

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division



MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: May 11, 2018

SUBJECT: First Draft of Report #19. Homicide

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #19, Homicide. OAG reviewed this document and makes the recommendations noted below.¹

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1101. Murder

Section 22A-1101 (a)(2)(E) makes it an aggravated murder when the requisite elements are met and “The defendant committed the murder after substantial planning...” As noted on page 6 of the memorandum, “Subsection (a)(2)(E) specifies that substantial planning is an aggravating circumstance. Substantial planning requires more than mere premeditation and deliberation. The accused must have formed the intent to kill a substantial amount of time before committing the murder.” The phrasing of this subparagraph raises several issues. First, the plain meaning of the term “substantial planning” sounds as if the planning has to be intricate.² However, the Comment portion just quoted makes it sound like the word “substantial” refers to the amount of time the intent was formed prior to the murder. These provisions should be redrafted to clarify

¹ This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

² In other words, the planning was of considerable importance, size or worth.

whether the intent is to have the enhancement apply when the perpetrator plans the murder some period prior to actually committing it (even if it is a simple plan to just shoot the victim), whether the plan to commit the murder has to have many steps to it (even if it was conceived almost instantaneously with the commission of crime), or whether either will suffice.

If the term “substantial planning” refers to the time between the planning and the commission of the offense and that “Substantial planning requires more than mere premeditation and deliberation” How much more – and how will anyone know? As the discussion points out, premeditation can happen in the blink of an eye. How much more is needed for substantial planning?

Section 22A-1101 (a)(2)(I) makes it an aggravated murder when the requisite elements are met and “In fact, the death is caused by means of a dangerous weapon.” However, this is a change from current District law. As noted on page 14 of the memorandum “Current D.C. Code § 22-4502 provides enhanced penalties for committing murder “while armed” or “having readily available” a dangerous weapon.” While there may be arguments for not providing an enhancement for an unseen weapon that is not used, there should be enhancements for when weapons are used or brandished. For example, a perpetrator shoots a person in chest and then sits on the bleeding victim and chokes him to death. While it cannot be said that “the death was caused by means of a dangerous weapon” the use of the gun certainly prevented the victim from defending herself. Similarly, victims may be less likely to defend themselves if assailants have guns aimed at them while they are being assaulted. To take these scenarios into account, we suggest that § 22A-1101 (a)(2)(I) be redrafted such that the enhancement applies any time a weapon is displayed or used, whether or not it in fact caused the death.

Section 22A-1101 (f) establishes a mitigation defense. Subparagraph (1)(B) says one mitigation defense to murder is “[a]cting with an unreasonable belief that the use of deadly force was necessary...” [emphasis added] Our understanding is that this was intentional, and wasn’t meant to say “reasonable.” We ask because of the discussion of it on page 9 of the memorandum. That discussion seems to say that a reasonable belief of necessity would be a complete defense to murder, while an unreasonable belief merely mitigates murder down to manslaughter. But the leadoff sentence in the comment implies the opposite. It says that “[s]ubsection (f)(1)(B) defines mitigating circumstances to include acting under a reasonable belief that the use of deadly force was necessary” [emphasis added] – suggesting that a reasonable belief merely mitigates down to manslaughter. This discussion needs to be clarified.

Subparagraph (3) of § 22A-1101(f) explains the effect of the mitigation defense. It states:

- (A) If the government fails to prove the absence of mitigating circumstances beyond a reasonable doubt, but proves all other elements of murder, the defendant shall not be found guilty of murder, but may be found guilty of first degree manslaughter.

(B) If the government fails to prove the absence of mitigating circumstances beyond a reasonable doubt, but proves all other elements of murder, and that the defendant was reckless as to the victim being a protected person, the defendant shall not be found guilty of murder, but may be found guilty of aggravated manslaughter.

Paragraphs (A) and (B) dictate what the defendant is guilty of if the government fails to prove the absence of mitigation circumstances beyond a reasonable doubt. We have a few observations and suggestions concerning this provision.

First, paragraphs (A) and (B) are written in terms of what a trier of fact may do as opposed to what the law is concerning mitigation (i.e. “shall not be found guilty of murder, but may be found guilty...”). These paragraphs should be rewritten to state what the law is concerning mitigation, as follows:

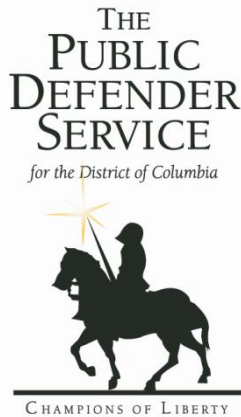
(A) If the government fails to prove the absence of mitigating circumstances beyond a reasonable doubt, but proves all other elements of murder, the defendant is not guilty of murder, but is guilty of first degree manslaughter.

(B) If the government fails to prove the absence of mitigating circumstances beyond a reasonable doubt, but proves all other elements of murder, and that the defendant was reckless as to the victim being a protected person, the defendant is not guilty of murder, but is guilty of aggravated manslaughter.

Second, a successful mitigation defense results in a conviction for either first degree or aggravated manslaughter notwithstanding that, but for the mitigation defense, the person committed an aggravated murder, first degree murder, or second degree murder. In other words, the penalties for committing these offenses are no longer proportionate to the conduct. More egregious conduct is penalized the same as less egregious conduct. There are a number of ways that the Commission could make these offenses proportionate. For example, a successful mitigation defense could lower the offense by one level.³

³ Under this proposal a person who would have been guilty of aggravated murder, but for a successful mitigation defense would be guilty of first degree murder, and a person who would have been guilty of first degree murder, but for a successful mitigation defense would be guilty of second degree murder.

MEMORANDUM



To: Richard Schmechel, Executive Director
D.C. Criminal Code Reform Commission

From: The Public Defender Service for the District
of Columbia

Date: May 11, 2018

Re: Comments on First Draft of Report No. 19,
Homicide

PDS has the following comments and suggestions for the RCC's homicide offenses.

1. Elimination of Aggravated Murder and Reconsideration of Aggravating Circumstances

PDS proposes that the RCC eliminate the offense of aggravated murder, RCC § 22A-1101(a). One problem with RCC § 22A-1101(a), identified by PDS at the May 2nd public meeting of the CCRC, is its inclusion of “in fact, the death was caused by means of a dangerous weapon” as a circumstance element sufficient to raise first degree murder to aggravated murder. The use of a dangerous weapon is exceedingly common in homicides – it is how most murders are committed. According to the Metropolitan Police Department Annual Report for 2016¹, during the previous five year period, 91% of homicides were committed with a gun or knife. Blunt force trauma accounted for 7% of homicides, the vast majority of which would have also involved the use of an object that would likely meet the definition of “dangerous weapon.” For the remaining 2% of homicides, 1% was committed by strangulation and 1% by other means not specified. Thus the RCC's definition would make between 91 and 98 percent of all homicides in the District an “aggravated murder.” The RCC's goal of creating proportionality between offenses would be defeated if every homicide could be charged as aggravated murder.

Rather than having an offense of aggravated murder, PDS suggests that the RCC retain first degree and second degree murder as in the current Code. PDS questions the need for having any aggravating circumstances to add to the maximum punishment for murder. Both first and second degree murder will already carry high statutory maximum prison sentences, leaving room for judges to exercise their discretion to sentence defendants to greater sentences based on the

¹ Available at:
https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/MPD%20Annual%20Report%202016_lowres.pdf

particular circumstances of the case or the unique vulnerability of the decedent. Statutes allowing for even greater sentences for murder in particular instances are thus not necessary.

However, in so far as the CRCC believes it needs to include in the RCC certain aggravating circumstances, such as for instance, the killing of a child or of a police officer, PDS suggests that the RCC include a separate enhancement or aggravator provision. While other parts of the RCC incorporate traditional enhancements or aggravators within different offense grades, PDS recommends the RCC treat murder differently. A separate statute for aggravating factors would also provide clarity because as currently drafted many of the aggravating factors listed in RCC § 22A-1101 cannot be logically applied in the sections where they have been assigned. For instance, it is first degree murder when a person acting with “extreme recklessness”² causes the death of another³ after substantial planning.⁴ A separate enhancement section would resolve the factual impossibilities included in this drafting.

2. Reconsideration of Aggravators

As drafted, the RCC provides an aggravating factor to homicide where the decedent is a minor, an adult age 65 or older, a vulnerable adult, a law enforcement officer, a public safety employee, a participant in a citizen patrol, a transportation worker, a District employee or official, or a family member of a District official or employee. While some of these aggravators are long-standing or included in the Code as stand-alone offenses, for instance the murder of a police officer in the course of his or her duties⁵, the RCC proposes to add the murder of District employees and their family members to the list of possible aggravators. This addition is not justified. There is not a unique and across the board vulnerability for all District of Columbia employees and their families that warrants their addition to this list. For example, a dispute at the Fort Totten Waste Transfer Station that leads to the death of a District employee is not categorically more dangerous to the community than an employee’s death at a similar privately-run facility. PDS recommends removing District employees and their family members from this list of possible aggravators. If there is a particular vulnerability that makes the murder of a District employee more dangerous or blameworthy, judges will have sufficient discretion to sentence defendants to the statutory maximum in such instances. Since the statutory maxima will necessarily be high for murder offenses, it will allow for judicial differentiation in sentencing in instances where the defendant’s culpability is heightened because of the decedent’s status.

² “Extreme recklessness” is shorthand for “recklessly, under circumstances manifesting extreme indifference to human life,” the mens rea for second degree murder at RCC § 22A-1101(c).

³ RCC §§ 22A-1101(b)(2), (c).

⁴ RCC § 22A-1101(b)(2)(E).

⁵ D.C. Code § 22-2106, murder of law enforcement officer.

The RCC also provides aggravators when the defendant mutilated or desecrated the decedent's body or when the defendant knowingly inflicted extreme physical pain or mental suffering for a prolonged period of time immediately prior to the decedent's death. This type of evidence typically would not be relevant to the question of whether the defendant committed the charged offense and therefore would often be inadmissible in a criminal trial.⁶ However, as the RCC is currently drafted, evidence of these aggravating circumstances would have to be presented to a jury and would be presented at the same time as all the other evidence in the case. In cases where the defense asserts that another individual committed the crime or that the defendant was misidentified, the evidence of torture or desecration of the decedent's body would be highly inflammatory and would not add anything to the jury's consideration of the key questions in the case.⁷ For this reason, PDS recommends that if the RCC keeps these provisions as aggravators, the RCC should also include a requirement that this evidence can only be introduced and proved at a separate hearing in front of a jury following an initial guilty verdict.

PDS also questions the need for a separate aggravator for homicides perpetrated because the decedent was a witness in a criminal proceeding or had provided assistance to law enforcement. This aggravating circumstance would also be charged as the separate substantive offense of obstruction of justice.⁸ Creating an aggravating circumstance that will be amply covered by a separate offense contravenes the CCRC's goal of streamlining offenses and eliminating unnecessary overlap.

3. Elevation of Mens Rea in First Degree Murder

PDS recommends that the RCC use the mens rea of purposely in first degree murder. RCC § 22A-1101(b), first degree murder, currently requires a mens rea of knowingly rather than purposely. While the definitions of knowingly and purposely are closely related, purposely is a

⁶ Only relevant evidence is admissible in a criminal trial. For evidence to be relevant, it must be "related logically to the fact that it is offered to prove, ... the fact sought to be established by the evidence must be material ... and the evidence must be adequately probative of the fact it tends to establish." *Jones v. United States*, 739 A.2d 348, 350 (D.C.1999) (internal citations omitted). The trial judge has the discretion to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. "Unfair prejudice" within this context means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Mercer v. United States*, 724 A.2d 1176, 1184 (D.C. 1999).

⁷ See *Chatmon v. United States*, 801 A.2d 92, 101 (D.C. 2002) (noting that the prosecutor's repeated reference to a photo of the decedent in a pool of blood while asking jurors to come to a decision that they could live with was improper and calculated to enflame the passions of the jury without adding to the proof in the case).

⁸ D.C. Official Code § 22-722, obstruction of justice.

higher mental state and requires a “conscious desire” to bring about a particular result.⁹ The RCC should use the highest mental state to describe the most serious and severely punished crimes in the Code. The RCC requires purposely as the mental state for aggravated assault (RCC § 22A-1202), child abuse (RCC § 22A-1501), first degree abuse of a vulnerable adult (RCC § 22A-1503), and unlawful obstruction of a bridge to the Commonwealth of Virginia (RCC § 22A-2605). The RCC should not use a lower mens rea for first degree murder.

4. Retention of the Element of Premeditation and Deliberation in First Degree Murder

PDS recommends that first degree murder in the RCC have as an element that the person acted with premeditation and deliberation as is currently required by the Code for first degree murder. RCC § 22A-101(b) removes this element from first degree murder. While the CCRC notes in the commentary that the DCCA has interpreted this element as requiring little more than turning a thought over before reaching the decision to kill,¹⁰ in practice, this element is critical to separating impulsive murders from those committed with some degree of forethought. The distinction has been important for the United States Attorney’s Office in making decisions about charging a homicide as first degree or second degree murder. The element of premeditation and deliberation has appropriately limited the cases that the United States Attorney’s Office brings as first degree murder to those where there is the additional culpability of some form of deliberation. Rash homicides that take place over the course of several angry seconds or that stem from immediate action after or during a dispute may meet the technical definition of deliberation, but are not charged this way. The additional reflection is a meaningful way of differentiating between the offenses of first degree and second degree murder and should not be lightly set aside by the CCRC.

5. Drafting Recommendation for First Degree Murder

RCC § 22A-1101 Murder.

(b) *First Degree Murder.* A person commits the offense of first degree murder when that person:

- (1) ~~Knowingly~~ Purposely causes the death of another person; ~~or~~
- (2) with premeditation and deliberation; ~~or~~
- (2) ~~Commits second degree murder and either:~~
 - (A) ~~The death is caused with recklessness as to whether the decedent is a protected person;~~
 - (B) ~~The death is caused with the purpose of harming the complainant because of the complainant’s status as a:~~
 - (i) ~~Law enforcement officer;~~

⁹ RCC § 22A-206(a), purpose defined.

¹⁰ Report #19, pages 25-26.

- ~~(ii) Public safety employee;~~
- ~~(iii) Participant in a citizen patrol;~~
- ~~(iv) District official or employee; or~~
- ~~(v) Family member of a District official or employee;~~
- ~~(C) The defendant knowingly inflicted extreme physical pain or mental suffering for a prolonged period of time immediately prior to the decedent's death;~~
- ~~(D) The defendant mutilated or desecrated the decedent's body;—~~
- ~~(E) The defendant committed the murder after substantial planning;~~
- ~~(F) The defendant committed the murder for hire;~~
- ~~(G) The defendant committed the murder because the victim was or had been a witness in any criminal investigation or judicial proceeding, or because the victim was capable of providing or had provided assistance in any criminal investigation or judicial proceeding;~~
- ~~(H) The defendant committed the murder for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; or~~
- ~~(I) In fact, the death is caused by means of a dangerous weapon.~~

6. Drafting Recommendation for Second Degree Murder

PDS recommends changes to RCC § 22A-1101(c), second degree murder, to accommodate the changes made to first degree murder and the retention of premeditation and deliberation in first degree murder. PDS recommends adding to the definition of second degree murder, murders that are committed knowingly, but without premeditation and deliberation. Many of the District's homicides that are committed with firearms would constitute knowingly causing the death of another. In such instances, where there is not premeditation and deliberation, that individual's mental state much more closely aligns with knowing that death is certain than with being reckless that death may result. Where the conduct is knowing, but without premeditation and deliberation, the offense definition and the instructions that a jury receives should more closely fit the conduct. It would be a fiction to call that mental state in all instances merely one of recklessness. The option of knowingly committing the homicide should exist within second degree murder.

PDS therefore recommends the following language:

(c) *Second Degree Murder*. A person commits the offense of second degree murder when that person:

- (1) Knowingly causes the death of another person; or
- (2) Recklessly, under circumstances manifesting extreme indifference to human life, causes the death of another person; or
- (3) Negligently causes the death of another person, other than an accomplice, in the course of and in furtherance of committing, or attempting to commit aggravated arson, first degree arson, [first degree sexual abuse, first degree child sexual

abuse,] first degree child abuse, second degree child abuse, [aggravated burglary], aggravated robbery, first degree robbery, second degree robbery, [aggravated kidnapping, or kidnapping]; provided that the person or an accomplice committed the lethal act; and

7. Availability of Mitigation Defense

PDS recommends rewriting part of the mitigation defense to recognize that the defendant may act with belief that deadly force was necessary to prevent someone other than the decedent from unlawfully causing death or serious bodily injury. For example, the defendant may have believed (unreasonably) that X was about to kill or seriously injure him; when reaching for a gun, the defendant is jostled so he fatally shoots Y rather than X. Just as a person would still be liable if he with premeditation and deliberation aimed to shoot X but due to poor aim or a defective firearm fatally shot Y instead, a person should still be able to avail himself of the mitigation defense if he causes the death of someone other than the person he believes is threatening death or seriously bodily injury. Further, the change PDS proposes would bring this part of the mitigation defense, at RCC § 22A-1101(f)(1)(B), in line with another, at RCC § 22A-1101(f)(1)(A). As explained in Report # 19, the “‘extreme emotional disturbance’ [that is mitigating pursuant to § 22A-1191(f)(1)(A)] need not have been caused wholly or in part by the decedent in order to be adequate.”¹¹

PDS proposes rewriting §22A-1101(f) as follows:

(f) *Defenses.*

- (1) *Mitigation Defense.* In addition to any defenses otherwise applicable to the defendant’s conduct under District law, the presence of mitigating circumstances is a defense to prosecution under this section. Mitigating circumstances means:
 - (A) Acting under the influence of an extreme emotional disturbance for which there is a reasonable cause as determined from the viewpoint of a reasonable person in the defendant’s situation under the circumstances as the defendant believed them to be;
 - (B) Acting with an unreasonable belief that the use of deadly force was necessary to prevent ~~the decedent~~ another person from unlawfully causing death or serious bodily injury;

8. Burden of Proof for Mitigation Defense

RCC § 22A-1101(f)(2) frames mitigating circumstances in first and second degree murder as an element or multiple elements that must be disproved by the government if “evidence of mitigation is present at trial.” PDS recommends that RCC §22A-1101(f)(2,) burden of proof for

¹¹ Report #19, page 18.

mitigation defense, mirror DCCA case law on the amount of evidence that must be presented to trigger the government's obligation to disprove the existence of any mitigating circumstances. Under current law, a defendant is entitled to a jury instruction such as mitigation for first degree and second degree murder or self defense if "the instruction is supported by any evidence, however weak."¹²

PDS recommends redrafting RCC § 22A-1101(f)(2) as follows:

Burden of Proof for Mitigation Defense.

If some evidence of mitigation, however weak, is present at trial, the government must prove the absence of such circumstances beyond a reasonable doubt.

9. Manslaughter

For clarity and consistency, PDS recommends that the RCC eliminate the offense of aggravated manslaughter, RCC § 22A-1102(a) and group status based aggravators where the decedent is, for instance a law enforcement officer or public safety employee, in a separate aggravator statute.

PDS believes that manslaughter should remain a lesser included offense of first and second degree murder and therefore would request a specific statutory provision that makes manslaughter a lesser included offense of murder even if the elements of the revised offenses do not align under the *Blockburger* test.¹³

¹² *Murphy-Bey v. United States*, 982 A.2d 682, 690 (D.C. 2009); *see also Henry v. United States*, 94 A.3d 752, 757 (D.C. 2014) (internal citations omitted) "Generally, when a defendant requests an instruction on a theory of the case that negates his guilt of the crime charged, and that instruction is supported by any evidence, however weak, an instruction stating the substance of the defendant's theory must be given."

¹³ *Blockburger v. United States*, 284 U.S. 299, 304 (1932).