

**To: Commission**  
**From: Brian Ashnault**  
**Re: State v. Rose – Aggravated Manslaughter Statute**  
**Date: July 11, 2016**

## **MEMORANDUM**

### **Executive Summary**

Commission Staff seeks authorization to conduct further research regarding whether the aggravated assault statute, N.J.S.A. 2C:11-4(a), needs to be modified. The statute as currently written does not include a requirement that has been identified through legislative intent and well established by case law. Staff would like to conduct research to determine whether this requirement should be included in N.J.S.A. 2C:11-4(a).

### **Statute**

#### **N.J.S.A. 2C:11-4(a)**

**a.** Criminal homicide constitutes aggravated manslaughter when:

- (1) The actor recklessly causes death under circumstances manifesting extreme indifference to human life; or
- (2) The actor causes the death of another person while fleeing or attempting to elude a law enforcement officer in violation of subsection b. of [N.J.S. 2C:29-2](#). Notwithstanding the provision of any other law to the contrary, the actor shall be strictly liable for a violation of this paragraph upon proof of a violation of subsection b. of [N.J.S. 2C:29-2](#) which resulted in the death of another person. As used in this paragraph, “actor” shall not include a passenger in a motor vehicle.<sup>1</sup>

### **Background**

Anthony Rose (defendant) was involved in a physical altercation with Eric Gadson, which resulted in Rose getting knocked to the ground.<sup>2</sup> Later that day, Rose confided in a friend, Zieiah Brown, that he was “having a problem with somebody” and then asked Brown if he could borrow a handgun from him.<sup>3</sup> Brown did not have a gun to lend to Rose, but saw Rose later in

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<sup>1</sup> N.J.S.A. § 2C:11-4(a) (2002).

<sup>2</sup> *State v. Rose*, No.10-04-0642, slip op. at 1 (N.J. Super. Ct. App. Div. Oct. 20, 2014).

<sup>3</sup> *Id.*

the day, at which point Rose informed him that he had “put in some work and laid somebody out,” which was taken to mean that Rose had killed someone.<sup>4</sup>

A store surveillance video showed the victim, Darius Burgess, being shot in the back while walking across the street.<sup>5</sup> A white car that was purchased by the defendant shortly before the shooting was identified from the surveillance footage.<sup>6</sup> Burgess was shot in the back across the street from the same park where the Rose and Gadson altercation had occurred earlier.<sup>7</sup> The State’s theory was that Burgess had been mistaken for Gadson because “he and the victim were similar in appearance.”<sup>8</sup> Rose was indicted on a charge of first degree murder along with various firearm possession charges, and was then convicted of aggravated manslaughter.<sup>9</sup>

Rose asserted that he did not meet the criteria of aggravated manslaughter due to the legislative intent of N.J.S.A. 2C:11-4(a) that is set forth by case law, which establishes an additional requirement beyond those set forth in the statute.<sup>10</sup> The statute describes aggravated manslaughter as requiring that “the actor recklessly causes death under circumstances manifesting extreme indifference to human life.”<sup>11</sup> Case law, however, has suggested a second element that is not clearly identified in the statute, when it has said that “the Legislature intended for this second element to require that the recklessness must involve a higher degree of probability that death will result from the actor’s conduct.”<sup>12</sup> The earlier case of the *State v. Curtis* introduced the requirement for aggravated assault to require *probability* of death, while reckless manslaughter requires only the *possibility* of death for the victim.<sup>13</sup>

Rose claimed that by shooting Burgess from “across a street, he could not be certain his shot would find its intended target.”<sup>14</sup> Arguably, the degree of difficulty, shooting from that distance, made Burgess’s death a possibility, not a probability, and the conduct does not satisfy the statutory elements of aggravated manslaughter.<sup>15</sup> The court did not find this argument persuasive, and affirmed the conviction of aggravated manslaughter.<sup>16</sup> Although the *Curtis* case is an older one, the statute has not been modified in the intervening years, and it appears that the issue of whether the standard that identified by the Court should be included in the statute remains.

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 1.

<sup>10</sup> *Id.* at 5.

<sup>11</sup> N.J.S.A. § 2C:11-4(a)(1).

<sup>12</sup> *State v. Curtis*, 195 N.J. Super. 354, 363-64 (N.J. Super. Ct. App. Div. 1984).

<sup>13</sup> *Id.*

<sup>14</sup> *Rose*, No.10-04-0642 slip op. at 6.

<sup>15</sup> *Id.* at 7.

<sup>16</sup> *Id.*

There is case law that adopts “the additional element that death be caused under circumstances manifesting extreme indifference to human life elevates the risk level from a mere possibility to a probability,” along with the requirement set forth in N.J.S.A. 2C:11-4(a)(1).<sup>17</sup> It is clear that a reckless action that will *probably* cause death is aggravated manslaughter and a reckless action that will *possibly* causes death is reckless manslaughter due to the established case law precedent.<sup>18</sup>

### **Conclusion**

The statutory language fails to state the “probability” of death requirement for aggravated manslaughter, but it has been adopted in practice. The absence of the “probability” of death requirement in the statute itself makes it more difficult for anyone who is not familiar with the case law or the practice in the aggravated manslaughter area to know what the requirements are.

Staff seeks authorization to engage in further research and outreach in order to determine whether the probability of death requirement for aggravated assault should be explicitly stated in the aggravated assault statute.

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<sup>17</sup> *Curtis*, 195 N.J. Super. at 363-64.

<sup>18</sup> *See State v. Bakka*, 176 N.J. 533, 548 (N.J. 2003), *See also State v. Galicia*, 210 N.J. 364, 378 (N.J. 2012), *See also State v. Saunders*, 277 N.J. Super. 322, 326 (App.Div. 1994), *See also State v. Gaines*, 377 N.J. Super. 612, 622 (App.Div. 2005).