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Criminal responsibility for the deliberate murder committed in the state
of strong emotional agitation

Speciality 12.00.08 - criminal law and criminology; criminal executive law.

ABSTRACT

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The thesis can be found in the library of the V.M. Koretsky of State and Law Institute of National Academy of Sciences of Ukraine (252 001, Kiev-1, street Trohsvyatytska, 4).

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Scientific Secretary of the Specialized Academic Council

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/signature/

GENERAL DESCRIPTION OF WORK

The actuality of the research. Rebuilding of the political, economic and legal relations in modern society passes against a background of significant growth in crimes and significant changes in their structure. So, we have continued to observe the same trend in Ukraine, which has been determined in the years of the USSR - a significant increase in committing serious violent crimes. Particularly alarming are the dynamic parameters of such violent crimes as a murders. Over the past ten years the number of socially dangerous acts committed for the year increased nearly threefold. This situation necessitates the intensification of the struggle against intentional murder, as well the intensification of theoretical research in this area.

Greater moral danger of committing deliberate murders determined that during the period of development of criminal law they has been a subject of thorough study. At the same time, complexity and diversity of knowledge of certain types of murders do not allow the scientist criminalists to abandon theoretical research in this direction.

The problem of strong emotional agitation and deliberate murder that occurred in this state continuously attracts attention of criminal law theorists. For that problem devoted works of such scholars as U.M. Krutov, V.V. Stashys, M.I. Bazhanov, S.V. Borodin, N.I. Dubinina, M.I. Zahorodnikov, I.P. Portnov, and other criminalists. However, significant number of important and practically valued aspects of this issue is not investigated. In particular, there isn't certain criminal legal term that shall be used to characterize the mental state maintaining in the article 95 of the Criminal Code of Ukraine functions of mitigation circumstance. The spring's mechanism of responsible person's criminal behavior connected to a state of strong emotional agitation is not learned enough. Discussion question remains about the place and role of strong emotional agitation in the characteristics of the examined crime. Remain unsolved and some other theoretical issues.

Relevance of the research is determined not only by poor drafting of some theoretical aspects of the problem, but also by the presence of significant difficulties in activity of Ukrainian law enforcement bodies in fighting against this category of crime. As shown by our data of the judicial practice for the last twenty years, often in the work of law enforcement agencies occur troubles with the criminal legal assessment of the person's emotional state at the time of committing the murder, and the circumstances that caused it. There is insufficient understanding of the needs to clarify all circumstances that preceded the commitment of affective murder, and characteristics of the victim and offender. The difficulties also arise in determining the motive of the affective crime which we consider.

Particular relevance of the thesis which connected to the research is determined by the time of designing of new Criminal Code of Ukraine.

The purpose of the research is to study the problem on the basis of affective murders judicial practice and develop recommendations to improve the criminal law and practical measures against these socially dangerous acts. For the full realization of this goal there should be the main focus of the thesis given to solving these problems:

- Consideration of the criminal law governing liability for murder in a state of strong emotional agitation (physiological affect);
- Assessment of its practical application;
- The observation of scientific views and developments on this issue;
- Studying the history of the criminal law provisions providing liability for affective crimes;
- Analysis of strong emotional agitation (physiological affect) as a criminal legal term based on scientific knowledge in psychology, psychiatry, and medicine.

The methodological base of the thesis is composed of provisions of philosophical theory of knowledge, systematic and systematic-structural, concrete-sociological, logical-semantic, comparative-legal, historical-legal methods.

Content of the thesis determined by a necessity of obtaining not only criminal law knowledge but also judicial psychology and forensic psychiatry one. In preparing of the work were used advisory opinions of the Supreme Courts of the USSR and Ukraine, as well as published practice of the litigation. Practical aspects of criminal cases (considered by courts of Ukraine in period from 1975 to 1995), which were related to deliberate murders under the section 95 of the Ukrainian Criminal Code, were investigated in the thesis. In addition, for the comparative study - 45 criminal cases concerning murders by exceeding the limits of necessary defense; 38 criminal cases of murders committed under aggravating circumstances; 32 criminal cases of murders committed without any mitigating and aggravating circumstances were investigated.

Scientific novelty of the research is revealed in the monographic new aspects of the problem of criminal responsibility for deliberate murder committed in a state of strong emotion. They help to prove the following theoretical provisions, conclusions and practical proposals which submitted to the defense:

- was proposed disposition of section 95 of the Criminal Code of Ukraine to interpret next way: "deliberate murder, committed in the state of physiological affect which arose as a result of unlawful violence or serious abuse of the victim";
- was identified linguistic error that occurred in the Criminal Law of Ukraine. The legal term which used in official publication of the Criminal Code in Ukrainian language was translated from Russian in different ways. In section 40 of the Criminal Code this is a "great emotional agitation", although in section 95,103 CC - "strong emotional agitation";
- was provided a clear classification of the physiological affect causes in connection to guilty person;
- was determined that in criminal legal meaning the use of the term "affect" is limited by instances where its content does not include the concept of "pathological affect";
- was concluded that the gap in time between the wrongful victim acts and arising as a result of them physiological affect of guilty person is not an obstacle for the qualification of this murder under section 95 of the Criminal Code of Ukraine;
- was substantiated the position that a selective choice in process of searching for

things of the material world, which are used as instruments of criminal action, not an obstacle for qualification of the murder under section 95 of the Criminal Code of Ukraine;

- was concluded that adultery cannot always be considered as a serious abuse and therefore to have the qualification of murder under section 95 of the Criminal Code of Ukraine;

- was stated that physiological affect cannot be recognized as the motive of considering crime. This emotional state of the guilty person should be understood as a separate element of the subjective side of deliberate murder under section 95 of the Criminal Code of Ukraine;

- was determined that the murder committed in a state of physiological affect and murder by exceeding the limits of necessary defense, committed in the same emotional state cannot be differentiated by the motive and purpose;

- was concluded that affective murder in the presence of aggravating circumstances specified in section 93 of the Criminal Code of Ukraine should be qualified under section 95 of the Criminal Code of Ukraine.

The practical importance of the work. Conclusions, suggestions and recommendations made in the thesis were used in preparation the lectures on the Special Part of Criminal Law for the High School of Law at the Institute of State and Law of National Academy of Sciences of Ukraine. Later they can be used:

- in the lawmaking - in the process of preparing of the new Criminal Code of Ukraine;

- in the law enforcement - for the stability of judicial practice and preparation of new determinations of the Supreme Court of Ukraine regarding the deliberate murders;

- for the educational purposes – in the preparation of relevant sections of textbooks and manuals and teaching the course of the Special Part of Criminal Law;

- in scientific activities - for further development and research issues of criminal responsibility for deliberate murder committed in a state of strong emotional agitation.

Structure of the thesis. Text of thesis contains 173 typewritten pages. The thesis consists of introduction, four chapters and conclusions. In addition, the thesis contains a list of sources.

Appraisal of the research results. Key provisions of the research were discussed at the meetings of criminal and criminological problems department of the V.M. Koretsky Institute of State and Law of National Academy of Sciences of Ukraine, and reported at scientific conference "The concept of legislation of Ukraine until 2005" (Kiev, 22-24 May 1996) and The international scientific conference of young lawyers "The future of the legal system Ukraine (Kiev, 15-16 September 1996).

Publications. Key provisions of the research published in the three scientific articles.

CONTENT OF THE WORK

In the introduction we substantiated the choice of the research theme; the relevance of the thesis, the object, subject, and other important provisions were also highlighted and therefore revealed theoretical and practical significance of the dissertation.

Content of section 1 of the research is defined by its name: " Strong emotional agitation as a mitigating circumstance of responsibility under the criminal law of Ukraine".

The problem of strong emotional agitation in criminal law aspect first of all should be considered from a position of conformity of content side of the concept to functions performed by it in the criminal law.

As a mitigating circumstance strong emotional agitation is presented in the criminal law in two forms:

- 1) as the general mitigating circumstance affecting punishment and responsibility;
- 2) as the mitigating circumstance that is included in the corpus delicti.

In this way it is described in three sections of the Criminal Code of Ukraine:

1) in section 40 "The mitigating circumstances of liability" – as a strong emotional agitation caused by the unlawful actions of the victim;

2) in section 95 "Deliberate murder which committed in a state of strong emotional agitation " and in section 103 "Intentional severe or moderate bodily harm in a state of strong emotional agitation" – as strong emotional agitation caused as a result of unlawful violence or severe abuse by the victim.

Meanwhile, in the theory of criminal law and judicial practice there is not unity in understanding of the particular mental state of guilty person, acting as mitigating circumstance in sections 40, 96 and 103 of the Criminal Code of Ukraine. In the criminal legal literature along with the term "strong emotional agitation" are often used the names "physiological affect", "affect", "strong sudden emotional agitation", "emotional agitation". The same variations in the terms can be found in the documents of criminal cases. The question arises: Whether does psychological science, which is a source of knowledge for criminal law regarding mental states in the sanity, use all the above terms in description of the same emotional state?

To answer this question there was examined psychological aspects of the mentioned concepts which allowing us to reach the following conclusions.

It was found that in psychology under the "emotional agitation" is understood mental reflection in the form of direct feeling of vital sense of events and situations which caused by conformity of its objective qualities to the needs of person. The meaning that the "emotional agitation" is a "strong" indicates that in its content can be included only intense mental states. At the same time, this category does not specify a defined level of intensity of such states and therefore, - their quality side.

Based on detailed research of a "strong emotional agitation" to detect its relations with other intense mental states, we got following working results.

It is proved that in psychological aspect "strong emotional agitation" is very broad concept and its content does not equate with physiological affect. However, opposite opinion had V.I. Tkachenko, V. Vladimirov, and many other criminalists. As strong emotional agitation can be characterized and less intense than physiological affect mental states as mental stress, emotional tension, and a more intense state as a pathological affect. This is making impossible to use the term "strong emotional agitation" "in the criminal law sense.

It should be noted that the author not only brings enough arguments regarding inappropriateness of such use of assessment categories in the Criminal Code of Ukraine, but also indicates the Legislator's reasons for the choice.

Avoiding the use of the above term will eliminate another error in the Criminal Code of Ukraine, linguistic in nature. In the official publication of the Criminal Code of Ukraine stating in Ukrainian language, the same legal term in different sections was described differently. If in sections 95, 103 of the Criminal Code of Ukraine this is "strong emotional agitation", in section 40 CC - "great emotional agitation". There is no need to emphasize the danger of such errors for both theory and practice.

The research of terminology by which criminalists describe mental states of the person have been determined that the candidate for a scientific degree believes that mentioned definitions have lack of clarity and uniqueness. In particular, some examples of the statements of the scientists-criminalists demonstrated how inappropriate replacement of the term "physiological affect" by the term "affect" leads to the theoretical errors. Analysis of these situations gives the right to assert that the term "affect" in the criminal legal meaning can only be used in case of exclusion from its content of "pathological affect" concept. Underlining the non-use of term "strong emotional agitation" in section 40, 95, 103 of the Criminal Code of Ukraine, the author submits his proposal to replace the above term by "physiological affect" which is widely known in psychological science and has fully conformity with criminal law needs. It should be noted that with the introduction of the term "physiological affect" in the Criminal Code of Ukraine there is no need in separate definition of "sudden nascency" of the examined mental state in sections 95, 103 of the Criminal Code of Ukraine. This feature is an internal feature of psychological affect. You must pay attention to the fact that "sudden nascency" cannot be regarded as characteristic of time continuity between the unlawful actions of the victim (cause) and physiological affect (the result).

In the theoretical point of view of criminal investigators of physiological affect problem there exists the need in much more study of the mechanism of mental state influence on a person's consciousness.

The basis of our position regarding this issue is the assertion that affective criminal actions are the conscious volitional actions although not fully conscious. For this reason, the author refrains from defining of such actions as impulsive in the meaning which put in this concept D.N. Uznadz, T.G. Shavhuschdze, I.G.Filanozskyy. For the same reason we cannot agree to the opinion expressed in the criminal justice literature about the lack of decision stage in affective criminal behavior, which is essential for demonstration of the responsible person will.

In assessing criminal legal value of physiological affect much attention should be paid to its causes. In forming of physiological affect involved two main reasons: the wrongful actions of the responsible person and internal features of person. As the internal features of an individual who is participating in induction of physiological affect must be taken following categories of reasons:

- 1) anti-social orientations of person;
- 2) character, the type of temperament;
- 3) age, health, mental abnormalities that do not deprive sanity, etc.

Mitigation of criminal responsibility provided by sections 40, 95, 103 of the Criminal Code of Ukraine is possible only if the unlawful conduct is a major cause of the physiological affect of the responsible person in comparison to underlined internal features. In the case when the primary cause of the examined mental state is anti-social orientations of person, character and temperament, there is impossible to speak about mitigation of criminal liability. Note that if the main cause of the physiological affect is age, health, mental abnormalities, various kinds of intoxication, in these situations we need to talk about the presence of pathological affect and not physiological affect. At physiological affect all underlined factors may play a role only of minor reasons.

We do not admit statements of some scientists that a gap in time between the unlawful actions of the victim (irritant) and physiological affect (irritation) is real obstacle to qualification of deliberate murder under section 95 of the Criminal Code of Ukraine.

Based on the research conducted in psychology regarding a time relationship

between irritant and irritation we can state that complexity and inadequacy of human reactions to external factors, dependence of them from many individual and psychological traits of the person do not allow to establish any patterns in the examined aspect of the problem. Physiological affect can occur as an immediate response to illegal acts of the victim and as reaction through quite a long time. By the way, the reasons for this long time can be quite varied.

The second section of the thesis “Objective features of deliberate murder under section 95 of the Criminal Code of Ukraine” consists of two units:

2.1. “Object”, 2.2. "Objective side".

In subsection 2.1. was described the object of affective intentional murder.

We established that generic object of this murder is a person. According to the new Constitution of Ukraine a person's life and health, honor and dignity, inviolability and security are recognized in Ukraine as the highest social value. So, the chapter “Crimes against life, health, freedom and dignity of the person” should take first place as the section of the Special Part of the Criminal Code of Ukraine.

It should be noted that the criminal legislation of Ukraine protects the interests of people regardless of their social skills. In this meaning cannot be recognized the position of some scholars who argue the opposite.

The direct object of murder under section 95 of the Criminal Code of Ukraine is life of another person. In the system of personal values protected by criminal law, life importance is the first.

The most important in criminal law meaning when we consider the biological aspects of life is the initial and final moment of life. In respect of affective murder the question of beginning of human life loses its relevance. Victim of this socially dangerous acts cannot be a newborn baby due to qualifying feature of corpus delicti – unlawful actions from his/her side.

The final moment of life is a death. In deciding the question: What does constitute deprivation of life in case of murder, clinical or biological death of the victim? – we must proceed from the fact that clinical death - is not a life.

If the victim which was in a state of clinical death is survived, a socially dangerous act of guilty person should have not qualified as murder but as an attempt on it (in case of direct intent) or bodily harm (in case of not direct intent).

In subsection 2.2. analyzed a range of issues related to the objective side of deliberate murder under section 95 of the Criminal Code of Ukraine. Murder committed in a state of physiological affect refers to crimes of material corpus delicti. In this connection its objective side consists of an act, socially dangerous consequence (death of the victim), and a causal connection between the act and consequence. In addition, the objective side of the examined crime contains the victim unlawful conduct.

Before to go directly to the analysis of objective side of intentional affective murder as completed crime candidate devoted his attention to the problem of preparation and attempt at the crime. We established that the murder under section 95 of the Criminal Code of Ukraine has no stage of preparation. Attempt at this crime is quite possible.

The analysis of such element of the affective murder's objective side as a socially dangerous act shows that it is largely formed by physiological affect of the liable person. Specifically we found that physiological affect:

- 1) Determines a single possible form of socially dangerous act - action;
- 2) Causes impulsivity (suddenness, unexpectedness) of socially dangerous acts and the possibility of continuing of these acts and after criminal result (death);
- 3) Causes the inability of guilty person to pause socially dangerous acts;
- 4) Determines the short duration of the criminal acts of the responsible person.

Method of committing murder - quality characteristic of a socially dangerous act is also affective. Therefore, the crime can be committed only through physical violence. Mental violence as a form of achievement of criminal result in this case cannot be applied.

Tools of premeditated affective murder most often are the things that first gotten in arm of guilty person. At the same time, selective choice to obtain tools of the crime does not always mean non-affective method. Separately, we should note that intentional affective murder cannot be committed in the way that provides previously premeditated intention.

Situation which precedes affective murder and causing commitment of this offence consists of the unlawful acts of the victim. They have the following characteristics:

1) they directly and eventually soften criminal responsibility of guilty in murder person;

2) they are always the cause of premeditated murder in a state of physiological affect and sometimes – ground;

3) they should be illegal;

4) they are committed guilty or innocently;

5) they should be directed against the guilty person or his/her intimate;

6) they shall be committed without cause from the side of guilty in murder person in the form of his/her unlawful acts;

7) they may be a single stage and systematic. The first also can be transient or long-term;

8) they should be in the form of unlawful violence or severe abuse.

Unlawful violence of the victim may take the form of both physical and mental violence. It can be committed both in the form of victim actions against the guilty person and by using insane persons, minors, animals.

Severe abuse by the victim cannot be identified with the concept described in section 126 of the Criminal Code of Ukraine. The question of what kind of abuse is severe - a question of fact that must be decided by the court in each individual case. The severity of abuse should be determined by analysis of the ratio between objectively expressed abuse with the standards of morality of contemporary

society, and ratio between abuse and images of social attitudes, positions, and views of victim of such abuse. In the analysis of last one must be taken into account the particularities of perception of the victim of abuse. Breach of faith may be regarded as a severe abuse only if it is accompanied by disrespectful actions against the victim of abuse, in other words, is characterized by high level of immorality.

Chapter three "Subjective features of deliberate murder under section 95 of the Criminal Code of Ukraine" consists of units: 3.1. "Subjective side" and 3.2. "Committer".

In subsection 3.1. we investigated subjective side of intentional affective murder.

The most important issue of this study is to determine where in the system of the elements of the subjective side is physiological affect. Some scientists-criminalists believe that the state of physiological affect is a motive of murder, responsibility for which is provided by section 95 of the Criminal Code of Ukraine. With this viewpoint we cannot agree. Emotions by selves are not motives although they are a large extent determination of motives contents. And, the more intense emotion is, the more it exercises considerable influence on the motivation of the crime and the harder it becomes do not recognize such emotion as a motive. This also explains why the state of physiological affect often is described as a crime motive.

Significantly affecting the consciousness of the responsible person and having a specific form of external expression, physiological affect determines to a large degree the content and form of the subjective and objective sides of the crime. That is why in the theory of criminal law criminalists say about affective criminal acts, affective goal, and affective intent. If we stated physiological affect as a motive of the crime, it would mean that there in criminal law exists a classification of above elements of the crime determined by motive and not determined by it. We know that this division is not possible, because the criminal acts, intent, purpose are always determined by the motive.

Expressed above considerations are led to conclusion that physiological affect need to be recognized as an independent element of the subjective side of murder under the section 95 of the Criminal Code of Ukraine.

Describing the intentional form of guilty in corpus delicti we should say the following.

It is possibly to consider such intention as affected and sudden. The suddenness of intent should be understood as the immediacy of its implementation. The particularity of the affected crime is the existence in some cases gaps in time between formation of intent and its implementation, created by searching of crime instruments or by objective obstacles to breaking physiological affect through outside. In these situations urgency of implementation of intention transforms into aspiration of implementation of intention.

It should be emphasized that although the physiological affect oppressively acts on the elements of consciousness of guilty person, intent of this person can be both determined and uncertain and both direct and indirect.

Most often motive of affective crimes is revenge determined the formation of this motive coupled with the emotional level of the responsible person, as well as speed and simplicity of revenge origin.

As motive of affective murder may be jealousy, feeling of offended dignity, and revenge established on jealousy soil.

The purpose of deliberate affective murder in psychological meaning can be described as a desire to find the optimal decision to terminate the external irritation.

It can be concluded that this may be a general desire to harm, and wish to inflict a death on the victim.

In subsection 3.2. of the thesis examined the complex of issues associated with the committer of murder under section 95 of the Criminal Code of Ukraine.

Determined that committer of intentional affective murder can be a sane individual who has reduced age of criminal responsibility (14 years).

It should be noted that we are against the recognition of the person who committed the affective murder, reduced-sane person. "Sanity" and "insanity" - legal categories, which in our opinion, don't have quantitative description. They cannot be "moving". For positive solutions of question of the subject of criminal responsibility, there is enough to define a person as a sane. Legal characteristic of various individual features of the committer is driven not by the category of

"sanity", but based on the content of guilty and its degree, and the circumstances mitigating and aggravating responsibility.

In Chapter 4 "Separation of deliberate murder committed in a state of strong emotional agitation from the murders under sections 93, 94, 96, 97 of the Criminal Code of Ukraine are considered the special issues of qualification of deliberate affective murder.

In subsection 4.1. "Separation of deliberate murder committed in a state of strong emotional agitation from other types of deliberate murder with mitigating circumstances" solved the problems of division of intentional affective murder from intentional murder of newborn baby by his mother (section 96 of the Criminal Code of Ukraine) and from murder by exceeding the limits of necessary (section 97 of the Criminal Code of Ukraine).

In the presence of all possible similar characteristics, the main criterion for differentiation of intentional affective murder and murder by exceeding the limits of necessary defense should be recognized as the character of unlawful violence. If the violence by its nature was not dangerous to life and health, and only was threatened bodily integrity, the affective murder committed in response to such action shall be qualified under section 95 of the Criminal Code of Ukraine. In case, when the violence was deliberately endangering life and health, or sexual integrity, affective murder should be qualified under section 97 of the Criminal Code of Ukraine.

The motive and purpose, in our opinion, cannot serve as criteria for differentiation of the examined murders. Significantly determined by the unlawful actions of the victim and by physiological affect arising as a result of these actions, they differ between themselves.

Universal character demarcated sign of murder committed in a state of strong emotional agitation and murder of a newborn child by his mother should be considered as unlawful actions of the victim. The victim of newborn baby murder is not capable to commit unlawful acts towards his mother - the committer of the crime cause baby physical and mental qualities.

In subsection 4.2. "Separation of deliberate murder committed in a state of strong emotional agitation from "simple" murder and premeditated murder under aggravating circumstances" noted the following.

Affective murder in the presence of aggravating circumstances listed in section 93 of the Criminal Code of Ukraine should be qualified under section 95 of the Criminal Code of Ukraine. Defect of the affected person's consciousness makes really impossible to determine the legal guilty of such person: in commission of murder of women who knowingly for accused person was in a state of pregnancy; in commission of murder with exceptional cruelty or in dangerous way for life of many persons; in commission of murder by an especially dangerous recidivist or a person who previously committed other murder.

The question of delimitation of deliberate murder under section 95 of the Criminal Code of Ukraine and "simple" murder occurs mainly in the case when last as well as the first committed in a state of physiological affect.

For a "simple" murder as external causes of physiological affect can be any lawful acts of the victim, or wrongful acts on his part less important than unlawful violence or great insult. At the same time, for deliberate murder under section 95 of the Criminal Code of Ukraine external cause of physiological affect can only be unlawful violence or severe abuse.

In the final part of the thesis formulated the main conclusions of the research, the most significant of which are set forth in this Abstract of the thesis during characteristic of the relevant sections of the work.

The main provisions of dissertation are published in such works:

- 1) Intent of crimes against the person's life / Legal State. Yearbook of scientific works - Kiev, 1996 – Issue 7, pages 268-270.
- 2) Characteristic of motive regarding murder in a state of physiological affect/ Legal State. Yearbook of scientific works - Kiev, 1997 – Issue 8, pages 291-296.
- 3) Strong emotional agitation as circumstance mitigating guilt in criminal law of Ukraine // Law and State. Yearbook of scientific works of young scholars - Kiev, 1997 – Issue 1, pages 72-75

Annotation

Burko O.V. Criminal responsibility for the deliberate murder committed in the state of strong emotional agitation. This thesis in the form of manuscript is presented for a Candidate of Law degree in the specialized field 12.00.08 — criminal law and criminology; criminal-executive law. V.M. Koretsky Institute of State and Law of the National Academy of Sciences of Ukraine; Kyiv, 1997.

This thesis is devoted to the problems of criminal responsibility for the deliberate murder committed in the state of strong emotional agitation. The problem of usage advisability of the term "Strong emotional agitation" in the criminal-legal aspect has been analyzed. It has concluded the necessity of the term-substitution from the "Strong emotional agitation" to the "Physiological affect". The peculiarities of objective and subjective features of the deliberate affective murder have been considered. The problem of differentiation of deliberate affective murder from the adjacent corpus delicti has also been touched in this thesis.

Key words: strong emotional agitation, physiological affect, deliberate murder, criminal responsibility.