979) (Larsen, J. opinion in support of affirmance, defense of abandonment and withdrawal). As subdivision (3) indicates the court must at some point in its instructions give the jury an adequate definition of the underlying felony or attempt.

According to the Pennsylvania Supreme Court, the Crimes Code has made no basic changes in the Pennsylvania law of felony murder, *see, e.g., Commonwealth v. Waters*, – Pa. –, 418 A.2d 312 (1980); *Commonwealth v. Allen*, 475 Pa. 165, 379 A.2d 1335 (1977). This instruction is derived from Crimes Code § 2502(b) as amended by Act No. 39 (1978) and the case law, *see, e.g., Commonwealth v. Waters, supra* (person other than slayer cannot be guilty of felony murder unless a conspiratorial, *i.e.*, a common design to commit the underlying felony exists when slaying occurs and slayer’s act causing death is in furtherance of the felony); *Commonwealth v. Legg*, – Pa. –, 417 A.2d 1152 (1980) (felony murder rule allows finder of fact to infer killing was malicious from fact that actor engaged in a felony of such a dangerous nature to human life as one of the statutorily enumerated crimes); *Commonwealth v. Allen, supra*.

It may be noted that the Pennsylvania appellate decisions do not always make it clear whether the imputation of malice from commission of the underlying felony is a permissive inference, a conclusive presumption (rendering “malice” a superfluous element in jury charges) or something in between, *see, e.g., Commonwealth v. Legg, supra; Commonwealth v. Allen, supra; Commonwealth v. Lee*, 484 Pa. 335, 399 A.2d 104 (1979) (Larsen, J. opinion in support of affirmance). For felony murder the felony must not be an afterthought, the intent to commit the felony must exist before the killing, *see Commonwealth v. Legg, supra*. The fact that Crimes Code § 2502(b) defines second degree murder in terms of a “criminal homicide” which Crimes Code § 2501(a) in turn defines to require that the death was at least negligently caused apparently does not change prior Pennsylvania law, e.g., that a felony-related death which is in a sense accidental may still be felony murder, *compare*

Commonwealth v. White, – Pa. –, 415 A.2d 399 (1980); with *Commonwealth v. Allen*, *supra*.

Felony murders other than those involving the felonies enumerated in Section 2502(b) are murders of the third degree, *see Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472 (1958). A jury has the power to fix the defendant's guilt at murder in the third degree even though the only evidence in the case establishes that the killing was committed in the perpetration of a § 2502(b) felony and the trial court is required to so instruct the jury. *See Commonwealth v. McNeal*, 456 Pa. 394, 319 A.2d 669 (1974).

For a general discussion of felony murder, its history and rationale, *see Commonwealth ex rel. Smith v. Myers*, 261 A.2d 438, 550 Pa. 218 (1970) (rejecting proximate cause as a basis of liability for felony murder).

15.2502C (Crim) THIRD DEGREE MURDER

(1) According to the Crimes Code, any murder that is not first or second degree murder is third degree murder. [Unless you are returning a verdict of (first) (or) (second) degree murder, you] [You] may find the defendant guilty of third degree murder if you are satisfied that the following three elements have been proven beyond a reasonable doubt:

First, that _____ is dead;

Second, that the defendant killed him; and

Third, that the killing was with malice. A killing is with malice if it is without lawful justification, excuse or circumstances mitigating the killing to manslaughter and the killer acted with one of the following states of mind: an intent to kill or an intent to inflict serious bodily harm or 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 an extreme indifference to the value of human life.

(2) Malice may be either expressed by a defendant or inferred from his words or conduct in the light of the attending circumstances. [When a deadly weapon is intentionally used against a vital part of the human body, malice may be inferred to exist.]

Subcommittee Note

This instruction is appropriate for use when the defendant is charged with third degree murder in violation of Crimes Code § 2502(c). Subdivisions (1) and (2) comprise instructions of general applicability. The first bracket material of subdivision (1) may be

used when first or second degree murder are in issue. The definition of malice in the third element of subdivision (1) may be omitted if the court has given it earlier in the charge.

Subdivision (2) deals very generally with proof of malice from the defendant's words, conduct and attending circumstances. Depending upon the evidence, it may be desirable to elaborate this part of the charge. For cases upholding the inference of malice from the intentional use of a deadly weapon on a vital part of the body, *see, e.g., Commonwealth v. Carter*, 481 Pa. 495, 393 A.2d 13 (1978); *Commonwealth v. Hinchcliffe*, 479 Pa. 551, 388 A.2d 1068 (1978). For a sampling of other cases in which malice was inferrable from various facts and circumstances, *see Commonwealth v. Moore*, — Pa. —, 412 A.2d 549 (1980) (whether malice inferrable from fist fight depends upon circumstances including relative size and fighting ability of parties, manner, ferocity and duration of attack, provocation, nature of injuries); *Commonwealth v. Steele*, 448 Pa. 518, 295 A.2d 334 (1974) (violent punching and kicking which seriously damaged victim's liver and ribs); *Commonwealth v. Bowden*, 442 Pa. 365, 276 A.2d 530 (1970) (father beat child ruthlessly); *Commonwealth v. Lawrence*, 428 Pa. 188, 236 A.2d 768 (1978) (defendant after knocking victim out dragged him unconscious, half-naked and bleeding to an isolated spot where he abandoned him on a cold winter night).

Some Pennsylvania decisions appear to equate the "intent to kill" in the definition of malice with the "specific intent to kill" required for first degree murder, *see, e.g., Commonwealth v. Pitts*, 486 Pa. 212, 404 A.2d 1305 (1979). There are cases, however, where a defendant as a factual matter has an intent, i.e., a purpose to kill sufficient for malice that does not amount to a specific intent to kill. Examples where such an intent may exist to permit conviction of third degree murder include a defendant who kills in sudden passion on inadequate provocation and a defendant who is incapable of premeditation and deliberation because of drunkenness or diminished capacity. In such cases a defendant's purposeful killing may be intentional for malice purposes but his intent may not be sufficiently formed or within his consciousness as to meet the legal standard for specific intent. The problem about which we are talking is largely one of semantics.

15.2503A (Crim) VOLUNTARY MANSLAUGHTER— MURDER IN ISSUE

(1) As my earlier definition of malice indicates, there can be no malice when certain mitigating circumstances are present. When those circumstances are present a killing may be manslaughter but never murder. This is true when a defendant kills in heat of passion

following serious provocation or kills under an unreasonable mistaken belief in justifying circumstances.

(2) Accordingly, you can find malice only if you are satisfied beyond a reasonable doubt that the defendant was *not* acting [under a sudden and intense passion resulting from serious provocation by (the victim) (another person whom the defendant was trying to kill when he negligently or accidentally killed the victim)] [or] [under an unreasonable belief that the circumstances were such that, if they existed, would have justified the killing.]

[(3) The term “passion” includes anger, rage, sudden resentment or terror which renders the mind incapable of cool reflection. “Serious provocation” is conduct sufficient to excite an intense passion in a reasonable person. (A provocation cannot be considered serious if there is enough time between the provocation and killing so that the passion of a reasonable person would have cooled.)]

[(4) (I shall instruct you shortly regarding the circumstances in which a killing is justified.) (I instruct you that a killing is justified when _____ .)]

(5) You may find the defendant guilty of voluntary manslaughter [regardless of (any provocation or passion) (an unreasonable belief in justifying circumstances)] if you are satisfied that the following three elements have been proven beyond a reasonable doubt:

First, that _____ is dead:

Second, that the defendant killed him; and

Third, that the killing was with specific intent to kill (or inflict serious bodily injury) and without lawful justification or excuse. [A killing is with specific intent to kill (or seriously injure) if it is by a person who has a fully formed intent to do so and who is conscious of his own intent.]

Subcommittee Note

This instruction is appropriate whenever voluntary manslaughter in violation of Crimes Code § 2503 is a permissible verdict and murder is also at issue under the charges. Subdivisions (1), (2) and (5) comprise a basic instruction of general applicability. Subdivision (3) may be used when further definitions of passion, provocation or cooling time are needed. Subdivision (4) should be used when there is an issue of unreasonable mistaken belief in justifying circumstances; the court must at some point in the instructions adequately define the elements of the pertinent justification.

This instruction treats passion-provocation and imperfect justification (unreasonable mistaken belief in justifying circumstances) as

defensive matters. When they are raised the Commonwealth must disprove them or it cannot win a conviction for murder. They are not elements which the prosecution must prove to convict of voluntary manslaughter. For voluntary manslaughter, all the Commonwealth need show is an intentional killing without justification or excuse. Subdivisions (2) and (5) of the Instruction are derived from Crimes Code § 2503. They reflect the defensive nature of some of the statutorily defined elements of voluntary manslaughter. The parenthesis in the third required element of voluntary manslaughter around the phrase “or inflict serious bodily injury” shows subcommittee uncertainty about Pennsylvania law on this point. The Supreme Court has said that either an intent to kill or to seriously injure is required for voluntary manslaughter, *see Commonwealth v. Mason*, 474 Pa. 308, 379 A.2d 807 (1974). However, in the great majority of its decisions the Supreme Court has said or suggested that an intent to kill, which it sometimes equates to the specific intent in first degree murder is essential, *see, e.g., Commonwealth v. Pitts*, 486 Pa. 212, 404 A.2d 1305 (1979); *Commonwealth v. Gay*, – Pa. –, 413 A.2d 675 (1980). Note that the language of Crimes Code § 2503(b) suggests that the mens rea in voluntary manslaughter is an intentional or knowing killing. The subcommittee recommends that trial judges adopt the cautious tactic of charging intent to injure only on the request of defense counsel.

The definition of passion in subdivision (3) is derived from *Commonwealth v. Harris*, 472 Pa. 406, 372 A.2d 757 (1977). The definition of “serious provocation” is taken from Crimes Code § 2301. The “cooling time” doctrine in subdivision (3), expressed in different language, can be found in *Commonwealth v. Long*, 460 Pa. 461, 333 A.2d 865 (1975) (before sufficient time has elapsed for the blood to cool and reason to reassume control of the actor’s conduct). When a jury is determining whether a defendant acted in passion they are concerned with his subjective mental state; when deciding whether a provocation was serious, *i.e.*, legally adequate, and cooling time was insufficient, the jury is applying an objective standard, *see Commonwealth v. McCusker*, 448 Pa. 382, 292 A.2d 286 (1972). *But see Commonwealth v. Potts*, 468 Pa. 509, 406 A.2d 1007 (1979), in which a majority of the court seems to undermine the objective nature of the serious provocation requirement. For additional cases which may be helpful to the court in deciding what issues should go to the jury and in framing additional instructions on passion, provocation and cooling time, *see Commonwealth v. Whitfield*, 475 Pa. 297, 380 A.2d 362 (1977) (cumulative impact of series of related events may add up to adequate provocation; dispute over trivial household matters which occurred half hour before stabbing was legally inadequate provoca-

tion); *Commonwealth v. Berry*, 461 Pa. 233, 336 A.2d 262 (1975) (insulting and scandalous words are not adequate provocation; words can be adequate provocation if they report a fact which if observed would have constituted adequate provocation); *Commonwealth v. Dews*, 429 Pa. 555, 239 A.2d 382 (1968) (defendant cannot seize upon past injury or insult as provocation; cooling time sufficient as matter of law where month passed between time defendant learned victim had beat up his brother and the killing).

For a general exposition of imperfect justification reducing murder to voluntary manslaughter and a potential source of instructions thereon, see *Commonwealth v. Cain*, 484 Pa. 240, 398 A.2d 1359 (1979) (killing in mistaken self-defense).

15.2503B (Crim) VOLUNTARY MANSLAUGHTER— MURDER NOT IN ISSUE

(1) In order to find the defendant guilty of voluntary manslaughter you must be satisfied that the following three elements have been proven beyond a reasonable doubt:

First, that _____ is dead;

Second, that the defendant killed him; and

Third, that the killing was with specific intent to kill (or inflict serious bodily injury) and without lawful justification or excuse. [A killing is with a specific intent to kill (or seriously injure) if it is by a person who has a fully formed intent to do so and who is conscious of his own intent.]

[(2) I instruct you that a killing is not justifiable or excusable merely because the killer (acts in passion after provocation) (unreasonably believes the circumstances to be such that, if they existed, would justify the killing). Such facts may prevent a killing from being the more serious crime of murder, but they are no defense to a charge of voluntary manslaughter.]

Subcommittee Note

This instruction is appropriate whenever voluntary manslaughter in violation of Crimes Code § 2503 is a permissible verdict and murder is not in issue. The instruction follows from the premise that passion-provocation and imperfect justification (unreasonable mistaken belief in justifying circumstances) are not elements of voluntary manslaughter in the conventional sense. They are defensive matters which preclude malice and hence murder. Where murder is not at issue, an instruction on passion-provocation or imperfect justification is superfluous.

The parenthesis in the third required element of voluntary man-

slaughter around the phrase “or inflict serious bodily injury” shows subcommittee uncertainty about Pennsylvania law on this point. The Supreme Court has said that either an intent to kill or to seriously injure is required for voluntary manslaughter, *see Commonwealth v. Mason*, 474 Pa. 308, 379 A.2d 807 (1974). However, in the great majority of its decisions the Supreme Court has said or suggested that an intent to kill, which it sometimes equates to the specific intent in first degree murder is essential, *see, e.g., Commonwealth v. Pitts*, 486 Pa. 212, 404 A.2d 1305 (1979); *Commonwealth v. Gay*, — Pa. —, 413 A.2d 675 (1980). Note that the language of Crimes Code § 2503(b) suggests that the mens rea in voluntary manslaughter is an intentional or knowing killing. The subcommittee recommends that trial judges adopt the cautious tactic of charging intent to injure only on the request of defense counsel.

15.2504 (Crim) INVOLUNTARY MANSLAUGHTER

(1) You may find the defendant guilty of involuntary manslaughter if you are satisfied that the following three elements have been proven beyond a reasonable doubt:

First, that _____ is dead;

Second, that the defendant’s conduct was a direct cause of his death; and

Third, that the defendant’s conduct was reckless or grossly negligent.

(2) A defendant’s conduct is reckless when he consciously disregards a substantial and unjustifiable risk that death will result from his conduct, the risk being such that it is grossly unreasonable for him to disregard it. A defendant’s conduct is grossly negligent when he should be aware of a substantial and unjustifiable risk that death will result from his conduct, the risk being such that it is grossly unreasonable for him to fail to perceive, that is recognize, the risk. [I shall now restate these definitions in more detail. A defendant’s conduct is reckless or grossly negligent when—I am now speaking of reckless conduct—the defendant is aware of and consciously disregards a substantial and unjustifiable risk that death will result from his conduct or when—I am now speaking of grossly negligent conduct—the defendant should be aware of such a risk even though he does not actually perceive it. The risk of death must be of such a nature and degree that the defendant’s disregard of the risk or failure to perceive it, considering the nature and intent of his conduct and the circumstances known to him, involves a gross deviation from the standard of conduct or care that a reasonable person would observe in the defendant’s situation.]

(3) As the definitions I just gave you indicate, the recklessness

or gross negligence required for involuntary manslaughter is a great departure from the standard of ordinary care evidencing a disregard for human life or an indifference to the possible consequences of one's conduct.]

[(4) Compared with recklessness and gross negligence, the malice required for third degree murder is a more culpable, that is a more blameworthy, state of mind. The essence of malice is an extreme indifference to the value of human life.]

(5) In determining whether the defendant's conduct was reckless or grossly negligent you should consider all the relevant facts and circumstances that you find from the evidence including _____ .

Subcommittee Notes

Subdivision (1), the unbracketed portion of subdivision (2) and subdivision (5) comprise an instruction of general applicability when the defendant is charged with involuntary manslaughter in violation of Crimes Code § 2504. Subdivision (5) should be tailored to point out significant facts and circumstances as to which there is evidence and which are relevant to recklessness or gross negligence. The bracketed portion of subdivision (2) may be used for a more technically complete definition of reckless or grossly negligent conduct. Subdivision (3) may be used if the court believes it may aid juror understanding. Subdivision (4) may be used to avert possible juror confusion as a result of similarity between definitions of recklessness-gross negligence and malice.

Subdivision (1) is a paraphrase of Crimes Code § 2504 except that the instruction does not refer to the concepts of "lawful act" and "unlawful act." Liability does not in any way turn on the distinction between lawful and unlawful acts. The only reason for referring to the distinction in the Crimes Code appears to be to emphasize that the lawful-unlawful act dichotomy no longer has any significance. The definitions of recklessness and gross negligence in subdivision (2) are derived from Crimes Code § 302(b)(3) and (b)(4). *See Commonwealth v. Thomas*, 482 Pa. 312, 393 A.2d 1122 (1978) (Pomeroy, J. opinion in support of affirmance). The description of recklessness and gross negligence in subdivision (3) is taken from *Commonwealth v. Polimeni*, 474 Pa. 430, 378 A.2d 1189, 1195 (1977). *See also Commonwealth v. Agnew*, — Pa. Super. Ct. —, 398 A.2d 209 (1979); *Commonwealth v. Feinberg*, 433 Pa. 558, 253 A.2d 636 (1969). For cases supporting subdivision (4) see *Commonwealth v. LaPorta*, 218 Pa. Super. Ct. 1, 272 A.2d 516 (1970) (culpability required for involuntary manslaughter is greater than tort negligence but less than malice); *Commonwealth v. Thomas, supra* (Pomeroy, J.) (extreme indifference to the value of human life connotes malice).

It has been said that the pre-Crimes Code case law regarding the definition of involuntary manslaughter has not been changed in any substantial way by Crimes Code § 2504, *see Commonwealth v. Thomas, supra* (Pomeroy, J.). The case law definition had evolved to the point where involuntary manslaughter in all its forms required two elements: recklessness or gross negligence and direct causation, *Commonwealth v. Feinberg, supra* (defendant merchant guilty of involuntary manslaughter in death of skid row bums who consumed sterno that he sold them ostensibly for use as a fuel); *Commonwealth v. Root*, 403 Pa. 571, 170 A.2d 310 (1961). Differences in the standard of liability for lawful act and unlawful act manslaughter were disappearing, *see Commonwealth v. Clouser*, 212 Pa. Super. Ct. 1208, 239 A.2d 870 (1968) (automobile case; proof of unlawful act is not per se sufficient for conviction of involuntary manslaughter). Thus the pre-Crimes Code case law, particularly the more recent cases, are still very pertinent when interpreting Crimes Code § 2504.

All facts and circumstances relevant to the definition of recklessness and gross negligence in subdivision (2) are of course relevant to guilt. The fact that the act of the defendant violated the Motor Vehicle Code while not itself sufficient, may together with surrounding circumstances evidence disregard for human life or an indifference to consequences, *see Commonwealth v. Agnew, supra* and cases cited therein. Although contributory negligence is not a defense, the actions of the victim must be considered along with the other facts and circumstances in determining whether the defendant's conduct was (i) reckless or grossly negligent, and (ii) the direct cause of the victim's death, *see Commonwealth v. Feinberg, supra; Commonwealth v. Clouser, supra; Commonwealth v. LaPorta, supra*.

