First Draft of Report #19
Homicide

SUBMITTED FOR ADVISORY GROUP REVIEW
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DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
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This Draft Report contains recommended reforms to District of Columbia criminal statutes for review by the D.C. Criminal Code Reform Commission's statutorily designated Advisory Group. A copy of this document and a list of the current Advisory Group members may be viewed on the website of the D.C. Criminal Code Reform Commission at www.ccrc.dc.gov.

This Draft Report has two parts: (1) draft statutory text for a new Title 22A of the D.C. Code; and (2) commentary on the draft statutory text. The commentary explains the meaning of each provision, considers whether existing District law would be changed by the provision (and if so, why this change is being recommended), and addresses the provision's relationship to code reforms in other jurisdictions, as well as recommendations by the American Law Institute and other experts.

Any Advisory Group member may submit written comments on any aspect of this Draft Report to the D.C. Criminal Code Reform Commission. The Commission will consider all written comments that are timely received from Advisory Group members. Additional versions of this Draft Report may be issued for Advisory Group review, depending on the nature and extent of the Advisory Group's written comments. The D.C. Criminal Code Reform Commission's final recommendations to the Council and Mayor for comprehensive criminal code reform will be based on the Advisory Group's timely written comments and approved by a majority of the Advisory Group's voting members.

The deadline for the Advisory Group's written comments on this First Draft of Report No. 19, *Recommendations for Homicide Offenses*, is May 11, 2018 (eight weeks from the date of issue). Oral comments and written comments received after May 11, 2018 will not be reflected in the Second Draft of Report No. 19. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

Chapter 11. Homicide.

RCC § 22A-1101 Murder.
RCC § 22A-1102 Manslaughter.
RCC § 22A-1103 Negligent Homicide.

RCC § 22A-1101 Murder.

(a) Aggravated Murder. A person commits the offense of aggravated murder when that person:

(1) Knowingly causes the death of another person; and

(2) Either:

(A) The death is caused with recklessness as to whether the decedent is a protected person; or

(B) The death is caused with the purpose of harming the decedent because of the decedent's status as a:

(i) Law enforcement officer;
(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.

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

(1) Knowingly causes the death of another person; 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;
(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.

(c) *Second Degree Murder*. A person commits the offense of second degree murder when that person:
(1) Recklessly, under circumstances manifesting extreme indifference to human life, causes the death of another person; or
(2) 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 kidnaping, or kidnapping]; provided that the person or an accomplice committed the lethal act.

(d) *Penalties.*
(1) *Aggravated Murder*. Aggravated murder is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) *First Degree Murder*. First degree murder is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(3) *Second Degree Murder*. Second degree murder is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions.* The terms "purpose," "knowledge," "recklessness," "negligence," and "circumstances manifesting extreme indifference" have the meanings specified in § 22A-206; the terms "protected person," "law enforcement officer," "public safety employee," "District official or employee," and "citizen patrol" have the meanings specified in § 22A-1001.

(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 from unlawfully causing death or serious bodily injury; or

(C) Any other legally-recognized partial defense which substantially diminishes either the defendant's culpability or the wrongfulness of the defendant's conduct.

(2) *Burden of Proof for Mitigation Defense*. If evidence of mitigation is present at trial, the government must prove the absence of such circumstances beyond a reasonable doubt.

(3) *Effect of Mitigation Defense.*

(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.

RCC § 22A-1101(a). Aggravated murder.

Commentary

Explanatory Note. *This subsection establishes the aggravated murder offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly causing the death of another person, with at least one aggravating circumstance. The current D.C. Code does not codify a separate aggravated murder offense. However, the current first degree murder statute is subject to sentencing enhancement if the government can prove at least one "aggravating circumstance" listed under D.C. Code § 22-2104.01 or § 24-403.01(b-2).*[1] *The RCC's aggravated murder statute replaces these aggravating circumstances, treating them as elements of the new offense which must be proven beyond a reasonable doubt at trial. The aggravated murder statute also replaces the current murder of a law enforcement officer offense, D.C. Code § 22-2106. In addition, the revised aggravated murder statutes obviates the procedural requirements under D.C. Code § 22-2104.01 (a), (c) and § 24-403.01(b-2)(A). Insofar as they are applicable to current first degree murder, the revised aggravated murder offense also replaces the protection of District public officials statute*[2] *and six penalty enhancements: the enhancement for senior citizens;*[3] *the enhancement for citizen patrols;*[4] *the enhancement for minors;*[5] *the enhancement for taxicab drivers;*[6] *the enhancement for transit operators and Metrorail station managers,*[7] *and the while-armed enhancement.*[8]

Subsection (a)(1) specifies that aggravated murder requires that the accused cause the death of another person. The culpable mental state for subsection (a)(1) is "knowingly," a term defined at RCC § 22A-206 to mean that the accused must have been aware to a practical certainty or consciously desired that his or her conduct would cause the death of another person. Subsection (a)(2) specifies that in addition to knowingly causing the death of another, aggravated murder requires proof of at least one aggravating circumstance.

Subsection (a)(2)(A) specifies that recklessness as to whether the decedent is a protected person is an aggravating circumstance. Recklessness is defined at RCC § 22A-206, and requires that the accused was aware of a substantial risk that the deceased was a protected person, and that the accused's conduct grossly deviated from the standard of care that a reasonable person would observe in that person's situation. The term "protected person" is defined under RCC § 22A-1001.[9]

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[1] Under current law, the maximum sentence allowable for first and second degree murder is life imprisonment without the possibility of release. However, a court may only impose a sentence in excess of 60 years if at least one of the statutorily aggravating circumstances were present.

[2] D.C. Code § 22-851.

[3] D.C. Code § 22-3601.

[4] D.C. Code § 22-3602.

[5] D.C. Code § 22-3611.

[6] D.C. Code §§ 22-3751; 22-3752.

[7] D.C. Code §§ 22-3751.01; 22-3752.

[8] D.C. Code § 22-4502.

[9] RCC § 22A-1001(15)

(15) "Protected person" means a person who is:

(A) Less than 18 years old, and, in fact, the defendant is at least 18 years old and at least 2 years older than the other person;

(B) 65 years old or older;

(C) A vulnerable adult;

Subsection (a)(2)(B) specifies that causing the death of another with the purpose of harming the decedent because of his or her status as a law enforcement officer, public safety employee, participant in a citizen patrol, district official or employee, or family member of a District official or employee is an aggravating circumstance. This aggravating circumstance requires that the accused acted with "purpose" a term defined at RCC § 22A-206, which means that accused must consciously desire to harm that person because of his or her status as a law enforcement officer, public safety employee, participant in a citizen patrol, district official or employee, or family member of a District official or employee.[10] "Law enforcement officer," "public safety employee," "citizen patrol," "District official or employee," and "family member" are all defined terms in RCC § 22A-1001.

Subsection (a)(2)(C) specifies that the infliction of extreme physical pain or mental suffering for a prolonged period of time immediately prior to the decedent's death is an aggravating circumstance.[11] Subsection (a)(2)(C) also specifies that the culpable mental state required for this aggravating circumstance is "knowingly," a term defined under RCC § 22A-206 to mean that the accused must have been practically certain, or consciously desired, that his or her conduct would cause extreme physical pain or mental suffering for a prolonged period of time prior to the decedent's death.

Subsection (a)(2)(D) specifies that mutilating or desecrating the decedent's body is an aggravating circumstance.[12] Per the rule of construction in RCC § 22A-207, the culpable mental state "knowingly" from subsection (a)(2)(C) applies to this aggravating circumstance. The accused must be practically certain, or consciously desired, that his or her conduct would mutilate or desecrate the body after death.

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.[13] Per the rule of construction in RCC § 22A-207, the culpable mental state "knowingly" from subsection (a)(2)(D) applies to substantial planning. The accused must have been practically certain, or consciously desired, that the murder be committed after substantial planning.

Subsection (a)(2)(F) specifies that murder committed for hire is an aggravating circumstance. This aggravating circumstance is satisfied if the accused received anything of pecuniary value in exchange for causing the death of another. Per the rule of construction in RCC § 22A-207, the culpable mental state "knowingly" from subsection (a)(2)(D) applies to this aggravating circumstance. The accused must have been practically certain, or consciously

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(D)A law enforcement officer, while in the course of official duties;
(E) A public safety employee while in the course of official duties;
(F) A transportation worker, while in the course of official duties;
(G)A District official or employee, while in the course of official duties; or
(H)A citizen patrol member, while in the course of a citizen patrol.

[10] For example, a defendant who murders an off-duty police officer in retaliation for the officer arresting the defendant's friend would constitute committing murder with the purpose of harming the decedent due to his status as a law enforcement officer.

[11] For example, murders preceded by keeping the victim tied up for a prolonged period of time, knowing that his or her death was forthcoming or starving the person to death, may satisfy this aggravating circumstance.

[12] For example, a defendant who cuts off body parts, disfigures body parts, or who uses the deceased's body for sexual gratification may satisfy this aggravating circumstance.

[13] For example, if days before a murder, the defendant plans out how he will ambush the victim, and chooses a weapon for the purpose of carrying out the murder, the substantial planning circumstance would be satisfied.

desired, that he or she would receive anything of value in exchange for causing the death of another.

Subsection (a)(2)(G) specifies that murder committed 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 is an aggravating circumstance. This aggravating circumstance requires that the accused's motive for knowingly causing the death of the victim was due to the victim serving as a witness, providing assistance in any criminal investigation or judicial proceeding, or capability of doing so. Per the rule of construction in RCC § 22A-207, the culpable mental state "knowingly" from subsection (a)(2)(D) applies to this aggravating circumstance. The accused must have been practically certain, or consciously desired, that the murder was committed because victim had been a witness, had provided assistance to a criminal investigation or judicial proceeding, or was capable of doing so.

Subsection (a)(2)(H) specifies that murder committed for the purpose of avoiding or preventing lawful arrest or effecting an escape from custody is an aggravating circumstance. This aggravating circumstance requires that the accused acted with "purpose" a term defined at RCC § 22A-206, which means that accused must consciously desire to avoid or prevent a lawful arrest, or to escape from custody.

Subsection (a)(2)(I) specifies that murder was, in fact, caused by means of a dangerous weapon is an aggravating circumstance. The term "dangerous weapon" is defined at RCC §22A-1001(5). The term "in fact" specifies no culpable mental state applies to whether the implement used was a dangerous weapon, or whether use of the weapon itself caused the death.[14]

Subsection (d) states that aggravated murder is a [Class X offense…RESERVED]

Subsection (e) cross-references applicable definitions located elsewhere in the RCC.

Subsection (f) provides that in addition to any other defenses otherwise applicable to the accused's conduct, the presence of mitigating circumstances is a defense to prosecution for aggravated murder.

Subsection (f)(1)(A) defines mitigating circumstances as acting under the influence of extreme emotional disturbance for which there was a reasonable cause. "Extreme emotional disturbance" refers to emotions such as "rage," "fear or any violent and intense emotion sufficient to dethrone reason."[15] Subsection (f)(1)(A) further specifies that the reasonableness of the cause of the disturbance shall be determined from the accused's reasonable person in the accused's situation under the circumstances as the accused believed them to be. The "accused's situation" includes some of the accused's personal traits, such as physical disabilities[16], or temporary emotional states,[17] which should be taken into account in determining reasonableness. However, the accused's idiosyncratic values or moral judgments are irrelevant.[18] Subsection

[14] Although there is no mental state required as to whether the *weapon itself* caused death, aggravated murder still requires that the defendant knowingly caused death of another.
[15] *See* Commentary to MPC § 210.3 at 60.
[16] For example, circumstances that may reasonably cause extreme emotional disturbance for a blind or paralyzed person may not be reasonable for an able-bodied person.
[17] For example, circumstances that may reasonably cause extreme emotional disturbance for a person suffering from extreme grief may not be reasonable for a person under a neutral emotional state.
[18] For example, if a defendant reacts to a minor verbal insult with homicidal rage and kills a person who insulted him, whether the minor insult was a reasonable cause for the extreme emotional disturbance depends on the community's values, not the defendant's individual values as to the proper response to minor insults. However, if

(f)(1)(A) also specifies that reasonableness shall be determined from the accused's situation "as the accused believed them to be." This language clarifies that the accused's *factual* beliefs, even if inaccurate, must be taken into account in determining whether the cause of the extreme emotional disturbance was reasonable.[19] The fact finder must determine in each case whether the provoking circumstance was a reasonable cause of the extreme emotional disturbance, such that "the actor's loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen."[20]

Subsection (f)(1)(B) defines mitigating circumstances to include acting under a reasonable belief that the use of deadly force was necessary to prevent death or serious bodily injury under the circumstances. This form of mitigation may arise in the context of imperfect self-defense or the defense of others.[21] A person may use deadly force if he reasonably believes he, or another person, is in imminent danger of serious bodily harm or death, and that the use of deadly force was necessary to prevent the infliction of that harm.[22] If the accused genuinely believes these circumstances exist, but that belief in either circumstance is unreasonable¸ causing the death of another shall be mitigated downwards from murder to manslaughter.[23]

Subsection (f)(1)(C) further defines mitigating circumstances to include any other legally recognized partial defense to murder. This prong of the definition is drafted broadly to include any other legally-recognized partial defenses. For example, an unreasonable belief in any circumstance that would provide a legal justification for the use of lethal force, apart from self-defense or defense of others, may constitute a mitigating circumstance.[24]

Subsection (f)(2) specifies the burden of proof for the mitigation defense. If any evidence of mitigating circumstances is presented at trial by either the government or the accused, the government bears the burden of proving the absence of mitigating circumstances beyond a reasonable doubt.

Subsection (f)(3) specifies the effect of the mitigation defense in a murder prosecution. If evidence of mitigation has been presented at trial and the government fails to meet its burden of proving that mitigating circumstance were absent, but proves all other elements of murder, then

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the insults were of such a severe nature that the community's values would deem them a reasonable cause of the extreme emotional disturbance, mitigation would be satisfied.

[19] For example, a classic heat of passion fact pattern involves a person discovering his or her spouse having sexual relations with another person. A defendant who genuinely, but falsely, believes that his or her spouse is having an affair may still be deemed to have acted under an extreme emotional disturbance for which there was a reasonable cause.

[20] *See* Commentary to MPC § 210.3 at 63.

[21] *Comber v. United States*, 584 A.2d 26, 41 (D.C. 1990) ("mitigation may also be found in other circumstances, such as "when excessive force is used in self-defense or in defense of another and '[a] killing [is] committed in the mistaken belief that one may be in mortal danger.'").

[22] *Bassil v. United States*, 147 A.3d 303, 307 (D.C. 2016).

[23] If a defendant uses lethal force reasonably believing that the decedent was threatening an imminent use of deadly force, but that the belief that use of lethal force was necessary to repel the attack is unreasonable because the defendant could have ran away, an imperfect self-defense claim would be available to mitigate the offense from murder to manslaughter.

[24] For example, a court may find that the use of deadly force is justified to defend against an attempted sexual assault, even absent the fear of serious bodily injury or death. *See, Evans v. United States*, 277 F.2d 354, 356 (D.C. Cir. 1960) (reversing conviction for second degree murder when trial court did not allow evidence of decedent's intoxication when defendant claimed she was "defending herself from a sexual assault.").

the accused shall not be found guilty of murder but may be found guilty of first degree manslaughter.[25]

Relation to Current District Law. *The aggravated murder statute makes twelve substantive changes to current District law that reduce unnecessary overlap with other offenses, reduce unnecessarily overlapping statutory provisions, clearly describe all elements that must be proven, and improve the proportionality of the revised offense.*

First, the aggravated murder statute omits as an aggravating circumstance that the murder was committed in the course of kidnapping or abduction, or attempt to kidnap or abduct. The current first degree murder statute is subject to a penalty enhancement where it is proven that the murder was committed in the course of a kidnapping, abduction, or attempted kidnapping or abduction.[26] By contrast, the revised statute omits this aggravating circumstance as unnecessary. In any case in which a person knowingly kills another while committing or attempting to commit kidnapping, the person may be convicted and separately sentenced for kidnapping or attempted kidnapping, which increases the maximum allowable punishment beyond a murder not committed in the course of a kidnapping or attempted kidnapping.[27] Eliminating this aggravating circumstance reduces unnecessary overlap between offenses[28], and improves the clarity and proportionality of the revised statute by preventing both enhanced penalty for the murder and a separate conviction and sentence for the kidnapping offense.

Second, the aggravated murder statute omits as an aggravating circumstance that the murder was committed while committing or attempting to commit a robbery, arson, rape, or sexual offense. The current first degree murder statute is subject to a penalty enhancement where it is proven that the murder was committed "while committing or attempting to commit a robbery, arson, rape, or sexual offense."[29] The terms "rape" and "sexual offense" are undefined by the current statute, and there is no case law on point.[30] By contrast, the revised statute omits this aggravating circumstance as unnecessary. Even with the omission of this aggravating circumstance, the accused may still be separately convicted and sentenced for the robbery, arson, rape, or other sexual offense.[31] Eliminating this aggravating circumstance reduces unnecessary

[25] The mitigation provision is also not intended to change current DCCA case law which states that if evidence of mitigation is presented in a murder trial, the defendant is entitled to a jury instruction as to voluntary manslaughter. *Price v. United States*, 602 A.2d 641, 645 (D.C. 1992).
[26] D.C. Code § 22-2104.1(b)(1).
[27] At this time, CCRC staff has not yet reviewed the kidnapping offense, and may ultimately recommend dividing the offense into multiple grades or separate offenses. At this time, it is unclear what combination of charges and penalties might apply in different fact patterns. Staff will revisit this issue after it has reviewed the kidnapping offense and proposes revisions to that offense.
[28] It is unclear whether under current District law, a defendant may be sentenced under the kidnapping aggravating circumstance and be separately convicted and sentenced for the kidnapping itself. It is possible that when kidnapping is used as an aggravating circumstance to enhance the maximum penalty for murder, the conviction for kidnaping merges with the murder conviction. If so, there is no overlap issue. No case law exists on point.
[29] D.C. Code § 22-2104.01(b)(8).
[30] Arguably, "rape, or sexual offense" at least includes first, second, third, and fourth degree sexual abuse, child sexual abuse, and other offenses currently described in Chapter 30 of Title 22 of the D.C. Code. However, many other offenses are included in the definition of a "registration offense" for purposes of the District's sex offender registry. D.C. Code § 22-4001(8). It is unclear whether these constitute a "sexual offense" for purposes of the current first degree murder aggravating circumstance. District case law has not established the scope of this language.
[31] At this time, CCRC staff has not yet reviewed and proposed revisions for rape or other sexual offenses. As with kidnapping, staff will revisit this issue after it has reviewed and proposed revisions to sex offenses.

overlap between offenses[32], and improves the clarity and proportionality of the revised statute by preventing both an enhanced penalty for the murder and a separate conviction and sentence for the other felony offense.

Third, the aggravated murder statute omits as an aggravating circumstance that there was more than one first degree murder arising out of one incident. The current first degree murder statute is subject to a penalty enhancement when there was more than one offense of murder in the first degree arising out of one "incident."[33] The term "incident" is not defined by the statute, and there is no case law on point. By contrast, the revised statute omits this aggravating circumstance as unnecessary. In any case in which the accused commits more than one murder, that person may be convicted and sentenced for multiple counts of murder, which allows for punishment proportionate to the conduct.[34] Eliminating this aggravating circumstance reduces unnecessary overlap between offenses,[35] and improves the clarity and proportionality of the revised statute by preventing both enhanced penalty for each murder and a separate conviction and sentence for the additional murders.

Fourth, the aggravated murder statute omits as an aggravating circumstance that the murder was a drive-by or random shooting. The current first degree murder statute is subject to a penalty enhancement when the murder was "a drive-by or random shooting."[36] By contrast, the revised statute omits this aggravating circumstance as disproportionate. Murders committed by drive-by or random shootings are not sufficiently distinguishable from other murders to justify a more severe sentence. Murders committing by random or drive-by shootings do not categorically inflict greater suffering on the victim, nor are they significantly more culpable than murders committed by other means.[37] Eliminating this aggravating circumstance improves the proportionality of the revised statute by preventing enhanced penalties for murders that are not categorically more heinous or culpable than other types of murder.

Fifth, the aggravated murder statute omits as an aggravating circumstance that the murder was committed because of the victim's race, color, religion, national origin, sexual orientation, or gender identity or expression. The current first degree murder statute is subject to a penalty enhancement when the murder was "committed because of the victim's race, color, religion,

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[32] It is unclear whether under current District law, a defendant may be sentenced under this aggravating circumstance and be separately convicted and sentenced for robbery, arson, rape, or other sexual offense. It is possible that when robbery, arson, rape, or other sexual offense is used as an aggravating circumstance to enhance the maximum penalty for murder, the conviction for robbery, arson, rape, or other sexual offense merges with the murder conviction. If so, there is no overlap issue. No case law exists on point.

[33] D.C. Code § 22-2104.1(b)(6).

[34] Other jurisdictions began enumerating aggravating circumstances to murder to authorize the death penalty in accordance with the Supreme Court's holding in *Furman v. Georgia*, 408 U.S. 238 (1972). The circumstances were necessary to distinguish between cases that warranted imposition of the death penalty as opposed to life imprisonment. However, the District does not impose the death penalty and there is no need to rely on aggravating circumstances when the defendant can already receive a proportionate term of imprisonment.

[35] It is unclear whether under current District law, a defendant may be sentenced under this aggravating circumstance and be separately convicted and sentenced for any other first degree murders that arise out of the same incident. It is possible that when another first degree murder is used as an aggravating circumstance to enhance the maximum penalty, the murder convictions merge. If so, there is no overlap issue. No case law exists on point.

[36] D.C. Code §§ 22-2104.1(b)(5), 24-403.01 (b-2)(2)(E).

[37] One possible rationale for punishing murders committed by drive-by or random shootings more severely is that these types of murders are less likely to result in apprehension and conviction. Therefore, to achieve sufficient deterrent effect, more severe punishment is needed. However, there are any number of factors that could make it significantly more difficulty to apprehend and convict a perpetrator that are not included as aggravating circumstances.

national origin, sexual orientation, or gender identity or expression[.]"[38] A separate bias-related crime penalty enhancement in current D.C. Code § 22-3703 increases the maximum punishment for any murder by one and a half times when the murder "demonstrates an accused's prejudice based on the actual or perceived race, color, religion, national origin, …sexual orientation, gender identity or expression…."[39] By contrast, the revised aggravated murder statute omits this aggravating circumstance as unnecessary. Bias motivated murders will be subject to a general penalty enhancement under RCC § 22A-807. Omitting this aggravating circumstance reduces unnecessary overlap between statutes[40] and improves the proportionality of the offense by precluding bias motivations from enhancing penalties twice, both as an aggravating circumstance and under the separate bias enhancement.

Sixth, the aggravated murder statute omits as an aggravating circumstance that the accused had previously been convicted of murder, manslaughter, or other enumerated violent offenses. The current first degree murder statute is subject to a penalty enhancement when the accused had previously been convicted of certain violent offenses.[41] Separate repeat offender penalty enhancements in current D.C. Code §§ 22-1804 and 22-1804a potentially increases the maximum punishment for any murder committed by a person with one or two prior convictions for certain offenses (including those currently as aggravating circumstances for first degree murder.)[42] By contrast, the revised statute omits this aggravating circumstance as unnecessary. The general penalty enhancement for recidivist conduct under RCC § 22A- provides for enhanced penalties. Omitting this aggravating circumstance reduces unnecessary overlap between criminal statutes[43] and improves the proportionality of the offense by precluding prior convictions from enhancing penalties twice, both as an aggravating circumstance and under the separate recidivist enhancement.

Seventh, the aggravated murder statute includes as an aggravating circumstance that the murder was committed for the purpose of harming the victim because of the victim's status as a law enforcement officer or public safety employee, participant in a citizen patrol, District official or employee, or family member of a District official or employee. Under current law, an accused who knowingly causes the death of a law enforcement officer or public safety employee, with knowledge or reason to know that the victim was an on-duty law enforcement officer or public safety employee, or "on account of performance"[44] of the officer's or employee's official duties is guilty of a separate murder of a law enforcement officer offense. A separate penalty enhancement in current D.C. Code § 22-3602 increases the maximum punishment for any murder by one and a half times when the murder is of "a member of a citizen patrol ("member") while that member is participating in a citizen patrol, or because of the member's participation in

[38] D.C. Code §§ 22-2104.1(b)(7), 24-403.01 (b-2)(2)(A).
[39] D.C. Code §§ 22-3701, 22-3703.
[40] It is unclear whether under current District law, a defendant may be sentenced under both the current bias-related crime statute D.C. Code § 22-3703, and the bias motivated aggravating circumstance. It is possible that only one statute may apply to a particular murder, and there is no overlap issue. No case law exists on point.
[41] D.C. Code § 22-2104.01(b)(12) (these offenses are: "murder, (B) manslaughter, (C) any attempt, solicitation, or conspiracy to commit murder, (D) assault with intent to kill, (E) assault with intent to murder, or (F) at least twice, for any offense or offenses, described in § 22-4501(f) [now § 22-1331(4)] whether committed in the District of Columbia or any other state, or the United States.").
[42] D.C. Code §§ 22-1804 and 22-1804a.
[43] It is unclear whether under current District law, a defendant may be sentenced under both the general recidivist enhancement, and this aggravating circumstance based on the same prior conviction. It is possible that only one statute may apply to a particular murder, and if so there is no overlap issue. No case law exists on point.
[44] D.C. Code § 22-2106.

a citizen patrol."[45] A separate offense criminalizes harming District officials or employees and their family members.[46] By contrast, the RCC includes as an aggravating circumstance that the murder was committed with purpose of harming the victim because of the victim's status as a law enforcement officer, public safety employee, participant in a citizen patrol, District official or employee, or family member of a District official or employee. Inclusion of this this aggravating circumstance replaces the murder of a law enforcement officer offense that exists under current law.[47] Use of the RCC's "law enforcement officer" definition also changes current law by including certain types of officers that are not included under the current murder of a law enforcement officer statute.[48] Including this aggravating circumstance, and eliminating the separate murder of a law enforcement officer, reduces unnecessary overlap between criminal statutes and improves the clarity of the code.

Eighth, the aggravated murder statute includes as an aggravating circumstance that the accused was reckless as to the victim's status as a "protected person" a term defined under RCC § 22A-1001, which includes "a law enforcement officer, while in the course of official duties", "public safety employee, while in the course of official duties," "transportation worker, while in the course of official duties," "District official or employee, while in the course of official duties," or a "citizen patrol member, while in the course of a citizen patrol." Under current law, the aggravating circumstances that authorize a life sentence for murder do not include the victim's status as an on duty law enforcement officer, public safety employee, transportation worker, District official or employee, or citizen patrol member. However, separate statutes authorize enhanced penalties based on the victim's status as a specified transportation worker,[49] or status as a citizen patrol member.[50] Separate statutes also criminalize murder of a law enforcement officer engaged in official duties,[51] and harming District officials or employees and their family members as separate offenses.[52] By contrast, the revised murder statute includes as aggravating circumstances that the victim was vulnerable due to age, a specified transportation worker, a member of a citizen patrol, or a law enforcement officer engaged in official duties, and replaces the separate penalty enhancements, and the murder of a law enforcement officer offense. Including recklessness as to victim being a protected person as an aggravating circumstance, and eliminating the separate penalty enhancements, and the separate murder of a law enforcement officer improves the clarity of the code.

Ninth, the revised statute, through use of the term "protected person" changes the range of victims' ages that qualify as an aggravating circumstance. Under current law, three separate statutory provisions authorize heightened penalties for murder based on the age of the victim.

[45] D.C. Code § 22-3602(b).
[46] D.C. Code §22-851.
[47] D.C. Code § 22-2106.
[48] The RCC's "law enforcement officer" definition includes; "any…reserve officer, or designated civilian employee of the Metropolitan Police Department;" "any licensed special police officer"; and "any officer or employee…of the Social Services Division of the Superior Court…charged with intake, assessment, or community supervision." These types of officers are not included in the definition of "law enforcement officer" in the current murder of a law enforcement officer statute.
[49] D.C. Code § 22-3751 (enhancement for specified crimes committed against taxicab drivers); D.C. Code § 22-3751.01 (enhancement for specified crimes committed against transit operator or Metrorail station manager).
[50] D.C. Code § 22-3602 (enhancement for specified crimes committed against citizen patrol members).
[51] The current murder of a law enforcement officer offense criminalizes causing the death of an on-duty law enforcement officer or public safety employee "with knowledge or reason to know the victim is a law enforcement officer or public safety employee." D.C Code § 22-2106.
[52] D.C. Code §22-851.

Both first and second degree murder are punishable by a lifetime sentence if the victim was less than 12 years old or more than 60 years old.[53] Separate statutes allow for penalty enhancements of one and one half times the maximum authorized punishment for murder if the victim was 65 years of age or older[54], or less than 18 years of age if the perpetrator was at least 18 years of age and at least two years older than the victim.[55] By contrast, the revised aggravated murder statute, through use of the term "protected person," includes as aggravating circumstances that the victim was less than 18 years old—if the accused is at least 18 years old and at least 2 years older than the other person—or the victim was 65 years or older.[56] This aggravating circumstance replaces both the age based aggravating circumstance under current law, and the separate statutory penalty enhancements based on the victim's age, insofar as they apply to murder. This change in law improves the consistency of the current code, and makes this enhancement for murder consistent with the revised assault offenses.[57]

Tenth, through the definition of "protected person" the revised statute recognizes as an aggravating circumstance that the accused was reckless as to the victim being a "vulnerable adult." Under current law, it is not an aggravating circumstance that the victim a "vulnerable adult". By contrast, the revised aggravated murder statute includes as an aggravating circumstance that the victim a "vulnerable adult". This change improves the consistency and proportionality of the RCC, by reflecting the special status these individuals have elsewhere in current District law,[58] and by making enhancement for murder consistent with enhancements for assault-type offenses.[59]

Eleventh, the aggravated murder statute does not require separate written notice and a separate hearing as is required under D.C. Code § 22-2104.01(a), or a separate written notice prior as is required under § 22-403.01(b-2)(A). Under current law, § 22-2104(a) requires that the government notify the accused in writing at least 30 days prior to trial if intends to seek a sentence of life imprisonment without release.[60] When the government alleges that aggravating circumstances enumerated under § 22-2104.01 were present, a separate sentencing proceeding must be held "as soon as practicable after the trial has been completed to determine whether to impose a sentence of more than 60 years[.]"[61] Following the hearing, if the sentencing court wishes to impose a sentence greater than 60 years, a finding in writing must state whether, beyond a reasonable doubt, one or more aggravating circumstances exist.[62] In addition, if the government intends to rely on the aggravating circumstances listed under § 24-403.01(b-2) it must file an indictment or information at least thirty days prior to trial or a guilty plea that states

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[53] D.C. Code § 24-403.01 (b-2)(1)(G).
[54] D.C. Code §22-3601.
[55] D.C. Code § 22-3611.
[56] RCC § 22A-1001(15).
[57] This aggravating circumstance may also change current law in another way. Under the revised second degree murder statute, first degree child abuse and second degree child abuse are predicate offenses for felony murder. The presence of an aggravating circumstance elevates what would otherwise constitute second degree murder to first degree murder. Under the RCC, a second degree felony murder predicated on child abuse may be elevated to first degree murder based on the victim's status as a minor. It is unclear whether under current law, a felony murder predicated on first degree child cruelty is subject to penalty enhancement due to the victim's status as a minor.
[58] Current D.C. Code §§ 22-933 and 22-936 make it a separate offense to assault a "vulnerable adult," with penalties depending on the severity of the injury.
[59] RCC § 22A-1202.
[60] D.C. Code § 22-2104.
[61] D.C. Code § 22-2104.01.
[62] D.C. Code § 22-2104.01(c).

in "writing one or more aggravating circumstances to be relied upon."[63] D.C. Code §24-403.01(b-2) does not specify whether a separate sentencing hearing must be held. By contrast, the aggravated murder statute does not require any additional procedural requirements, and eliminates the special requirements under D.C. Code § 22-2104.01(a),(c) and § 24-403.01(b-2)(A) that relate to sentences for murder.[64] Under the aggravated murder statute, proof of at least one aggravating circumstance is an element of the offense which must be alleged in the indictment[65] and proven beyond a reasonable doubt at trial.[66] The jury or sentencing judge are not required to separately produce a written finding that at least one aggravating circumstance was proven beyond a reasonable doubt. However, requiring that a jury find beyond a reasonable doubt that at least one aggravating circumstance was present in the murder does not change applicable Sixth Amendment law.[67] This change improves the clarity of the criminal code by treating the aggravating circumstances as elements of the offense, which must be alleged and proven, instead of relying on a separate hearing.

The revised aggravated murder statute does not specifically address the effect of an appellate determination that the burden of proof was not met with respect to an aggravating circumstance that was the basis for the conviction. Current D.C. Code § 22-2104.01(d) provides that if a trial court is reversed on appeal due to "an error only in the separate sentencing procedure, any new proceeding before the trial court shall only pertain to the issue of sentencing."[68] However, this provision is unnecessary as the revised aggravated murder statute does not require any separate sentencing proceeding. If a conviction for aggravated murder is reversed on appeal on grounds that only relate to one of the aggravating circumstances, the appellate court may order entry of judgment as to first degree murder.[69]

Twelfth, the revised aggravated murder statute integrates penalty enhancements for using a dangerous weapon to kill the other person, and bars the application of both a weapon enhancement and other enhancements based on the victim's status. Current D.C. Code § 22-4502 provides enhanced penalties for committing murder "while armed" or "having readily available" a dangerous weapon. Current District case law on D.C. Code § 22-4502 holds that the penalty enhancements are authorized if the accused either had "actual physical possession of [a weapon]";[70] or if the weapon was merely in "close proximity or easily accessible during the

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[63] D.C. Code § 22-403.01 (b-2)(1)(A).

[64] D.C. Code § 24.403.01 includes sentencing procedures for other offenses. The statutory language of § 24.403.01 will only change insofar as it is relevant to sentencing for murder.

[65] D.C. Super. Ct. R. Crim. P. 7.

[66] *In re Winship*, 397 U.S. 358 (1970).

[67] *See Ring v. Arizona*, 536 U.S. 584, 609 (2002) (holding that the Sixth Amendment requires a jury to find at least one aggravating circumstance that authorizes imposition of the death penalty); *Long v. United States*, 83 A.3d 369, 379 (D.C. 2013), *as amended* (Jan. 23, 2014) (holding that it was plain error for a judge to make factual findings to determine a defendant's eligibility for an enhanced sentence of life without the parole).

[68] D.C. Code § 22-2104.01 (d).

[69] Under the RCC, first degree murder is a lesser included offense of aggravated murder under the elements test set forth in *Byrd v. United States*, 598 A.2d 386 (D.C.1991) (en banc), because if the elements of aggravated murder are proven, the elements of first degree murder will have also necessarily been proven. The revised aggravated murder statute does not change current District law that allows an appellate court to order entry of judgment as to a lesser included offense if conviction of a greater offense is reversed on grounds that only pertain to elements unique to the greater offense. *Gathy v. United States*, 754 A.2d 912, 919 (D.C. 2000).

[70] *Johnson v. United States*, 686 A.2d 200, 205 (D.C. 1996).

commission of the underlying [offense],"[71] provided that the accused also constructively possessed the weapon.[72] There is no further requirement under current law that the accused actually used the weapon or caused any injury.[73] The D.C. Code is silent as to whether or how the current while-armed penalty enhancement may "stack" on top of other penalty enhancements based on the status of the victim, and current case law has not specifically addressed the issue.[74] Currently, first degree murder and second degree murder with a while-armed penalty enhancement are both subject to an additional mandatory minimum term of at least 5 years and a maximum term of up to life imprisonment without parole.[75]

By contrast, in the RCC aggravated murder offense the accused must actually cause death "by means of" a dangerous weapon. Merely being armed with or having readily available, a dangerous weapon would not be sufficient.[76] Because the use of a dangerous weapon is a means of committing aggravated murder in the RCC, it is not possible to "stack" enhancements based on use of a dangerous weapon and the status of the victim. Integrating dangerous weapon penalty enhancements improves the consistency of reformed offenses, which similarly grade by use of a dangerous weapon. Also, including enhancements for use of a dangerous weapon within the revised statute improves the proportionality of punishment by matching more severe penalties to those homicides that involve actual use of a dangerous weapon (compared to mere possession on one's person), by tailoring the penalty for use of a dangerous weapon enhancement to the underlying degree of homicide,[77] and by ensuring the main offense elements and gradations are the primary determinant of penalties rather than stacked enhancements.

Beyond these twelve changes to current District law, five other aspects of the aggravated murder statute may constitute a substantive change of law.

First, the aggravated murder statute recognizes as aggravating circumstances that that the accused knowingly subjected the victim to extreme physical pain or mental suffering prior to the victim's death, or mutilated or desecrated the victim's body. Under current law, first degree murder is subject to enhanced penalties if the murder "was especially heinous, atrocious, or cruel."[78] The phrase "especially heinous, atrocious, or cruel" (EHAC) is not statutorily defined

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[71] *Clyburn v. United States*, 48 A.3d 147, 154 (D.C. 2012) (reversing sentencing enhancement under D.C. Code § 22-4502 when rifle was located in a different room from where defendant committed the underlying offense); *cf. Guishard v. United States*, 669 A.2d 1306, 1310 (D.C. 1995) (affirming sentencing enhancement under D.C. Code § 22-4502 when firearm was in a dresser drawer in the same room as the underlying offense).

[72] *Cox v. United States*, 999 A.2d 63, 69 (D.C. 2010) ("to have a weapon 'readily available,' one must at a minimum have constructive possession of it. To prove constructive possession, the prosecution was required to show that Cox knew the pistol was present in the car, and that he had not merely the ability, but also the intent to exercise dominion or control over it.").

[73] *See*, *Morton v. United States*, 620 A.2d 1338, 1340 (D.C. 1993) (affirming sentencing enhancement under D.C. Code § 22-4502 when firearm was within arm's length, but no evidence that the firearm was ever used to further any crime).

[74] However, current District practice appears to allow for such stacking of a while-armed and enhancements based on the age of the victim. [See Commentary at XXX, providing relevant statistics.]

[75] D.C. Code § 22-4502(a)(3).

[76] However, per the revised possession of a dangerous weapon during a crime of violence offense, RCC 22A-XXXX, the revised criminal code will still provide for additional punishments when committing a homicide while possessing, but not using or displaying, a dangerous weapon.

[77] Current D.C. Code § 22-4502(a)(3) provides the same while-armed enhancement to both first and second degree murder, raising the statutory maximum for both grades of murder to life without parole.

[78] D.C. Code § 22-403.01 (b-2)(2)(D).

and case law is unclear.[79] The DCCA has held that a murder may be EHAC if it involves inflicting substantial physical pain or mental anguish prior to death,[80] but substantial physical or mental suffering may not be necessary. The Court has recognized that EHAC does "not focus exclusively upon the sensations of the victim before death."[81] For example, the DCCA has recognized that a murder involving mutilation of body parts, regardless of whether this inflicted additional suffering on the victim, can render a murder EHAC.[82] The DCCA also has stated that a murder may be EHAC if the killing is unprovoked,[83] if the accused did not deny his role in the killing,[84] if the murder involved a violation of trust,[85] if the accused's motive for the murder was to avoid returning to prison,[86] or if the murder was committed "for the fun of it."[87] However, although the DCCA has recognized these circumstances as relevant to determining whether a murder is EHAC, the DCCA has never held that these circumstances *alone* render a murder EHAC. In these cases, the murder also involved infliction of substantial physical or mental suffering, or both.[88]

The RCC aggravated murder statute more clearly identifies murder involving extreme and prolonged physical or mental suffering prior to death, or mutilation or desecration of the body, as subject to heightened penalties. Other circumstances referenced in DCCA descriptions of EHAC that do not involve substantial physical or mental suffering, or mutilation or desecration of the body cannot sustain a conviction for aggravated murder unless they satisfy another enumerated aggravating circumstance. Specifying that inflicting extreme physical pain or mental suffering, or mutilating or desecrating the body are aggravating circumstances improves the clarity of the code, and helps to ensure proportionate penalties. The current EHAC formulation is vague, and creates the possibility of arbitrariness in sentencing. As the DCCA has noted, all murders "are to some degree heinous, atrocious, and cruel"[89] and the difficulty in

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[79] *See* Rosen, Richard, A. *The "Especially Heinous" Aggravating Circumstance in Capital Cases-the Standardless Standard*, 64 N.C. L. Rev. 941 (1986).

[80] *Parker v. United States*, 692 A.2d 913 (D.C. 1996) (murder was especially heinous, atrocious, or cruel when defendant stalked victim and victim was aware of the possibility of harm, and the victim experienced prolonged and excruciating pain, including mental suffering); *Henderson v. United States*, 678 A.2d 20, 23 (D.C. 1996) (victim suffered severe injuries, and "death came neither swiftly nor painlessly" and therefore "the death in this case was a form of torture which was especially heinous, atrocious, or cruel."); *Keels v. United States*, 785 A.2d 672, 681 (D.C. 2001) (murder was especially, heinous, or cruel based on evidence that victim "did not die instantly, that she had suffered numerous wounds, and that an object had been inserted into her vagina").

[81] *Rider v. United States*, 687 A.2d 1348, 1355 (D.C. 1996).

[82] *Id*, at 1355 (affirming finding that murder was EHAC when defendant slashed victim's testicles and ankles despite evidence indicating that at the time victim was unconscious and unable to feel pain).

[83] *Parker v. United States*, 692 A.2d 913 (D.C. 1996).

[84] *Id.*

[85] *Henderson v. United States*, 678 A.2d 20, 24 (D.C. 1996).

[86] *Id. at* 24.

[87] *Long v. United States*, 83 A.3d 369, 381 (D.C. 2013), as amended (Jan. 23, 2014) (noting that the legislative history of D.C. Code § 22-2104.01 indicates that murders committed "just for the fun of it" may be deemed especially heinous, atrocious, or cruel). Committee Report on the "First Degree Murder Amendment Act of 1992", Bill 9-118, at 2.

[88] *Parker*, 692 A.2d 913 (D.C. 1996) (victim experienced prolonged and excruciating pain, including mental suffering, and was stalked prior to the killing making her aware of the possibility of violence); *Henderson*, 678 A.2d 20 (D.C. 1996) (victim was alive when defendant stabbed her, severed her windpipe, and then strangled her, and her death was "a form of torture").

[89] *Long v. United States*, 83 A.3d 369, 381 (D.C. 2013), as amended (Jan. 23, 2014); see also *State v. Salazar*, 844 P.2d 566, 585–86 (Ariz. 1992) ("If there is some 'real science' to separating 'especially' heinous, cruel, or depraved killers from 'ordinary' heinous, cruel, or depraved killers, it escapes me. It also has escaped the court.").

distinguishing those murders that are *especially* heinous, atrocious, or cruel can lead to arbitrary and disproportionate results.[90] By omitting the vague EHAC formulation, the aggravated murder statute improves penalty proportionality by more clearly defining the class of murders that warrant heightened punishment.

Second, the aggravated murder statute requires recklessness as to whether the victim is a law enforcement officer or public safety employee engaged in the course of his or her official duties. The current murder of a law enforcement statute[91] criminalizes intentionally causing the death of another "with knowledge *or reason to know* that the victim is a law enforcement officer or public safety employee" while that officer or employee is "engaged in . . . performance of such officer's or employee's official duties[.]"[92] Although the DCCA has clearly held that actual knowledge that the victim was a law enforcement officer or public safety employee is not required[93], the DCCA has not further specified the mental state as to whether the officer or employee was engaged in performance of official duties. RCC subsection (a)(2)(A) of the revised aggravated murder statute resolves this ambiguity and requires that the accused caused the death of another with recklessness as to whether the decedent was a law enforcement officer or public safety employee in the course of his or her official duties. Specifying a recklessness mental state improves the clarity of the criminal code by resolving this ambiguity under current District law, and is consistent with the culpable mental state requirement for other offenses in the RCC based on the victim being a protected person.[94]

Third, the term "protected person" includes "vulnerable adults," a term defined by RCC § 22A-1001 (21). Under current law, it is an aggravating circumstance to commit murder of a person who is "vulnerable because of mental or physical infirmity."[95] No current statute, nor DCCA case law, however, clarifies what types of mental or physical infirmities are required to be proven per this language. In the RCC the term "vulnerable adult" is defined as "a person who is 18 years of age or older and has one or more physical or mental limitations that substantially impair the person's ability to independently provide for their daily needs or safeguard their person, property, or legal interests."[96] Use of the RCC's definition of "vulnerable adult" improves the clarity of the criminal code by providing a definition for "vulnerable adult," and is consistent with elevated protections for such persons recognized elsewhere in the RCC.

Fourth, the revised murder statute states that acting under an "extreme emotional disturbance for which there is a reasonable cause" constitutes a mitigating circumstance, and serves as a partial defense to murder. Although current District murder statutes make no mention of mitigating circumstances, the DCCA has held that a person commits voluntary manslaughter when he or she causes the death of another with a mental state that would constitute murder, except for the presence of mitigating circumstances.[97] The DCCA has not clearly defined what

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[90] *See Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (noting that the words "outrageously or wantonly vile, horrible and inhuman" in the Georgia criminal code do not create "any inherent restraint on the arbitrary and capricious infliction of the death sentence.").

[91] D.C. Code § 22-2106.

[92] D.C. Code § 22-2106 (emphasis added).

[93] *Dean v. United States*, 938 A.2d 751, 762 (D.C. 2007).

[94] *E.g.*, RCC § 22A-1202.

[95] D.C. Code § 24-403.01 (b-2)(2)(G).

[96] RCC §22A-1001 (21).

[97] *Comber v. United States*, 584 A.2d 26, 41 (D.C. 1990). Furthermore, in a murder prosecution, if evidence of mitigating circumstances is presented at trial, the government must prove beyond a reasonable doubt that mitigating circumstances were not present. If the government fails to meet this burden, but proves all other elements of murder, the defendant may only be found guilty of voluntary manslaughter. *See Harris v. United States*, 373 A.2d

constitutes a "mitigating circumstance," but has held that mitigating circumstances include a accused "act[ing] in the heat of passion caused by adequate provocation."[98] Under common law, cases interpreting what constituted adequate provocation came to recognize "fixed categories of conduct"[99] that "the law recognized as sufficiently provocative to mitigate"[100] murder to the lesser offense of manslaughter.[101]

In contrast, the RCC's murder statute states that acting under "extreme emotional disturbance" is a mitigating circumstance, thereby adopting the modern approach to provocation, which is more flexible in determining which circumstances are sufficient to mitigate murder to manslaughter.[102] This modern approach "does not provide specific categories of acceptable or unacceptable provocatory conduct."[103] Instead of being limited to the "fixed categories" that have been previously recognized by courts, the modern approach more generally inquires whether the "provocation is that which would cause . . . a reasonable man . . . to become so aroused as to kill another"[104] such that "the actor's loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen."[105] Under subsection (f) of the revised murder statute, it is possible to mitigate homicides from murder to manslaughter even under circumstances that have not been traditionally recognized at common law.[106]

One notable change from the common law of provocation is that an "extreme emotional disturbance" need not have been caused wholly or in part by the decedent in order to be adequate.[107] For example, consider a case in which the accused discovers that his neighbor has killed the accused's spouse, and in a fit of rage, the accused kills a third person who attempted to protect the neighbor. Under the traditional common law approach, since the third party was not responsible for provoking the accused, mitigation would be unavailable. Under the "extreme emotional disturbance" rule however, it is at least possible that the homicide could be mitigated downwards to manslaughter. Despite the difference, the modern approach in many ways is similar to the common law approach. Under both approaches, the accused must have acted with

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590, 592-93 (D.C. 1977) ("The defendant is entitled to a manslaughter instruction if there is 'some evidence' to show adequate provocation or lack of malice aforethought.")

[98] *E.g.*, *High v. United States*, 972 A.2d 829, 833 (D.C. 2009).

[99] *Brown v. United States*, 584 A.2d 537, 540 (D.C. 1990).

[100] *Id.* at 540. See also Commentary to MPC § 210.3 at 57 ("Traditionally, the courts have also limited the circumstances of adequate provocation by casting generalizations about reasonable human behavior into rules of law that structured and confined the operation of the doctrine.").

[101] *See*, Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter As Partial Justification and Partial Excuse*, 52 Wm. & Mary L. Rev. 1027, 1036 (2011) ("The law came to recognize four distinct-and exhaustive-categories of provocative conduct considered "sufficiently grave to warrant the reduction from murder to manslaughter of a hot-blooded intentional killing." The categories were: (1) a grossly insultive assault; (2) witnessing an attack upon a friend or relative; (3) seeing an Englishman unlawfully deprived of his liberty; and (4) witnessing one's wife in the act of adultery."); Lafave, Wayne. 2 Subst. Crim. L. § 15.2 (3d ed.) ("There has been a tendency for the law to jell concerning what conduct does or does not constitute a reasonable provocation for purposes of voluntary manslaughter.").

[102] Commentary to MPC § 210.3 at 49.

[103] *Brown*, 584 A.2d at 542 (D.C. 1990).

[104] *Id.* at 542.

[105] Commentary to MPC § 210.3 at 63.

[106] For example, at common law, and under current DCCA case law, mere words alone are inadequate provocation. *See Brown*, 584 A.2d at 540 (D.C. 1990); D.C. Crim. Jur. Instr. § 4-202; Lafave, Wayne. 2 Subst. Crim. L. § 15.2 (3d ed.). However, under the "extreme emotional disturbance" formulation, it is at least possible that mere words, if sufficiently provocative, could constitute a reasonable cause for an extreme emotional disturbance.

[107] Commentary to MPC § 210.3 at 49.

an emotional state that would cause a person to become so "aroused as to kill another"[108] or that would "naturally induce a reasonable man in the passion of the moment to lose self-control and commit the act on impulse and without reflection."[109] Further, under both approaches, the reasonableness of the accused's reaction to the provoking circumstance is determined from the accused's view of the facts.[110]

It is unclear whether adopting the modern "extreme emotional disturbance" approach changes current District law.[111] Although the DCCA has long used the traditional "adequate provocation" formulation[112], the Court has also noted that while under the common law, "there grew up a process of pigeon-holing provocative conduct . . . [o]ur own law of provocation in the District of Columbia began with a general formulation similar to the modern view[.]"[113] Instead of being bound by common law precedent defining specific fact patterns that constitute adequate provocation, the District may already embrace the more flexible modern approach that "does not provide specific categories of acceptable or unacceptable provocatory conduct."[114] Ultimately the DCCA has not fully reconciled its "recognition (or non-recognition) of the Model Penal Code"[115] approach to provocation, and so it is unclear how adopting the modern approach changes current law.[116]

The RCC revised murder statute's adoption of the "extreme emotional disturbance" language improves the proportionality of the criminal code by allowing courts to recognize mitigating circumstance that may not have long standing common law precedent, but nonetheless meaningfully reduce the accused's culpability. This flexibility allows courts to mitigate murder to first degree manslaughter to reflect the accused's reduced culpability when appropriate.

Fifth, the revised murder statute may also change current District law by explicitly recognizing legally-recognized partial defenses besides imperfect self-defense or defense of others as mitigating circumstances.[117] While the District's murder statutes are silent as to the relevance or definition of mitigating circumstances, DCCA case law has recognized that mitigating circumstances may be found in situations besides imperfect self-defense or defense of others.[118] However, the DCCA has not specified when the use of deadly force is justified in

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[108] *High v. United States*, 972 A.2d 829, 833-34 (D.C. 2009).
[109] *Brown,* 584 A.2d at 543 n. 17.
[110] *See, High*, 972 A.2d at 834 (stating that instruction on voluntary manslaughter mitigation would be appropriate if "a reasonable man would have been induced to lose self-control . . . because he *believed* that his friend engaged in sexual relations with his adult step-sister" with on regard to whether this belief was factually accurate).
[111] *See, Comber*, 584 A.2d at 41 ("The mitigation principle is predicated on the legal system's recognition of the 'weaknesses' or 'infirmity' of human nature, R. Perkins & R. Boyce, supra, at 84; Bradford, supra, 344 A.2d at 214 (citation omitted), as well as a belief that those who kill under "extreme mental or emotional disturbance for which there is reasonable explanation or excuse" are less 'morally blameworth[y]' than those who kill in the absence of such influences. Model Penal Code, supra, § 210.3 comment 5").
[112] *E.g.*, *High*, 972 A.2d at 833.
[113] *Brown v. United States*, 584 A.2d 537, 542-43 (D.C. 1990).
[114] *Id.* at 542.
[115] *Simpson v. United States*, 632 A.2d 374, 377 (D.C. 1993).
[116] For example, the DCCA has explicitly declined to decide whether the decedent must have provided the provoking circumstance.
[117] *Fersner v. United States*, 482 A.2d 387, 390 (D.C. 1984).
[118] *Comber*, 584 A.2d at 41 ("mitigation may also be found in other circumstances, such as "when excessive force is used in self-defense or in defense of another and '[a] killing [is] committed in the mistaken belief that one may be in mortal danger.'"). It is possible that mitigation exists in some cases in which a person uses lethal force to prevent significant, but not serious, bodily injury.

other circumstances,[119] and whether mitigation would be available for mistakes as to those justifications. By contrast, the RCC specifically recognizes that any other legally-recognized partial defense which substantially diminishes either the accused's culpability or the wrongfulness of the accused's conduct constitute mitigating circumstances. For example, if lethal force may be justified under certain circumstances, even absent the fear of death or serious bodily harm, then an unreasonable belief that those circumstances existed could constitute a mitigating circumstance.[120] The RCC's recognition of mitigation in situations besides imperfect self-defense or defense of others clarifies the revised murder statutes while leaving to courts the precise contours of such mitigating circumstances. Explicitly recognizing these partial defenses as mitigating circumstances improves the proportionality of the offense, by allowing courts to recognize mitigation when appropriate to reflect the accused's reduced culpability.

Relation to National Legal Trends. *The aggravated murder offense's above-mentioned substantive changes to current District law have mixed support in national legal trends*.

First, omitting as an aggravating circumstance that the murder was committing in the course of committing or attempting to commit kidnapping, robbery, arson, rape, or other sexual offense is not consistent with most criminal codes. A majority of states nationwide still include as an aggravating circumstance that the murder was committed in the course of committing, or attempting to commit, kidnapping.[121]

Second omitting as an aggravating circumstance that the murder was committed in the course of committing or attempting to commit robbery, arson, rape, or other sexual offense is not consistent with most criminal codes. A majority of states nationwide still include as an aggravating circumstance that the murder was committed in the course of robbery, arson, or sexual offense, or in the course of attempting to commit one of those offenses.[122]

Third, omitting as an aggravating circumstance that there was more than one murder arising out of one incident is supported by many criminal codes. Half of states nationwide do not include as an aggravating circumstance that more than one murder was committed in a single incident,[123] including twelve[124] of the 29 states that have adopted a new criminal code influenced by the Model Penal Code (MPC) ("reformed jurisdictions").[125]

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[119] *But see*, *Evans v. United States*, 277 F.2d 354, 356 (D.C. Cir. 1960) (reversing conviction for second degree murder when trial court did not allow evidence of decedent's intoxication when defendant claimed she was "defending herself from a sexual assault.").

[120] For example, it is unclear if a person may use lethal force to prevent a sexual assault, absent fear of death or serious bodily harm. However, if repelling sexual assault justifies the use of lethal force, then a genuine but unreasonable belief that lethal force was necessary to repel a sexual assault could constitute a mitigating circumstance. *See generally*, Christine R. Essique, *The Use of Deadly Force by Women Against Rape in Michigan: Justifiable Homicide?,* 37 Wayne L. Rev. 1969 (1991).

[121] *E.g.*, Iowa Code Ann. § 707.2, N.Y. Penal Law § 125.26, Tex. Penal Code Ann. § 19.03. However, CCRC staff did not analyze how these states may provide for separate prosecution and penalties for commission of such crimes in the course of committing murder.

[122] *E.g.*, Iowa Code Ann. § 707.2, N.Y. Penal Law § 125.26, Tex. Penal Code Ann. § 19.03.

[123] Alaska Stat. Ann. § 12.55.125; Ark. Code Ann. § 5-4-604; Ariz. Rev. Stat. Ann. § 13-701; Fla. Stat. Ann. § 921.141; Ga. Code Ann. § 17-10-30; Iowa Code Ann. § 707.2; Idaho Code Ann. § 19-2515; Ind. Code Ann. § 35-50-2-9; Mass. Gen. Laws Ann. ch. 279, § 69; Mich. Comp. Laws Ann. § 750.316; Minn. Stat. Ann. § 609.185; Mo. Ann. Stat. § 565.032; Mont. Code Ann. § 46-18-303; N.C. Gen. Stat. Ann. § 15A-2000; Neb. Rev. Stat. Ann. § 29-2523; N.H. Rev. Stat. Ann. § 630:1; N.J. Stat. Ann. § 2C:11-3; N.M. Stat. Ann. § 31-20A-5; Nev. Rev. Stat. Ann. § 200.033; Ohio Rev. Code Ann. § 2903.01; Okla. Stat. Ann. tit. 21, § 701.12; 42 Pa. Stat. Ann. § 9711; 11 R.I. Gen. Laws Ann. § 11-23-2; S.D. Codified Laws § 23A-27A-1; Wyo. Stat. Ann. § 6-2-102.

Fourth, omitting as an aggravating circumstance that the murder involved a drive by or random shooting is consistent with most criminal codes. A majority of states do not recognize drive by or random shooting as an aggravating circumstance.[126]

Fifth, omitting as an aggravating circumstance that the murder was committed due to the victim's race, color, religion, national origin, sexual orientation, or gender identity or expression is consistent with most criminal codes and reformed criminal codes. Almost all states omit bias motivation as an aggravating circumstance for murder.[127]

Sixth, omitting the recidivist aggravating circumstance is not consistent with state criminal codes. A majority of states recognize as an aggravating circumstance that the accused had been previously convicted or murder, manslaughter, or other violent offenses.[128]

Seventh, adding as an aggravating circumstance that the victim was a law enforcement officer is consistent with state criminal codes. Only five states omit as an aggravating circumstance that the victim is a law enforcement officer.[129] Adding as an aggravating factor that the victim was a participant in a citizen patrol, District official or employee, or family member of a District official or employee

Eighth, it is unclear whether recognizing as an aggravating factor that when the murder was committed with recklessness as to the victim being a public safety employee in the course of official duties, transportation worker in the course of official duties, District official or employee in the course of official duties, or member of a citizen patrol member, while in the course of a citizen patrol is consistent with national legal trends. CCRC staff has not yet determined whether other jurisdictions recognize the victim's status as a public safety employee, transportation worker, government official or employee, or member of a citizen patrol as an aggravating circumstance.

Ninth, it is unclear whether adding as an aggravating circumstance that the victim was under the age of 18, or over the age of 65 is supported by national legal trends. CCRC staff has not researched the specific age ranges that qualify as aggravating circumstances for murder in

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[124] Alaska Stat. Ann. § 12.55.125; Ark. Code Ann. § 5-4-604; Ariz. Rev. Stat. Ann. § 13-701; Ind. Code Ann. § 35-50-2-9; Minn. Stat. Ann. § 609.185; Mo. Ann. Stat. § 565.032; Mont. Code Ann. § 46-18-303;; N.H. Rev. Stat. Ann. § 630:1; N.J. Stat. Ann. § 2C:11-3; Ohio Rev. Code Ann. § 2903.01; 42 Pa. Stat. Ann. § 9711; S.D. Codified Laws § 23A-27A-1.

[125] Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007).

[126] Only seven states recognize drive by or random shootings as an aggravating circumstance for murder. Ala. Code § 13A-5-40; Cal. Penal Code § 190.2; 720 Ill. Comp. Stat. Ann. 5/9-1; La. Stat. Ann. § 14:30; Minn. Stat. Ann. § 609.185; Tenn. Code Ann. § 39-13-204; Wash. Rev. Code Ann. § 10.95.020.

[127] Only four states explicitly include bias motivation as an aggravating circumstance for murder: Ariz. Rev. Stat. Ann. § 13-701; Colo. Rev. Stat. Ann. § 18-1.3-1201; Cal. Penal Code § 190.2; Nev. Rev. Stat. Ann. § 200.033.

[128] Alaska Stat. Ann. § 12.55.125; Ala. Code § 13A-5-49; Ark. Code Ann. § 5-4-604; Ariz. Rev. Stat. Ann. § 13-701; Colo. Rev. Stat. Ann. § 18-1.3-1201; Conn. Gen. Stat. Ann. § 53a-54b; Del. Code Ann. tit. 11, § 4209; Fla. Stat. Ann. § 921.141; Ga. Code Ann. § 17-10-30; Ind. Code Ann. § 35-50-2-9; Ky. Rev. Stat. Ann. § 532.025; Mo. Ann. Stat. § 565.032; Mont. Code Ann. § 46-18-303; Neb. Rev. Stat. Ann. § 29-2523; N.Y. Penal Law § 125.27; Or. Rev. Stat. Ann. § 163.095; 42 Pa. Stat. Ann. § 9711; S.D. Codified Laws § 23A-27A-1; Utah Code Ann. § 76-5-202; Va. Code Ann. § 18.2-31; Wyo. Stat. Ann. § 6-2-102. However, CCRC staff did not analyze how these states may provide for separate recidivist penalty enhancements applicable to murder.

[129] Arkansas, Hawaii, Maine, Texas, and Wyoming.

other jurisdictions. However, almost half of the states recognize as an aggravating circumstance that the victim was vulnerable due to age or infirmity.[130]

Tenth, it is unclear whether adding as an aggravating circumstance that the victim was a "vulnerable adult" is consistent with national legal trends. Although it is unclear whether other jurisdictions' criminal codes define a term similar to the RCC's "vulnerable adult," almost half of all states recognize as an aggravating circumstance that the victim was vulnerable due to age or infirmity.[131]

Eleventh, eliminating the procedural requirements procedural requirements under D.C. Code § 22-2104.01 and § 24-403.01, is not generally supported by state criminal codes. A majority of states hold a separate sentencing proceeding to determine whether aggravating circumstances were present.[132]

Twelfth, it is unclear whether including as an aggravating circumstance that the murder was committed by using a dangerous weapon is consistent with national legal trends. Only a few states specifically recognize as an aggravating factor that a weapon was used to commit the murder.[133] However, CCRC staff has not researched whether other jurisdictions' criminal codes include separate while-armed enhancement provisions that may authorize heightened penalties for murders committed while armed.

Thirteenth, omitting that the murder was EHAC as an aggravating circumstance has mixed support in state criminal codes. A slight majority of states do not recognize as an aggravating circumstance that the murder was EHAC.[134] However, only a minority of states

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[130] Ala. Code § 13A-5-40; Ark. Code Ann. § 5-4-604; Ariz. Rev. Stat. Ann. § 13-701; Colo. Rev. Stat. Ann. § 18-1.3-1201; Conn. Gen. Stat. Ann. § 53a-54b; Del. Code Ann. tit. 11, § 4209; Fla. Stat. Ann. § 921.141; 720 Ill. Comp. Stat. Ann. 5/9-1; Ind. Code Ann. § 35-50-2-9; Kan. Stat. Ann. § 21-5401; La. Stat. Ann. § 14:30; N.J. Stat. Ann. § 2C:11-3; Nev. Rev. Stat. Ann. § 200.033; Ohio Rev. Code Ann. § 2903.01; Or. Rev. Stat. Ann. § 163.095; 42 Pa. Stat. Ann. § 9711; S.C. Code Ann. § 16-3-20; Tenn. Code Ann. § 39-13-204; Tex. Penal Code Ann. § 19.03; Utah Code Ann. § 76-5-202; Va. Code Ann. § 18.2-31; Wyo. Stat. Ann. § 6-2-102.

[131] Ala. Code § 13A-5-40; Ark. Code Ann. § 5-4-604; Ariz. Rev. Stat. Ann. § 13-701; Colo. Rev. Stat. Ann. § 18-1.3-1201; Conn. Gen. Stat. Ann. § 53a-54b; Del. Code Ann. tit. 11, § 4209; Fla. Stat. Ann. § 921.141; 720 Ill. Comp. Stat. Ann. 5/9-1; Ind. Code Ann. § 35-50-2-9; Kan. Stat. Ann. § 21-5401; La. Stat. Ann. § 14:30; N.J. Stat. Ann. § 2C:11-3; Nev. Rev. Stat. Ann. § 200.033; Ohio Rev. Code Ann. § 2903.01; Or. Rev. Stat. Ann. § 163.095; 42 Pa. Stat. Ann. § 9711; S.C. Code Ann. § 16-3-20; Tenn. Code Ann. § 39-13-204; Tex. Penal Code Ann. § 19.03; Utah Code Ann. § 76-5-202; Va. Code Ann. § 18.2-31; Wyo. Stat. Ann. § 6-2-102.

[132] In most states that still employ the death penalty, a separate hearing is held after conviction for murder to determine whether aggravating factors outweigh any mitigating factors before the death penalty may be imposed. *Roberts v. Louisiana*, 431 U.S. 633, 637 (1977). However, among non-death penalty states, a minority do not appear to require any separate proceeding to determine the presence of aggravating factors that authorize heightened penalties as compared to ordinary murder. Alaska Stat. Ann. § 11.41.100; Haw. Rev. Stat. Ann. § 707-701; Iowa Code Ann. § 707.2; Minn. Stat. Ann. § 609.185; *State v. Pallipurath*, No. A-5491-11T3, 2015 WL 10438847, at *11 (N.J. Super. Ct. App. Div. Mar. 11, 2016); *State v. Chadwick-McNally*, No. S-1-SC-36127, 2018 WL 1007882, at *4 (N.M. Feb. 22, 2018); *State v. Grega*, 168 Vt. 363, 386, 721 A.2d 445, 461 (1998).

[133] Ala. Code § 13A-5-40 (but requires that weapon be fired into a house or vehicle); Ariz. Rev. Stat. Ann. § 13-701; Colo. Rev. Stat. Ann. § 18-1.3-1201 (but only if possession of the weapon constitutes a class 1 felony).

[134] Haw. Rev. Stat. Ann. § 707-701; Iowa Code Ann. § 707.2; Ind. Code Ann. § 35-50-2-9; Kan. Stat. Ann. § 21-5401; Ky. Rev. Stat. Ann. § 532.025; La. Stat. Ann. § 14:30; Mass. Gen. Laws Ann. ch. 279, § 69; Md. Code Ann., Crim. Law § 2-203; Me. Rev. Stat. tit. 17-A, § 201; Minn. Stat. Ann. § 609.185; Miss. Code. Ann. § 97-3-19; Mont. Code Ann. § 46-18-303; N.D. Cent. Code Ann. § 12.1-16-01; N.H. Rev. Stat. Ann. § 630:1; N.M. Stat. Ann. § 31-20A-5; Nev. Rev. Stat. Ann. § 200.033; Ohio Rev. Code Ann. § 2903.01; Or. Rev. Stat. Ann. § 163.095; 42 Pa. Stat. Ann. § 9711; 11 R.I. Gen. Laws Ann. § 11-23-2; S.C. Code Ann. § 16-3-20; Tex. Penal Code Ann. § 19.03; Utah Code Ann. § 76-5-202 (include especially heinous, atrocious, or cruel, but "must be demonstrated by physical

explicitly recognize torture or infliction of substantial suffering[135] or mutilation or desecration of the body[136] as an aggravating circumstance.

Fourteenth, recognizing that acting under "extreme emotional disturbance" is a mitigating circumstance is not strongly supported by other criminal codes. Only ten states recognize acting "under extreme emotional disturbance" as a circumstance that can mitigate murder down to manslaughter.[137] The majority of states use the traditional "heat of passion" formulation.[138]

Fifteenth, statutorily recognizing that any legally recognized partial defenses may mitigate murder to manslaughter is not supported by national legal trends. Only four states' voluntary manslaughter statutes include partial defenses as a mitigating circumstance.[139] However, the Commission has not reviewed relevant case law in other jurisdictions to determine if courts have recognized other partial defenses as a mitigating circumstance.

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torture, serious physical abuse, or serious bodily injury of the victim before death"); Va. Code Ann. § 18.2-31; Vt. Stat. Ann. tit. 13, § 2311; Wash. Rev. Code Ann. § 10.95.020.

[135] Del. Code Ann. tit. 11, § 4209; Ga. Code Ann. § 17-10-30; Ind. Code Ann. § 35-50-2-9; Mo. Ann. Stat. § 565.032; Mont. Code Ann. § 46-18-303; N.J. Stat. Ann. § 2C:11-3; Or. Rev. Stat. Ann. § 163.095; 42 Pa. Stat. Ann. § 9711; S.D. Codified Laws § 23A-27A-1.

[136] Ind. Code Ann. § 35-50-2-9; Nev. Rev. Stat. Ann. § 200.033; S.C. Code Ann. § 16-3-20; Tenn. Code Ann. § 39-13-204; Utah Code Ann. § 76-5-202.

[137] Ark. Code Ann. § 5-10-104; Conn. Gen. Stat. Ann. § 53a-55; Del. Code Ann. tit. 11, § 632; Haw. Rev. Stat. Ann. § 707-702; Ky. Rev. Stat. Ann. § 507.030; Mont. Code Ann. § 45-5-103; N.D. Cent. Code Ann. § 12.1-16-01; N.H. Rev. Stat. Ann. § 630:2; N.Y. Penal Law § 125.20; Or. Rev. Stat. Ann. § 163.118. In addition, Maine's manslaughter statute recognizes acting "under the influence of extreme anger or extreme fear brought about by adequate provocation[.]" Me. Rev. Stat. tit. 17-A, § 203.

[138] Alaska Stat. Ann. § 11.41.115.; Ala. Code § 13A-6-3; Ariz. Rev. Stat. Ann. § 13-1103; Cal. Penal Code § 192; Colo. Rev. Stat. Ann. § 18-3-103; Ga. Code Ann. § 16-5-2; Iowa Code Ann. § 707.4; Idaho Code Ann. § 18-4006; 720 Ill. Comp. Stat. Ann. 5/9-2; Ind. Code Ann. § 35-42-1-3; Kan. Stat. Ann. § 21-5404; La. Stat. Ann. § 14:31; Com. v. Knight, 637 N.E.2d 240, 246 (Mass. App. Ct. 1994); Cox v. State, 534 A.2d 1333, 1335-36 (Md. 1988); People v. Sullivan, 586 N.W.2d 578, 582 (Mich. Ct. App. 1998); Minn. Stat. Ann. § 609.19; Mo. Ann. Stat. § 565.023; Miss. Code. Ann. § 97-3-35; State v. Alston, 588 S.E.2d 530, 535-36 (N.C. Ct. App.2003); Neb. Rev. Stat. Ann. § 28-305; Nev. Rev. Stat. Ann. § 200.040; N.J. Stat. Ann. § 2C:11-4; N.M. Stat. Ann. § 30-2-3; Nev. Rev. Stat. Ann. § 200.040; Ohio Rev. Code Ann. § 2903.03; Okla. Stat. Ann. tit. 21, § 711; State v. McGuy, 841 A.2d 1109, 1112-13 (R.I. 2003); State v. Smith, 609 S.E.2d 528, 530 (S.C. Ct. App. 2005); S.D. Codified Laws § 22-16-15; Tenn. Code Ann. § 39-13-211; Tex. Penal Code Ann. § 19.02; Canipe v. Com., 25 Va. App. 629, 643, 491 S.E.2d 747, 753 (1997); State v. Yoh, 910 A.2d 853, 864-65 (Vt. 2006); Wis. Stat. Ann. § 940.01; State v. Wade, 490 S.E.2d 724, 732 (W.V. 1997); Yung v. State, 906 P.2d 1028, 1035 (Wyo. 1995).

[139] 18 Pa. Stat. Ann. § 2503; 720 Ill. Comp. Stat. Ann. 5/9-2; Kan. Stat. Ann. § 21-5404; Wis. Stat. Ann. § 940.01.

RCC § 22A-1101(b). First degree murder.

Explanatory Note. *This subsection establishes the first degree murder offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly causing the death of another person, or committing second degree murder with the addition of at least one aggravating circumstance. The RCC's first degree murder statute replaces several types of murder criminalized under the current first degree and second degree murder statutes,*[140] *and completely replaces the special form of committing first degree murder by obstruction of a railroad, D.C. Code § 22-2102. In addition, first degree murder is no longer subject to heightened penalties authorized under §§ 22-2104.01 and 24-403.01(b-2). An accused who knowingly causes the death of another under aggravating circumstances may be convicted of the separate revised aggravated murder offense.*[141] *This re-organization of murder offenses clarifies the revised statutes and better aligns penalties with the degree of culpability required for of each version of murder. Insofar as they are applicable to current second degree murder offenses, the revised first degree murder offense also replaces the protection of District public officials statute*[142] *and six penalty enhancements: the enhancement for senior citizens;*[143] *the enhancement for citizen patrols;*[144] *the enhancement for minors;*[145] *the enhancement for taxicab drivers;*[146] *the enhancement for transit operators and Metrorail station managers,*[147] *and the while-armed enhancement.*[148]

Subsection (b)(1) specifies that a person commits first degree murder if he or she knowingly causes the death of another person. The means of causation, whether by obstruction of a railway[149] or otherwise, are irrelevant. The subsection requires that the accused either consciously desired or was practically certain that he or she would cause the death of another person.

Subsection (b)(2) provides that a person also commits first degree murder if he or she commits second degree murder and at least one of the enumerated aggravating circumstances were present. Unlike under subsection (b)(1), it is not required that the defendant knowingly cause the death of another. This subsection requires that the accused cause the death of another

[140] Under current law, first degree murder criminalizes three types of murder: (1) purposely causing the death of another with premeditation and deliberation; (2) purposely causing the death of another while committing or attempting to commit any felony; or (3) causing the death of another, with or without purpose, while committing or attempting to commit first degree sexual abuse, first degree child sexual abuse, first degree cruelty to children, mayhem, robbery, kidnaping, burglary while armed with or using a dangerous weapon, or any felony involving a controlled substance. Currently, second degree murder criminalizes three different versions of murder: (1) knowingly causing the death of another without premeditation and deliberation; (2) causing the death of another with intent to cause serious bodily injury; and (3) causing the death of another with extreme recklessness, also known as acting with a "depraved heart." The RCC first degree murder statute replaces: 1) purposely causing the death of another with premeditation and deliberation; 2) purposely causing the death of another while committing any felony; and 3) knowingly causing the death of another without premeditation and deliberation.

[141] RCC § 22A-1101 (a).

[142] D.C. Code § 22-851.

[143] D.C. Code § 22-3601.

[144] D.C. Code § 22-3602.

[145] D.C. Code § 22-3611.

[146] D.C. Code §§ 22-3751; 22-3752.

[147] D.C. Code §§ 22-3751.01; 22-3752.

[148] D.C. Code § 22-4502 (enhancement for specified crimes committed against citizen patrol members).

[149] D.C. Code § 22-2102.

with a mental state that would constitute second degree murder, plus proof of at least one aggravating circumstance. For discussion of the aggravating circumstances, see Commentary to aggravated murder, RCC § 22A-1101(a).

Subsection (d) states that first degree murder is a [Class X offense…RESERVED]

Subsection (e) cross-references applicable definitions located elsewhere in the RCC.

Subsection (f)(1) provides that in addition to any other defenses otherwise applicable to the accused's conduct, the presence of mitigating circumstances is a defense to prosecution for first degree murder. For discussion of the definition of a mitigating circumstance, see Commentary to aggravated murder, RCC § 22A-1101(a).

Subsection (f)(2) specifies the burden of proof for the mitigation defense. If any evidence of mitigating circumstances is presented at trial by either the government or the accused, the government bears the burden of proving the absence of mitigating circumstances beyond a reasonable doubt.

Subsection (f)(3) specifies the effect of the mitigation defense in a murder prosecution. If evidence of mitigation has been presented at trial and the government fails to meet its burden of proving that mitigating circumstance were absent, but proves all other elements of murder, then the accused shall not be found guilty of murder but may be found guilty of first degree manslaughter.[150]

Relation to Current District Law. *The revised first degree murder statute changes current District law in five ways to improve the clarity of the offense and the proportionality of penalties.*

First, the revised first degree murder statute eliminates premeditation and deliberation as elements.[151] Under current District law, when a person knowingly causes the death of another, the distinction between first and second degree murder turns on whether the person acted with premeditation and deliberation.[152] However, DCCA case law suggests that there is little practical difference between a premeditated and non-premeditated murder as these terms are defined.[153] The DCCA has held that premeditation merely requires "giv[ing] thought before acting to the idea of taking a human life and [reaching] a definite decision to kill[.]"[154] Such premeditation "may be instantaneous, as quick as thought itself"[155] and only requires that the accused formed the intent prior to committing the act. Only an act that occurs at nearly the same instant that

[150] The mitigation provision is also not intended to change current DCCA case law which states that if evidence of mitigation is presented in a murder trial, the defendant is entitled to a jury instruction as to voluntary manslaughter. *Price v. United States*, 602 A.2d 641, 645 (D.C. 1992).

[151] However, the RCC aggravated murder statute, like current D.C. Code § 22-2104.01(11), still provides elevated penalties where the defendant caused the death of another after "substantial planning."

[152] *Comber*, 584 A.2d at 38 (noting that second degree murder, which requires malice aforethought includes cases in which "the perpetrator acts with the specific intent to kill").

[153] Commentators have also questioned whether premeditated killings are actually more culpable than non-premeditated killings. Kimberly Kessler Ferzan, *Plotting Premeditation's Demise*, Law & Contemp. Probs., (2012), at 83. For example, it is unclear if a person who intentionally and impulsively shoves a person from a Metro platform into the path of an oncoming train is significantly less culpable than a person who considers the reflects on the decision to kill for a few seconds.

[154] *Thacker v. United States*, 599 A.2d 52, 56-57 (D.C. 1991)); *see, e.g., Watson v. United States*, 501 A.2d 791, 793 (D.C. 1985).

[155] *Bates v. United States*, 834 A.2d 85, 93 (D.C. 2003) (upholding jury instruction that defined premeditation as "the formation of a design to kill, [may be] instantaneous [ ] as quick as thought itself."; D.C. Crim. Jur. Instr. § 4-201.

intent forms in the mind would not be premeditated.[156] Deliberation is a slightly more demanding element under DCCA case law and requires that the accused acted with "consideration and reflection upon the preconceived design to kill, turning it over in the mind, giving it a second thought."[157] However, case law has established that deliberation does not require prolonged thought, and the DCCA has stated that "the time involved may be as brief as a few seconds."[158] Although there is some District case law stating that deliberation requires that the accused had a "calmly planned and calculated intent to kill,"[159] and that "the determination to kill was reached calmly and in cold blood,"[160] the case law also demonstrates deliberation can be found in all but the most purely impulsive of murders.[161] The DCCA has repeatedly upheld findings or premeditation and deliberation in cases that involved very brief encounters in which the accused would not have calmly reflected and calculated the intent to kill.[162]

By contrast, under the revised first degree murder statute, proof of premeditation or deliberation is not required. The minimal distinction under current law between premeditated and impulsive killings creates the possibility of widely disparate punishments for practically indistinguishable conduct.[163] Critics have said that the distinction is not only subtle, but unclear.[164] Relying on premeditation and deliberation to distinguish first and second degree murder risks imposing widely disparate punishments for nearly identical conduct due to juries' difficulty in clearly understanding the minimal distinction between premeditated and non-premeditated murders. Eliminating the minimal requirements of premeditation and deliberation as elements distinguishing degrees of murder improves the clarity and proportionality of homicide statutes.

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[156] S*ee*, *Bullock v. United States*, 122 F.2d 213, 214 (D.C. Cir. 1941) ("There is nothing deliberate and premeditated about a killing which is done within a second or two after the accused first thinks of doing it; or, as we think the evidence shows, instantaneously, as appellant, interrupted in his quarrel, turned and fired.").

[157] *Porter*, 826 A.2d at 405.

[158] *Watson,* 501 A.2d at 793. For an example of how quickly a defendant can form premeditation and deliberation, consider the facts of *Perry v. United States*, 571 A.2d 1156 (D.C. 1990). In *Perry*, the defendant was fleeing from burglarizing a store with a police officer in pursuit on foot. The officer caught up to the defendant, and in the ensuing struggle the officer's gun fired causing several wounds to the officer, and a hand wound to the defendant. Apparently in anger at having been wounded, the defendant then fatally shot the officer as he lay on the floor. The DCCA held that "the fact that the shooting by [the defendant] occurred *immediately upon his confrontation* with the officer does not preclude the jury finding premeditation and deliberation." *Perry*, 571 A.2d at 1160 (D.C. 1990).

[159] *Thacker v. United States*, 599 A.2d 52, 57–58 (D.C. 1991) (quoting *McAdoo v. United States*, 515 A.2d 412 (D.C. 1986); *Belton v. United States*, 382 F.2d 150, 153 (D.C. Cir. 1967).

[160] *Harris v. United States*, 375 A.2d 505, 507–08 (D.C. 1977).

[161] S*ee*, *Bullock*, 122 F.2d at 213–14 (holding that evidence for premeditation and deliberation was insufficient when defendant was in a fight, and when a police officer came on the scene and asked what was going on, the defendant shot the officer as soon as he spoke).

[162] For example, in *Harris v. United States,* 668 A.2d 839, 842 (D.C. 1995), the defendant discovered that his bike had been stolen. He angrily asked if anyone knew who had stolen the bike. When he did not receive a response, he told a passerby to "lean down because he was about to do something." He pulled out a pistol and shot at two cars, injuring but not killing a passenger. He then crossed the street and knocked on the front door of a house. When the occupants refused to open the door, defendant shot a man who had been napping on the front porch of the house, killing him. The defendant was convicted of first degree premeditated murder.

[163] This is especially true as under current law, first degree premeditated murder carries a 30 year mandatory minimum sentence, whereas second degree non-premeditated intentional murder has no mandatory minimum.

[164] *See, e.g.,* Robert Weisberg, *Impulsive Intent/impassioned Design*, 47 Tex. Tech L. Rev. 61, 65 (2014) (quoting Benjamin N. Cardozo, Address at The New York Academy of Medicine: What Medicine Can Do for Law, in Law and Literature and Other Essays and Addresses 70, 99-101 (4th ed. 1938)) (noting that the distinction is "is so obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand it.").

Second, the revised first degree murder statute no longer criminalizes felony murder. Under current law, a person may be convicted of first degree murder if he or she unintentionally causes the death of another while committing or attempting to commit a specified felony.[165] Such an unintentional felony murder is currently punished more severely than an intentional, but non-premeditated killing (which currently constitutes second degree murder), subjecting the defendant to a life sentence if the government can prove that at least one aggravating circumstance was present. Moreover, one of the possible aggravating circumstances enhancing penalties for first degree felony murder is that the killing occurred while the accused was committing or attempting to commit "kidnapping,"[166] "robbery, arson, rape, or a sexual offense,"[167] and the DCCA has held that the predicate felony for felony murder can also serve as an aggravating circumstance.[168] Consequently, under current law, an unintentional felony murder that occurs during a robbery, arson, sexual offense, or kidnapping is subject to a more severe maximum sentence than even a premeditated, intentional killing (which currently constitutes first degree murder absent aggravating circumstances). By contrast, under the RCC, unintentionally causing the death of another while committing an enumerated felony is criminalized under the revised second degree murder statute. This change improves the proportionality of penalties under the RCC by treating killings committed with a lower culpable mental state less severely.

Third, the revised first degree murder statute criminalizes what would otherwise constitute second degree murder, when at least one aggravating circumstance is present. Under current law, the presence of an aggravating circumstance does not elevate second degree murder to first degree murder, but rather has the effect of enhancing the maximum penalty for second degree murder to lifetime imprisonment. Consequently, the current statutory scheme increases the maximum penalty due to the presence of an aggravating circumstance more than the distinction between intentional and non-intentional killing (first and second degree murder).[169] By contrast, subsections (b)(2)(A)-(b)(2)(I) of the revised first degree murder statute provide liability where a person otherwise commits second degree murder and one or more aggravating circumstances are present. This change improves the proportionality of the revised homicide statutes by ensuring that the accused's culpable mental state, rather than the attendant circumstances, remains the primary grading factor.

Fourth, one of the aggravating circumstances that can elevate what would otherwise constitute second degree murder to first degree murder is that death was caused by means of a dangerous weapon. This aggravating circumstance replaces current D.C. Code § 22-4502, which provides enhanced penalties for committing murder "while armed" or "having readily available" a dangerous weapon. Current District case law on D.C. Code § 22-4502 holds that the penalty enhancements are authorized if the accused either had "actual physical possession of [a

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[165] These specified felonies are: first degree sexual abuse, first degree child sexual abuse, first degree cruelty to children, mayhem, robbery, kidnapping, first degree burglary while armed, or a felony involving a controlled substance. D.C. Code § 22-2101.

[166] There is only one grade of kidnapping under current law. [CCRC staff has not yet reviewed the kidnapping offense, but may eventually recommend that the offense be divided into multiple penalty gradations.]

[167] D.C. Code § 22-2104.01 (b)(8).

[168] *Page v. United States*, 715 A.2d 890, 891 (D.C. 1998).

[169] For example, under the current second degree murder statute, knowingly causing the death of another without premeditation, and depraved heart murder are subject to the same maximum sentence. However, either form of murder is subject to a lifetime maximum sentence if an aggravating circumstance is present.

weapon]";[170] or if the weapon was merely in "close proximity or easily accessible during the commission of the underlying [offense],"[171] provided that the accused also constructively possessed the weapon.[172] There is no further requirement under current law that the accused actually used the weapon or caused any injury.[173] The D.C. Code is silent as to whether or how the current while-armed penalty enhancement may "stack" on top of other penalty enhancements based on the status of the victim, and current case law has not specifically addressed the issue.[174] Currently, first degree murder and second degree murder with a while-armed penalty enhancement are both subject to an additional mandatory minimum term of at least 5 years and a maximum term of up to life imprisonment without parole.[175]

By contrast, in the RCC first murder offense the accused must actually cause death "by means of" a dangerous weapon. Merely being armed with or having readily available, a dangerous weapon would not be sufficient.[176] Because the use of a dangerous weapon is a means of committing first degree murder in the RCC, it is not possible to "stack" enhancements based on use of a dangerous weapon and the status of the victim. Integrating dangerous weapon penalty enhancements improves the consistency of reformed offenses, which similarly grade by use of a dangerous weapon. Also, including enhancements for use of a dangerous weapon within the revised statute improves the proportionality of punishment by matching more severe penalties to those homicides that involve actual use of a dangerous weapon (compared to mere possession on one's person), by tailoring the penalty for use of a dangerous weapon enhancement to the underlying degree of homicide,[177] and by ensuring the main offense elements and gradations are the primary determinant of penalties rather than stacked enhancements.

Fifth, by criminalizing what would otherwise constitute second degree murder, when at least one aggravating circumstance is present, the first degree murder statute eliminates the procedural requirements under D.C. Code § 24-403.01 (b-2)(1)(A). Under current law, second degree murder is punishable by up to life if at least one aggravating circumstance exists.[178] The government must file an indictment or information specifying which aggravating circumstance

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[170] *Johnson v. United States*, 686 A.2d 200, 205 (D.C. 1996).

[171] *Clyburn v. United States*, 48 A.3d 147, 154 (D.C. 2012) (reversing sentencing enhancement under D.C. Code § 22-4502 when rifle was located in a different room from where defendant committed the underlying offense); *cf. Guishard v. United States*, 669 A.2d 1306, 1310 (D.C. 1995) (affirming sentencing enhancement under D.C. Code § 22-4502 when firearm was in a dresser drawer in the same room as the underlying offense).

[172] *Cox v. United States*, 999 A.2d 63, 69 (D.C. 2010) ("to have a weapon 'readily available,' one must at a minimum have constructive possession of it. To prove constructive possession, the prosecution was required to show that Cox knew the pistol was present in the car, and that he had not merely the ability, but also the intent to exercise dominion or control over it.").

[173] *See*, *Morton v. United States*, 620 A.2d 1338, 1340 (D.C. 1993) (affirming sentencing enhancement under D.C. Code § 22-4502 when firearm was within arm's length, but no evidence that the firearm was ever used to further any crime).

[174] However, current District practice appears to allow for such stacking of a while-armed and enhancements based on the age of the victim. See Advisory Group #10, Penalty Enhancements Appendices C and D, providing relevant statistics.

[175] D.C. Code § 22-4502(a)(3).

[176] However, per the revised possession of a dangerous weapon during a crime of violence offense, RCC 22A-XXXX, the revised criminal code will still provide for additional punishments when committing a homicide while possessing, but not using or displaying, a dangerous weapon.

[177] Current D.C. Code § 22-4502(a)(3) provides the same while-armed enhancement to both first and second degree murder, raising the statutory maximum for both grades of murder to life without parole.

[178] D.C. Code §24-403.01 (b-2)(1)(A)

will be relied upon at least 30 days prior to trial or entry of a guilty plea.[179] By contrast, under the RCC a person who commits second degree murder with at least one aggravating circumstance can be convicted of first degree murder.

Sixth, the revised first degree murder statute eliminates as a distinct form of murder D.C. Code § 22-2102, which requires that the accused "maliciously places an obstruction upon a railroad or street railroad . . . and thereby occasions the death of another."[180] In contrast, the RCC treats killings caused by obstructing railroads the same as other killings, with charges dependent on the accused's culpable mental state, and the presence of aggravating or mitigating circumstances. The fact that a killing occurs by means of obstructing a railroad no longer, by itself, renders the killing first degree murder. This change will improve the proportionality of the revised homicide statutes by ensuring that the accused's culpable mental state remains the primary grading factor, instead of the specific means of placing obstructions upon a railroad or street railroad.

Beyond these four changes to current District law, three other aspects of the revised first degree murder statute may constitute substantive changes in law.

First, the revised first murder statute recognizes that acting under an "extreme emotional disturbance for which there is a reasonable cause" constitutes a mitigating circumstance, and serves as a partial defense to murder. For further discussion of the effect on current District law of codifying this mitigating circumstance, see Commentary to the revised aggravated murder RCC § 22A-1101.

Second, the revised first murder statute may change current District law by explicitly including any other legally-recognized partial defenses, apart from imperfect self-defense, or defense of others, as a mitigating circumstance.[181] For further discussion of the effect on current District law of codifying this mitigating circumstance, see Commentary to the revised aggravated murder statute RCC § 22A-1101.

Third, the revised first degree murder statute may change current law by allowing a second degree felony murder predicated on first or second degree child abuse[182] to be elevated to first degree murder based on the aggravating circumstance that the victim was under the age of 18. Under current law, felony murder may be predicated on first degree child cruelty, an offense that requires the victim be under the age of 18. A separate statute allows any crime of violence to be punished by up to 1 ½ times the maximum term of imprisonment otherwise allowed if the victim is under the age of 18. In addition, a separate statutory provision authorizes a life sentence for murder if the victim was under the age of 12. However, it is unclear under current law whether either of these sentencing enhancements may be applied to felony murder predicated on first degree child cruelty.[183] By contrast, the RCC allows a heightened penalty for felony murder predicated on first or second degree child abuse by elevating the offense to first

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[179] D.C. Code § 24-403.01 (b-2)(1)(A).

[180] D.C. Code § 22-2101. The statute also includes displacing or injuring "anything appertaining" to a railroad or street railroad, or "any other act with intent to endanger the passage of any locomotive or car[.]"

[181] *Fersner v. United States*, 482 A.2d 387, 390 (D.C. 1984).

[182] As discussed in Commentary to second degree murder, replacing the current first degree child cruelty offense with the RCC's first and second degree child abuse offenses as predicate offenses for felony murder changes law, as the current first degree child cruelty offense includes conduct not covered by the RCC's first or second degree child abuse offenses.

[183] Cf. *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982) (the while armed enhancement does not apply to assault with a dangerous weapon).

degree murder based on the aggravating factor that the victim is under the age of 18. Resolving this ambiguity will improve the clarity of the criminal code.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

First, the revised statute eliminates as a distinct form of first degree murder purposely causing the death of another while "perpetrating or attempting to perpetrate an offense punishable by imprisonment in the penitentiary."[184] The DCCA has held that an "offense punishable by imprisonment in the penitentiary refers to any felony.[185] Under the RCC, this statutory language is superfluous. Purposely causing the death of another person while committing or attempting to commit a felony will still be covered under the revised first degree murder statute, which covers all intentional killings, regardless of whether they were premeditated, or occurred while committing or attempting to commit a separate felony offense. This change improves the clarity of the revised first degree murder statute.

Second, the revised statute eliminates as a distinct form of first degree murder causing the death of another by means of poison. Current District statutory language states that a person commits first degree murder if he or she "kills another purposely . . . by means of poison[.]" Under the RCC this statutory language is superfluous. Any intentional killing by means of poison would still be covered by the revised first degree murder statute, which covers all intentional killings, whether by poison or other means. This change improves the clarity of the revised first degree murder statute.

Third, the revised statute eliminates any statutory reference to the accused being "of sound memory and discretion." Current District statutory language states that "[w]hoever, being of sound memory and discretion" kills another with the requisite mens rea is "guilty of murder in the first degree."[186] Yet, under current law, it is not an element of first degree murder that the accused was "of sound memory and discretion."[187] Rather, the words "of sound memory and discretion" only refers to the basic requirement of legal sanity.[188] Under the RCC this statutory

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[184] D.C. Code § 22-2101.

[185] *Lee v. United States*, 112 F.2d 46, 49 (D.C. Cir. 1940) (noting that the phrase "punishable by imprisonment in the penitentiary" was a codification of a "common law concept of felony" and that "offenses punishable by imprisonment in a penitentiary" are those offenses with a possible sentence greater than one year).

[186] D.C. Code § 22-2101.

[187] *Hill v. United States*, 22 App. D.C. 395, 409-10 (D.C. Cir. 1903); *Shanahan v. United States*, 354 A.2d 524, 526 (D.C. 1976) (in prosecuting first degree murder, government was not required to affirmatively prove that defendant was of sound memory and discretion).

The formulation of murder requiring that the defendant be of "sound memory and discretion" dates at least as far back as 17th century England. Michael H. Hoffheimer, *Murder and Manslaughter in Mississippi: Unintentional Killings*, 71 MISS. L.J. 35, 39 (2001) (noting that William Blackstone defined murder in the 18th relying on Sir Edward Coke's 17th century formulation, which required that the defendant be "a man of sound memory, and of the age of discretion[.]"). American courts dating back to the 19th century have interpreted the words "sound memory and discretion" as referring to the basic requirement of legal sanity. *E.g.*, *Davis v. United States*, 160 U.S. 469, 484 (1895) ("All this is implied in the accepted definition of murder, for it is of the very essence of that heinous crime that it be committed by a person of 'sound memory and discretion[.]' . . . Such was the view of the court below, which took care in its charge to say that the crime of murder could only be committed by a sane being[.]"

[188] *E.g.*, *Davis v. United States*, 160 U.S. 469, 484 (1895) ("All this is implied in the accepted definition of murder, for it is of the very essence of that heinous crime that it be committed by a person of 'sound memory and discretion[.]' . . . Such was the view of the court below, which took care in its charge to say that the crime of murder could only be committed by a sane being[.]"

language is superfluous. The accused's sanity remains a general defense to all crimes, not just first degree murder. This change improves the clarity of the revised first degree murder statute.

Relation to National Legal Trends. *The above discussed changes to current District law have mixed support among national legal trends.*

First, abolishing the distinction between premeditated and non-premeditated murders is consistent with national legal trends. A majority of the twenty nine reformed jurisdictions as well as the MPC[189] and the Proposed Federal Criminal Code[190] do not distinguish between murders that are premeditated and those that are not.

Second, criminalizing felony murder as second degree murder instead of first degree murder is not generally supported by state criminal codes. A majority of jurisdictions treat felony murder as a form of first degree murder. However, a small number of jurisdictions treat felony murder as a lower grade of murder as compared to intentionally or knowingly causing the death of another.[191]

Third, the District would be an outlier in treating second degree murder with the addition of an aggravating circumstance as a form of first degree murder. No other jurisdictions specifically treat aggravated second degree murder as a form of first degree murder.[192]

Fourth, it is unclear whether incorporating a penalty enhancement for using a dangerous weapon as an element that elevates second degree murder to first degree murder is consistent with national legal trends. Only a few states specifically recognize as an aggravating factor that a weapon was used to commit the murder.[193] However, CCRC staff has not researched whether other jurisdictions' criminal codes include separate while-armed enhancement provisions that may authorize heightened penalties for murders committed while armed, or whether such enhancements may be applied on conjunction with other enhancements.

Fifth, it is unclear if eliminating the procedural requirements procedural requirements under § 24-403.01, is supported by state criminal codes. CCRC staff has not researched what procedures other jurisdictions require for applying sentencing enhancements applicable to second degree murder.

Sixth, abolishing D.C. Code § 22-2101, the specialized form of murder involving obstructing railroads, is consistent with national legal trends. The District is the only jurisdiction in the country that retains this form of murder as a separate offense.

Seventh, recognizing that acting under "extreme emotional disturbance" as a mitigating circumstance is not strongly supported by state criminal codes. Ten states recognize acting "under extreme emotional disturbance" as a circumstance that can mitigate murder down to

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[189] MPC § 210.2.

[190] Proposed Federal Criminal Code § 1601.

[191] Alaska Stat. Ann. § 11.41.100, Alaska Stat. Ann. § 11.41.110; Haw. Rev. Stat. Ann. § 707-701 (Hawaii does not recognize felony murder); Ky. Rev. Stat. Ann. § 507.020 (Kentucky does not recognize felony murder); Me. Rev. Stat. tit. 17-A, § 201, Me. Rev. Stat. tit. 17-A, § 202; 18 Pa. Stat. Ann. § 2502; Wis. Stat. Ann. § 940.05 Wis. Stat. Ann. § 940.03.

[192] However, CCRC staff did not research whether or how these other states may have separate penalty enhancements that affect second degree murder.

[193] Ala. Code § 13A-5-40 (but requires that weapon be fired into a house or vehicle); Ariz. Rev. Stat. Ann. § 13-701; Colo. Rev. Stat. Ann. § 18-1.3-1201 (but only if possession of the weapon constitutes a class 1 felony).

manslaughter.[194] However, the majority of states use the traditional "heat of passion" formulation.[195]

Seventh, statutorily recognizing that any legally recognized partial defenses may mitigate murder to manslaughter is not generally supported by state criminal codes. Only four states' voluntary manslaughter statutes include partial defenses as a mitigating circumstance.[196] However, staff has not yet reviewed relevant case law in other jurisdictions to determine if courts have recognized other partial defenses as a mitigating circumstance.

[194] Ark. Code Ann. § 5-10-104; Conn. Gen. Stat. Ann. § 53a-55; Del. Code Ann. tit. 11, § 632; Haw. Rev. Stat. Ann. § 707-702; Ky. Rev. Stat. Ann. § 507.030; Mont. Code Ann. § 45-5-103; N.D. Cent. Code Ann. § 12.1-16-01; N.H. Rev. Stat. Ann. § 630:2; N.Y. Penal Law § 125.20; Or. Rev. Stat. Ann. § 163.118. In addition, Maine's manslaughter statute recognizes acting "under the influence of extreme anger or extreme fear brought about by adequate provocation[.]" Me. Rev. Stat. tit. 17-A, § 203.

[195] Alaska Stat. Ann. § 11.41.115.; Ala. Code § 13A-6-3; Ariz. Rev. Stat. Ann. § 13-1103; Cal. Penal Code § 192; Colo. Rev. Stat. Ann. § 18-3-103; Ga. Code Ann. § 16-5-2; Iowa Code Ann. § 707.4; Idaho Code Ann. § 18-4006; 720 Ill. Comp. Stat. Ann. 5/9-2; Ind. Code Ann. § 35-42-1-3; Kan. Stat. Ann. § 21-5404; La. Stat. Ann. § 14:31; Com. v. Knight, 637 N.E.2d 240, 246 (Mass. App. Ct. 1994); Cox v. State, 534 A.2d 1333, 1335-36 (Md. 1988); People v. Sullivan, 586 N.W.2d 578, 582 (Mich. Ct. App. 1998); Minn. Stat. Ann. § 609.19; Mo. Ann. Stat. § 565.023; Miss. Code. Ann. § 97-3-35; State v. Alston, 588 S.E.2d 530, 535-36 (N.C. Ct. App.2003); Neb. Rev. Stat. Ann. § 28-305; Nev. Rev. Stat. Ann. § 200.040; N.J. Stat. Ann. § 2C:11-4; N.M. Stat. Ann. § 30-2-3; Nev. Rev. Stat. Ann. § 200.040; Ohio Rev. Code Ann. § 2903.03; Okla. Stat. Ann. tit. 21, § 711; State v. McGuy, 841 A.2d 1109, 1112-13 (R.I. 2003); State v. Smith, 609 S.E.2d 528, 530 (S.C. Ct. App. 2005); S.D. Codified Laws § 22-16-15; Tenn. Code Ann. § 39-13-211; Tex. Penal Code Ann. § 19.02; Canipe v. Com., 25 Va. App. 629, 643, 491 S.E.2d 747, 753 (1997); State v. Yoh, 910 A.2d 853, 864-65 (Vt. 2006); Wis. Stat. Ann. § 940.01; State v. Wade, 490 S.E.2d 724, 732 (W.V. 1997); Yung v. State, 906 P.2d 1028, 1035 (Wyo. 1995).

[196] 18 Pa. Stat. Ann. § 2503; 720 Ill. Comp. Stat. Ann. 5/9-2; Kan. Stat. Ann. § 21-5404; Wis. Stat. Ann. § 940.01.

RCC § 22A-1101(c). <u>Second degree murder</u>.

Explanatory Note.

This subsection establishes the second degree murder offense for the Revised Criminal Code (RCC). This offense criminalizes recklessly, under circumstances manifesting extreme indifference to human life, causing the death of another person (commonly known as "depraved heart murder"), or negligently causing the death of another person in the course of, and in furtherance of, certain[197] *serious crimes (commonly known as "felony murder"). The RCC's second degree murder statute replaces several types of murder criminalized under the current first degree and second degree murder statutes.*[198] *In addition, second degree murder is no longer subject to heightened penalties authorized under §§ 22-2104.01 and 24-403.01(b-2). A person who commits second degree murder in the presence of aggravating circumstances may be convicted of the separate revised first degree murder offense.*[199] *This re-organization of murder offenses clarifies the revised statutes and better aligns penalties with the degree of culpability required for of each version of murder.*

Subsection (c)(1) specifies that a person commits second degree murder if he or she recklessly causes the death of another person under circumstances manifesting extreme indifference to human life. This provision codifies what is commonly known as "depraved heart murder."[200] The subsection specifies a culpable mental state of recklessness a term defined at RCC § 22A-206 to mean that the accused was consciously aware of a substantial risk of death or bodily injury. However, recklessness alone does not suffice; the accused must also have acted under circumstances manifesting extreme indifference to human life. The term "under circumstances manifesting extreme indifference" is defined at RCC § 22A-206 to mean "an extreme deviation from the standard of care that a reasonable person would observe in the person's situation."[201]

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[197] The specified felonies are: first degree sexual abuse, first degree child sexual abuse, first degree cruelty to children, mayhem, robbery, kidnaping, burglary while armed with or using a dangerous weapon, or any felony involving a controlled substance

[198] Under current law, first degree murder criminalizes three types of murder: (1) causing the death of another with premeditation and deliberation; (2) purposely causing the death of another while committing or attempting to commit any felony; or (3) causing the death of another, with or without purpose, while committing or attempting to commit one of eight specified felonies. Currently, second degree murder criminalizes three different versions of murder: (1) knowingly causing the death of another without premeditation and deliberation; (2) causing the death of another with intent to cause serious bodily injury; and (3) causing the death of another with extreme recklessness, also known as acting with a "depraved heart." The RCC second degree murder statute replaces: (1) causing the death of another, with or without purpose, while committing or attempting to commit a specified felony; (2) causing the death of another with intent to cause serious bodily injury; and (3) causing the death of another with extreme recklessness, also known as acting with a "depraved heart."

[199] RCC § 22A-1101 (b).

[200] *See Comber v. United States*, 584 A.2d 26, 39 (D.C. 1990) (en banc) (noting that examples of depraved heart murder include firing a bullet into a room occupied, as the defendant knows, by several people; starting a fire at the front door of an occupied dwelling; shooting into . . . a moving automobile, necessarily occupied by human beings . . . .; playing a game of 'Russian roulette' with another person [.]"); *Jennings v. United States*, 993 A.2d 1077, 1078 (D.C. 2010) (depraved heart murder when defendant fired a gun at across a street towards a group of people, hitting and killing one of them); *Powell v. United States*, 485 A.2d 596 (D.C. 1984) (defendant guilty of depraved heart murder when he led police on a high speed chase, drove at speeds of up to 90 miles per hour, turned onto a congested ramp and caused a fatal car crash).

[201] RCC § 22A-206 (c)(4).

Subsection (c)(2) specifies that a person commits second degree murder if he or she negligently causes the death of another person while committing or attempting to commit one of the enumerated felonies: 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 kidnaping, or kidnapping]. The statute specifies that culpable mental state of "negligently" applies, a term defined at RCC § 22A-206 to mean the accused not only committed or attempted to commit one of the enumerated felonies, but also should have been aware of a substantial risk that death would result from his or her conduct, and the accused's conduct constituted a gross deviation from the ordinary standard of care.[202] Also, it is not sufficient that a death happened to occur during the commission or attempted commission of the felony. The "mere coincidence in time" between the underlying felony and death is insufficient for felony murder liability.[203] There must be "some causal connection between the homicide and the underlying felony."[204] The death must have been caused by an act "in furtherance" of the underlying felony.[205] The fatal act must have somehow facilitated commission or attempted commission of the felony, or avoiding apprehension or detection of the felony. In addition, the decedent must not have been an accomplice to the underlying felony,[206] and the lethal act must have been committed by the accused or a fellow participant in the underlying felony.[207]

Subsection (d) states that second degree murder is a [Class X offense…]

Subsection (e) cross-references applicable definitions located elsewhere in the RCC.

Subsection (f)(1) provides that in addition to any other defenses otherwise applicable to the accused's conduct, the presence of mitigating circumstances is a defense to prosecution for second degree murder. For discussion of the definition of a mitigating circumstance, see Commentary to aggravated murder, RCC § 22A-1101(a).

Subsection (f)(2) specifies the burden of proof for the mitigation defense. If any evidence of mitigating circumstances is presented at trial by either the government or the accused, the government bears the burden of proving the absence of mitigating circumstances beyond a reasonable doubt.

Subsection (f)(3) specifies the effect of the mitigation defense in a murder prosecution. If evidence of mitigation has been presented at trial and the government fails to meet its burden of proving that mitigating circumstance were absent, but proves all other elements of murder, then the accused shall not be found guilty of murder but may be found guilty of first degree manslaughter.[208]

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[202] RCC 22A-206(e).
[203] *Head v. United States*, 451 A.2d 615, 625 (D.C. 1982).
[204] *Johnson v. United States*, 671 A.2d 428 (D.C. 1995).
[205] It is not required that the death itself facilitated commission or attempted commission of the predicate felony. Rather the lethal act must have facilitated commission or attempted commission of the predicate felony. For example, if during a robbery a defendant fires a gun in order to frighten the robbery victim, and accidentally hits and kills a bystander, felony murder liability is appropriate so long as the *act of firing the gun* facilitated the robbery.
[206] For example, if in the course of an armed robbery, the defendant accidentally fires his gun, striking and killing his accomplice who was acting as a lookout, there would be no felony murder liability.
[207] For example, if during a robbery, police arrive at the scene and in an ensuing shootout the police fatally shoot a bystander, there would be no felony murder liability.
[208] The mitigation provision is also not intended to change current DCCA case law which states that if evidence of mitigation is presented in a murder trial, the defendant is entitled to a jury instruction as to voluntary manslaughter. *Price v. United States*, 602 A.2d 641, 645 (D.C. 1992).

Relation to Current District Law. *The revised second degree murder statute changes current District law in five ways to increase the proportionality of penalties.*

First, the revised second degree murder statute does not specify that knowingly causing the death of another is a basis for liability. Under current law, a person commits second degree murder if he or she causes the death of another and had intent to kill without premeditation and deliberation.[209] By contrast, in the RCC, knowingly or purposely causing the death of another, regardless of whether done with premeditation and deliberation, is criminalized by the revised first degree murder statute.[210] The revised second degree murder statute specifically addresses unintentional forms of murder, although the requirements of the revised second degree murder statute still would be met by knowingly causing the death of another.[211] This change improves the proportionality of the revised homicide statutes by ensuring that the accused's culpable mental state remains the primary factor in gradation, and avoids reliance on the minimal distinction between premediated and non-premeditated murders.[212]

Second, the revised second degree murder statute specifically criminalizes negligent killings in the course of committing certain serious crimes (so-called "felony murder"). Under current law, unintentionally causing the death of another person while committing or attempting to commit a specified felony is criminalized under the first degree murder statute.[213] Such an unintentional felony murder is punished more severely than an intentional, but non-premeditated killing (which currently constitutes second degree murder), including a life sentence if the government can prove that at least one aggravating circumstance was present. Moreover, one of the possible aggravating circumstances enhancing penalties for first degree felony murder is that the killing occurred while the accused was committing or attempting to commit "kidnapping,"[214] "robbery, arson, rape, or a sexual offense,"[215] and the DCCA has held that the predicate felony for felony murder can also serve as an aggravating circumstance.[216] Consequently, under current law, an unintentional felony murder that occurs during a robbery, arson, sexual offense, or kidnapping is subject to a more severe maximum sentence than even a premeditated, intentional killing (which, unenhanced, currently constitutes first degree murder). By contrast, under the RCC, unintentionally causing the death of another while committing a specified felony is criminalized under the revised second degree murder statute. This change improves the proportionality of penalties under the RCC by treating killings committed with a lower culpable mental state less severely.

Third, the revised second degree murder statute changes the specified felonies that may serve as a predicate offense under subsection (c)(2) in five ways.[217] The current first degree

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[209] *Comber*, 584 A.2d at 38-39.

[210] RCC § 22A-1102 (b).

[211] Under the RCC's general provisions, proof of a greater culpable mental state satisfies the requirements for a lower culpable mental state. Knowingly causing the death of another person satisfies the mental state of recklessness with extreme indifference to human life.

[212] See Commentary to first degree murder, RCC § 22A-1101 (b).

[213] The enumerated felonies are: first degree sexual abuse, first degree child sexual abuse, first degree cruelty to children, mayhem, robbery, kidnapping, first degree burglary while armed, or a felony involving a controlled substance. D.C. Code § 22-2101.

[214] There is only one grade of kidnapping under current law. CCRC staff has not yet reviewed the kidnapping offense, but may eventually recommend that the offense be divided into multiple penalty gradations.

[215] D.C. Code § 22-2104.01 (b)(8).

[216] *Page v. United States*, 715 A.2d 890, 891 (D.C. 1998).

[217] In addition to felony murder under the revised second degree murder statute, the revised aggravated arson statute provides an alternate means of criminalizing certain homicides. The revised aggravated arson offense criminalizes

murder statute includes as predicates: (1) all conduct constituting "robbery," currently an ungraded offense; (2) first degree child cruelty; (3) any "felony involving a controlled substance;"[218] (4) mayhem, a common law offense; and (5) "any housebreaking while armed with or using a dangerous weapon," although it is unclear which specific crimes constitute such "housebreaking."[219]

By contrast, the RCC clarifies, and in several respects reduces, the conduct that is a predicate for felony murder. First, the revised statute states that aggravated, first degree, and second degree robbery are predicates for felony murder, but does not include the RCC's third degree robbery as a predicate offense, or pickpocketing-type conduct that is treated as theft from a person[220] in the RCC. Eliminating such conduct as predicates for felony murder improves the statute's proportionality because such conduct does not involve infliction of significant bodily injury or the use of a weapon, and lacks the inherent dangerousness of aggravated, first degree, and second degree robbery.[221] Second, the revised second degree murder statute does not include first degree child cruelty, and instead includes the RCC's first and second degree child abuse, but not third degree child abuse. This changes current law as at least some conduct that constitutes the RCC's third degree child abuse offense would satisfy the elements of first degree child cruelty.[222] Omitting third degree child abuse as a predicate for felony murder improves the proportionality of the statute, as the RCC third degree child abuse and the current first degree child cruelty statute cover conduct that is not sufficiently dangerous or harmful to warrant felony murder liability.[223] Third, the revised second degree murder statute does not include felonies involving a controlled substance as predicates for felony murder. Omitting controlled substance

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committing arson when the defendant knows the building is a dwelling, with recklessness as to the dwelling being occupied, and in fact, death or serious bodily injury results.

[218] D.C. Code §22-2101.

[219] Under current law, burglary is divided into two grades, both of which appear to be included in the felony murder statutory reference to "housebreaking." The original 1901 Code codified the offense now known as burglary, but called it "housebreaking." The original "housebreaking" offense only had one grade, and criminalized entry of *any building* with intent to commit a crime therein. In 1940, Congress amended the first degree murder statute and included an enumerated list of felonies, which included housebreaking, for felony murder. See H.R. Rep. Doc. No. 76-1821, at 1 (1940) (Conf. Rep). In 1967, Congress relabeled "housebreaking" as "second degree burglary," and created first degree burglary, which required that the burglar entered an occupied dwelling. The RCC further divided burglary into three grades, all of which would have constituted the offense of "housebreaking." However, the DCCA has also held that only the current first degree burglary offense may serve as a predicate to non-purposeful felony murder. *Robinson v. United States*, 100 A.3d 95, 109 (D.C. 2014).

[220] Under the RCC, pick pocketing or sudden snatching of property that does not involve threats or physical force are not criminalized under the robbery statute, but instead are treated as theft from a person, RCC §§ 22A-1201, 22A-2101.

[221] Third degree robbery requires that the defendant took or attempted to take property from the immediate actual possession of another by means of either: 1) using physical force that overpowers another person present; 2) causing bodily injury to any one present; or 3) committing conduct constituting second degree menace.

[222] The RCC's third degree child abuse offense includes recklessly causing bodily injury to a child, which would also satisfy the elements of first degree child cruelty. Third degree child abuse also includes recklessly using physical force that overpowers a child, which would not satisfy the elements of first degree child cruelty.

[223] A person commits the current first degree child cruelty offense by recklessly creating "a grave risk of bodily injury to a child, and thereby causes bodily injury." D.C. Code § 22-1101. Recklessly causing any degree of bodily injury may suffice for first degree child cruelty. If a parent leaves a child unsupervised on playground equipment, and the child falls and suffers a minor cut, it appears that the parent could be found guilty under the current first degree child cruelty statute. If that cut becomes infected and ultimately proves fatal, the parent could be liable for felony murder. Such conduct is not sufficiently dangerous or harmful to serve as a predicate for felony murder liability. See Commentary to RCC § 22A-1501 for more explanation of the revised child abuse statutes.

offenses from the enumerated offenses improves the proportionality of the felony murder rule, as controlled substance offenses do not present the same inherent, direct risk of harm as compared to the other enumerated felonies.[224] Fourth, the revised second degree murder statute no longer includes "mayhem" as a predicate for felony murder. Mayhem is a common law offense that is replaced under the RCC by the revised aggravated assault and first degree assault offenses.[225] The revised statute does not include these offenses as enumerated predicate offenses as unnecessary. In most cases, a person who causes the death of another while committing or attempting to commit aggravated assault or first degree assault can be convicted of second degree murder under a depraved heart theory.[226] Omitting these offenses from the enumerated predicate offenses improves the clarity of the code. Fifth, the revised second degree murder statute's specified felonies required for felony murder replaces the phrase "any housebreaking while possessing a dangerous weapon" with "aggravated burglary."[227] This change clarifies the statute and excludes the degrees of the revised burglary statute that do not involve the use of a dangerous weapon as predicate offenses for felony murder. Under current law, only first degree burglary while armed may serve as a predicate offense.[228] The current first degree burglary offense requires that the accused entered an occupied dwelling. This largely corresponds to the RCC's aggravated burglary offense, except to the extent that some elements of the RCC's aggravated burglary offense differ from the current armed first degree burglary offense.[229]

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[224] If in the course of committing a controlled substance offense, a defendant intentionally causes the death of another, or intentionally causes serious bodily injury that causes death of another, he or she may still be convicted of first or second degree murder.

[225] See Commentary to RCC § 22A-1202, 1201. In any case in which a person commits aggravated assault and causes the death of the victim of the aggravated assault, depraved heart murder liability would apply. However, if while committing aggravated assault, the person negligently causes the death of another person, depending on the specific facts, depraved heart liability may not apply

[226] At common law mayhem required that the defendant cause a "permanent disabling injury to another" and "did so willfully and maliciously." *Edwards v. United States*, 583 A.2d at 668 & n.12 ("The elements of mayhem are: (1) that the defendant caused permanent disabling injury to another; (2) that he had the general intent to do the injurious act; and (3) that he did so willfully and maliciously.") (citing *Wynn v. United States*, 538 A.2d 1139, 1145 (D.C. 1988)). Any case in which a person caused the death of another while committing mayhem would also satisfy the elements of second degree murder under subsections (c)(1). The DCCA has held that the "maliciously" mental state can be satisfied either intentionally causing a specified result, or by disregarding a risk of causing the specified result, under circumstances manifesting extreme indifference to causing that result. *Comber v. United States*, 584 A.2d 26, 38 (D.C. 1990) (*en banc*). A person can commit mayhem by either intentionally causing a permanent disabling injury, or by recklessly causing a permanent disabling injury under circumstances manifesting extreme indifference. If a defendant causes death while committing mayhem, the defendant would also have either intentionally caused a serious bodily injury as required under (c)(1), or recklessly caused the death of another under circumstances manifesting extreme indifference to human life as required under (c)(2).

[227] Although the initial proposed revisions to the burglary offense did not include an aggravated burglary offense, CCRC staff intends to produce updated statutory language for burglary that includes an aggravated burglary degree that requires that the defendant was armed with a dangerous weapon.

[228] *Robinson v. United States*, 100 A.3d 95, 109 (D.C. 2014) (Because robbery is one of the felonies enumerated in the felony murder statute, D.C.Code § 22–2101 (2012 Repl.), and second-degree burglary is not, the government is required to prove an intent to kill in order to convict a defendant of felony murder with the underlying felony of second-degree burglary, but is not required to prove that intent for robbery.).

[229] The RCC's aggravated degree burglary statute differs from the current first degree burglary offense in three main ways. The RCC's first degree burglary statute requires that the defendant enter a dwelling: (1) knowing that he or she lacked the effective consent of the owner; (2) knowing the building was a dwelling, and (3) the dwelling was, in fact, occupied by someone who is not a participant in the crime. The current first degree burglary statute does not require that the defendant knew the building was a dwelling, that the defendant lacked effective consent to enter, or that the occupant be a non-participant in the crime.

Omitting first, second, and third degree burglary from the enumerated offenses improves the proportionality of felony murder liability, as these degrees of burglary do not present the same inherent, direct risk of harm as aggravated burglary.

Fourth, the revised second degree murder statute requires that, for felony murder, the accused must have caused the death of another while acting "in furtherance" of the predicate felony. The current statute does not specify that the accused cause the death of another "in furtherance" of the underlying felony, and the DCCA has held that "[t]here is no requirement in the law . . . that the government prove the killing was done in furtherance of the felony in order to convict the actual killer of felony murder."[230] However, while there is no "in furtherance" requirement under current law,[231] the DCCA has held that "[m]ere temporal and locational coincidence"[232] between the underlying felony and the death are not enough. There must have been an "actual legal relation between the killing and the crime . . . [such] that the killing can be said to have occurred *as a part of the perpetration of the crime*."[233] By contrast, the revised statute, through use of the "in furtherance" phrase, requires that the accused's conduct that caused the death of another in some way facilitated the commission or attempted commission of the offense, including avoiding apprehension or detection of the offense or attempted offense.[234] Practically, this change in law may have little impact, as most cases in which the accused causes the death of another as "part of perpetration of the crime," he or she would also have been acting in furtherance of the crime. However, this change improves the proportionality of the offense insofar as a person whose risk creating behavior is not in furtherance of the felony is not as culpable as a person who otherwise negligently kills someone in the course of committing a specified felony.[235]

Beyond these four changes to current District law, four other aspects of the revised second degree murder statute may constitute substantive changes of law.

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[230] *Butler v. United States*, 614 A.2d 875, 887 (D.C. 1992).

[231] However, the DCCA has clearly held that when one party to the underlying felony causes the death of another, an aider and abettor to the underlying felony may only be convicted of felony murder if the "killing takes place in furtherance of the underlying felony." *Butler v. United States*, 614 A.2d 875 (D.C. 1992).

[232] *Johnson v. United States*, 671 A.2d 428, 433 (D.C. 1995).

[233] *Id.* 433 (emphasis original).

[234] Courts in other states have disagreed about the meaning of "in furtherance" language in felony murder statutes. Some courts have held that "in furtherance" requires that the act that caused the death must have advanced or facilitated commission of the underlying crime. *State v. Arias*, 131 Ariz. 441, 443, 641 P.2d 1285, 1287 (1982); *Auman v. People*, 109 P.3d 647, 656 (Colo. 2005) (the death must occur either "in the course of" or "in furtherance of" immediate flight, so that a defendant commits felony murder only if a death is caused during a participant's immediate flight or while a person is acting to promote immediate flight from the predicate"). However, other states have interpreted "in furtherance" more narrowly, to only require a "logical nexus" between the underlying crime and death, to "exclude those deaths which are so far outside the ambit of the plan of the felony and its execution as to be unrelated to them." *State v. Young*, 469 A.2d 1189, 1192–93 (Conn. 1983); see also, *Noble v. State*, 516 S.W.3d 727, 731 (Ark. 2017) (rejecting appellant's argument that "in furtherance" requires that lethal act facilitated the underlying crime, but noting that a burglary committed with intent to kill cannot serve as a predicate offense to felony murder when the defendant completes the murder, because the murder was not committed in furtherance of the burglary); *People v. Henderson*, 35 N.E.3d 840, 845 (N.Y. 2015) ("[Appellant] asserts that the statutory language "in furtherance of" requires that the death be caused in order to advance or promote the underlying felony. We have not interpreted "in furtherance of" so narrowly.").

[235] For example, if in the course of committing a kidnapping, the defendant binds and gags the victim to prevent him from escaping, and the defendant suffocates as a result, felony murder liability would be appropriate. If however, the defendant leaves the kidnapping victim to go on an unrelated errand, and while doing so causes the death of another by driving negligently, felony murder liability would not be appropriate.

First, felony murder as codified under the revised second degree murder statute requires that the accused negligently caused the death of another. Although the current statute is clear that intent to cause death is not required, DCCA case law has not clearly stated whether strict liability as to death is sufficient. Some case law suggests no culpable mental state is necessary,[236] while at least one *en banc* decision suggests that a mental state requirement of negligence is required.[237] The RCC second degree murder statute clarifies this ambiguity by requiring negligence as to the killing for felony murder liability. To the extent that requiring negligence may change current District case law, this change would improve the proportionality of the statute by ensuring a person who was not even negligent as to the death of another could not be punished for murder.[238] A person who was not even negligent as to death does not share the relatively high culpability that justifies murder liability for unintentionally causing the death of another while committing a specified felony.

Second, under the revised second degree murder statute, felony murder liability does not exist if the person killed was an accomplice to the predicate felony.[239] Current statutory language and DCCA case law do not clarify whether a person can be convicted of felony murder when the decedent was an accomplice to the predicate felony.[240] The RCC second degree murder statute resolves this ambiguity under current law, and improves the proportionality of the offense. Under the revised offense, felony murder would provide greater punishment only for victims of the predicate offense or other innocent bystanders who are killed during the commission or attempted commission of an enumerated felony. When the decedent was an accomplice to the underlying offense, he or she assumed the risk in taking part in an inherently dangerous felony, and the negligent death of such a person does not warrant as severe a punishment.

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[236] For example, the DCCA has held that "[t]he government need not establish that the killing was intended or even foreseeable." *Bonhart v. United States*, 691 A.2d 160, 162 (D.C. 1997). Notably, however, it appears that in every instance where the DCCA has applied this principle, the accused does indeed appear to have acted negligently as to the death of the victim.

[237] The *en banc* court in *Wilson-Bey* stated that the felony murder doctrine applies "in the case of a *reasonably foreseeable* killing, without a showing that the defendant intended to kill the decedent, if the homicide was committed in the course of one of several enumerated felonies." *Wilson-Bey v. United States*, 903 A.2d 818, 838 (D.C. 2006). Other statements in the *Wilson-Bey* decision strongly suggest that "reasonably foreseeable" is the practical equivalent of criminal negligence. The opinion quotes the Model Penal Code, "To say that the accomplice is liable if the offense . . . is 'reasonably foreseeable' or the 'probable consequence' of another crime is to make him liable for negligence, even though more is required in order to convict the principal actor. This is both incongruous and unjust."

[238] Even if this revision constitutes a technical change to current law, the practical effect of this change would be very small. Negligently causing death of another requires that the defendant failed to regard a substantial risk of death, and that the defendant's conduct grossly deviated from the ordinary standard of care. Even if strict liability suffices, felony murder still requires that the defendant committed or attempted to commit an inherently dangerous felony. These enumerated felonies in almost all cases create a substantial risk of death, and constitute a gross deviation from the ordinary standard of care. Fact patterns in which a defendant commits or attempts to commit an enumerated felony, and proximately causes the death of another, but do *not* also satisfy the requirements of negligence are extremely unlikely to occur.

[239] For example, if the in the course of committing an armed robbery, the defendant's gun accidentally fires and fatally wounds his accomplice who was acting as a lookout, the defendant could not be convicted of felony murder based on the accomplice's death.

[240] Numerous other jurisdictions, either by statute or judicial opinion, do not apply the felony murder doctrine when the decedent was an accomplice or participant in the underlying felony.

Third, the revised second degree murder statute requires that the lethal act be committed by the accused or an accomplice to the predicate felony.[241] Current statutory language and DCCA case law do not clarify whether a person can be convicted of felony murder when someone other than the accused or an accomplice actually committed the lethal act. The revised second degree murder statute resolves this ambiguity under current law and improves the proportionality of the offense insofar as it is disproportionately severe to punish a person for murder based on the voluntary lethal acts of another person who was not acting in concert with the accused in furtherance of an enumerated felony.[242]

Fourth, the revised second degree murder statute does not criminalize unintentionally causing the death of another while committing or attempting to commit a felony that is not specified in the statute. Although the current first degree statute does not provide for such liability, the DCCA has stated that it is unclear if second degree murder liability applies to a *non-purposeful* killing that occurs during the commission of a *non-enumerated* felony.[243] The revised second degree murder statute resolves this ambiguity by clarifying that unintentionally causing the death of another person while committing or attempting to commit any unspecified felony is not criminalized as murder under the RCC.[244] Eliminating second degree murder liability for non-purposeful felony murder predicated on any felony offense also improves the proportionality of the RCC. Punishing as murder unintentionally causing death of another while committing or attempting to commit any felony, regardless of the inherent dangerousness of the felony would be disproportionately severe.[245]

Two other changes to the revised second degree murder statute are clarificatory in nature, and are not intended to change current District law.

First, the revised second degree murder statute explicitly codifies killing with recklessness under circumstances manifesting extreme indifference to human life (commonly called "depraved heart murder") in subsection (c)(1). The current second degree murder statute only defines the offense as killing another person "with malice aforethought."[246] However, the DCCA has recognized that "malice aforethought" is a common law term of art that encompasses multiple distinct mental states, including depraved heart malice.[247] The revised statute abandons this archaic legal term of art and instead specifies that causing the death of another with

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[241] For example, if in the course of robbery, the intended robbery victim lawfully defends himself by firing shots at the robber and accidentally hits and kills a bystander, the robber himself cannot be convicted of felony murder based on the death of that bystander. Further, if the use of force by the intended robbery victim was *unlawful*, the robber's liability for that unlawful use of force is governed by RCC § 22A-1201.

[242] This limitation of the felony murder rule does not preclude murder liability anytime a non-participant's voluntary act contributes to the death of another. *See Bonhart v. United States*, 691 A.2d 160 (D.C. 1997) (affirming felony murder conviction when defendant committed arson, and victim ran back into burning building to rescue his property).

[243] In *Comber v. United States*, the DCCA noted that "[w]hat remains unclear in the District of Columbia is the status of one who commits a non-purposeful killing in the course of a [felony not enumerated in the first degree murder statute]."[243]

[244] Depending on the facts of the case, such an unintentional killing may be prosecuted as manslaughter or negligent homicide.

[245] This is especially true given the modern expansion of criminal code. The felony murder rule originates in English common law, and developed at a time when English law only recognized a small number of inherently dangerous felonies. Lafave, Wayne. § 14.5.Felony murder, 2 Subst. Crim. L. § 14.5 (3d ed.).

[246] D.C. Code § 22-2103.

[247] *Comber* 584 A.2d at 38-39.

recklessness under circumstances manifesting extreme indifference to human life constitutes second degree murder.

Second, the revised second degree murder statute does not specifically criminalize acting with intent to cause serious bodily harm, and thereby causing the death of another. Under current District case law, a person commits second degree murder if he causes the death of another without intent to cause death, but with intent to cause "serious bodily harm."[248] However, under the revised second degree murder statute, causing death by engaging in conduct with intent to commit serious bodily injury is still criminalized as second degree murder because it constitutes depraved heart murder under subsection (c)(1). The current second degree murder statute's reference to acting with intent to cause serious bodily harm and thereby killing a person is superfluous to the revised second degree murder offense and its elimination clarifies the statute.

Relation to National Legal Trends. *The changes to the second degree murder statute have mixed support from national legal trends.*

First, omitting knowingly causing the death of another without premeditation and deliberation from second degree murder is supported by national legal trends. A slight minority of reformed jurisdictions retains both first and second degree murder, and includes knowingly causing the death of another as a form of second degree murder.[249]

Second, criminalizing felony murder as second degree murder is not generally supported by state criminal codes. A majority of jurisdictions treat felony murder as a form of first degree murder. Only six jurisdictions treat felony murder as a lower grade of murder as compared to intentionally or knowingly causing the death of another.[250]

Third, it is unclear whether the changes to predicate offenses for felony murder are consistent with national legal trends. CCRC staff has not researched which specific offenses may serve as predicate offenses for felony murder in other jurisdictions, and how those offenses correspond to the offenses included in the revised second degree murder statute.

Fourth, the limitations to felony murder liability also have mixed support from other jurisdictions. First, a minority of states' felony murder statutes include an "in furtherance"

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[248] *Id*.

[249] Alaska Stat. Ann. § 11.41.110; Ariz. Rev. Stat. Ann. § 13-1104; Ark. Code Ann. § 5-10-103; Colo. Rev. Stat. Ann. § 18-3-103; Haw. Rev. Stat. Ann. § 707-701.5; Kan. Stat. Ann. § 21-5403; Minn. Stat. Ann. § 609.19; Mo. Ann. Stat. § 565.021; N.H. Rev. Stat. Ann. § 630:1-b; N.Y. Penal Law § 125.25; S.D. Codified Laws § 22-16-7; Tenn. Code Ann. § 39-13-210; Wash. Rev. Code Ann. § 9A.32.050; Wis. Stat. Ann. § 940.05.

[250] Alaska Stat. Ann. § 11.41.100, Alaska Stat. Ann. § 11.41.110 (although Alaska criminalizes felony murder as second degree murder, the same grade as depraved heart or intent-to-cause-serious—physical-injury murder, Alaska's first degree murder statute does include unintentional forms of murder when the victim is under the age of 16, and recognizes a limited form of felony murder that must be predicated on either intentionally damaging an oil or gas pipeline, or making terroristic threats); Haw. Rev. Stat. Ann. § 707-701.5 (Hawaii is one of two states to entirely abolish the felony murder rule by statute); Ky. Rev. Stat. Ann. § 507.020 (Kentucky is one of two states to abolish the felony murder rule by statute); Me. Rev. Stat. tit. 17-A, § 201; Me. Rev. Stat. tit. 17-A, § 202; *People v. Aaron*, 299 N.W.2d 304, 326 (Mich. 1980) (Abolishing the felony murder rule. "Our review of Michigan case law persuades us that we should abolish the rule which defines malice as the intent to commit the underlying felony"); 18 Pa. Stat. Ann. § 2502 (under Pennsylvania's criminal code, intentionally cause the death of another is first degree murder, felony murder is second degree murder); Wis. Stat. Ann. § 940.01, Wis. Stat. Ann. § 940.01 (Wisconsin's first-degree intentional homicide covers intentionally causing the death of another, and felony murder is covered by a separate statute with less severe penalties).

requirement.[251] Second, a minority of states bar felony murder liability when the decedent was a participant in the underlying felony.[252] Third, slightly less than half of reformed jurisdictions require that the lethal act be committed by the accused or an accomplice to the underlying offense.[253]

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[251] Ark. Code Ann. § 5-10-102; Ariz. Rev. Stat. Ann. § 13-1105; Colo. Rev. Stat. Ann. § 18-3-102; Conn. Gen. Stat. Ann. § 53a-54c; N.D. Cent. Code Ann. § 12.1-16-01; N.Y. Penal Law § 125.25; Or. Rev. Stat. Ann. § 163.115; Tex. Penal Code Ann. § 19.02; Wash. Rev. Code Ann. § 9A.32.030, Wash. Rev. Code Ann. § 9A.32.050.

[252] Alaska Stat. Ann. § 11.41.110 ("causes the death of a person other than one of the participants"); Colo. Rev. Stat. Ann. § 18-3-102 ("the death of a person, other than one of the participants, is caused by anyone"); Conn. Gen. Stat. Ann. § 53a-54c ("causes the death of a person other than one of the participants"); N.J. Stat. Ann. § 2C:11-3 ("causes the death of a person other than one of the participants"); N.Y. Penal Law § 125.25 ("causes the death of a person other than one of the participants"); Or. Rev. Stat. Ann. § 163.115 ("causes the death of a person other than one of the participants"); Utah Code Ann. § 76-5-203 ("a person other than a party as defined in Section 76-2-202 is killed in the course of the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense"); *Wooden v. Com.,* 284 S.E.2d 811, 816 (Va. 1981) ("we hold that under § 18.2-32, a criminal participant in a felony may not be convicted of the felony-murder of a co-felon killed by the victim of the initial felony"); Wash. Rev. Code Ann. § 9A.32.030 ("causes the death of a person other than one of the participants").

[253] Colo. Rev. Stat. Ann. § 18-3-102; Ark. Code Ann. § 5-10-102; Conn. Gen. Stat. Ann. § 53a-54c; *Weick v. State*, 420 A.2d 159, 161-62 (Del. 1980) ("The defendants contend that this section was improperly applied to them because, manifestly, s 635(2) was not intended to punish one who commits a felony for a homicide that occurs during the perpetration of that felony but is not committed by him, his agent, or someone under his control. We agree."); *State v. Sophophone*, 270 Kan. 703, 713, 19 P.3d 70, 77 (2001) ("We hold that under the facts of this case where the killing resulted from the lawful acts of a law enforcement officer in attempting to apprehend a co-felon, Sophophone is not criminally responsible for the resulting death of Somphone Sysoumphone, and his felony-murder conviction must be reversed"); Me. Rev. Stat. tit. 17-A, § 20; *Poole v. State*, 295 Md. 167, 174, 453 A.2d 1218, 1223 (1983); *State v. Branson*, 487 N.W.2d 880, 885 (Minn. 1992) ("The felony murder statute, Minn.Stat. § 609.19(2), does not extend to apply to a situation in which a bystander is killed during exchange of gunfire in which defendant allegedly participated but where the fatal shot was fired by someone in a group adverse to the defendant rather than by the defendant or someone associated with the defendant in committing or attempting to commit a felony"); Mont. Code Ann. § 45-5-102; N.D. Cent. Code Ann. § 12.1-16-01; State v. Quintana, 261 Neb. 38, 59, 621 N.W.2d 121, 138, opinion modified on denial of reh'g, 261 Neb. 623, 633 N.W.2d 890 (Neb. 2001) ("Causation, in the context of felony murder, requires that the death of the victim result from an act of the defendant or the defendant's accomplice"); *Jackson v. State*, 589 P.2d 1052, 1052 (NM 1979) ("The sole question presented by this petition for writ of certiorari is whether a co-perpetrator of a felony can be charged with the felony murder of a co-felon, under s 30-2-1(A)(3), N.M.S.A. 1978, (formerly s 40A-2-1(A)(3), N.M.S.A. 1953), when the killing is committed by the intended robbery victim while resisting the commission of the offense. We hold that he cannot."); N.Y. Penal Law § 125.25; Or. Rev. Stat. Ann. § 163.115; *State v. Severs*, 759 S.W.2d 935, 938 (Tenn. Crim. App. 1988) (holding that felony murder rule was inapplicable when lethal act was perpetrated by an innocent party who was thwarting the felony); *Blansett v. State*, 556 S.W.2d 322, 324–25 (Tex. Crim. App. 1977) (rev'd on other grounds) (holding that felony murder liability does not apply when death was caused by police officer acting in legal self defense); *Rivers v. Com.*, 21 Va. App. 416, 422, 464 S.E.2d 549, 551 (1995); *People v. Washington*, 402 P.2d 130, 133 (Wash. 1965)(in bank) ("When a killing is not committed by a robber or by his accomplice but by his victim, malice aforethought is not attributable to the robber, for the killing is not committed by him in the perpetration or attempt to perpetrate robbery.")

Chapter 11. Homicide.

RCC § 22A-1101 Murder.
RCC § 22A-1102 Manslaughter.
RCC § 22A-1103 Negligent Homicide.

RCC § 22A-1102 Manslaughter.

(a) **Aggravated Manslaughter.** A person commits the offense of aggravated manslaughter when that person:

(1) Knowingly causes the death of another;
(2) Recklessly, under circumstances manifesting extreme indifference for human life, causes death of another; or
(3) Negligently causes the death of another person 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 kidnaping, or kidnapping], provided that the person or an accomplice committed the lethal act; and
(4) 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;
    (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; or
  (C) In fact, the death is caused by means of a dangerous weapon.

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

(1) Knowingly causes the death of another,
(2) Recklessly, under circumstances manifesting extreme indifference for human life, causes death of another;
(3) Negligently causes the death of another person 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 kidnaping, or kidnapping], provided that the person or an accomplice committed the lethal act; or
(4) Recklessly causes the death of another and:
  (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;
   (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; or

(C) In fact, the death is caused by means of a dangerous weapon.

(c) **Second Degree Manslaughter**. A person commits the offense of second degree manslaughter when that person recklessly causes the death of another person.

(d) *Penalties*.

(1) *Aggravated manslaughter.* Aggravated manslaughter is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) *First degree manslaughter*. First degree manslaughter is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) *Second degree manslaughter*. Second degree manslaughter is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions*. The terms "knowledge," "recklessness," "negligence," and "circumstances manifesting extreme indifference," have the meanings specified in § 22A-206; the terms "protected person," "law enforcement officer," "public safety employee," "District official or employee," and "citizen patrol" have the meanings specified in § 22A-1001.

RCC § 22A-1102(a). Aggravated manslaughter.

Commentary

Explanatory Note. *This section establishes the aggravated manslaughter offense for the Revised Criminal Code (RCC). The aggravated manslaughter offense incorporates various penalty enhancements otherwise applicable to voluntary manslaughter in current District law. To be convicted of aggravated manslaughter, a defendant first must satisfy the elements of first degree manslaughter (corresponding to voluntary manslaughter in current District law) plus at least one of three additional elements (corresponding to various penalty enhancements in current law). As described further in RCC § 22A-1102,* a *defendant commits first degree manslaughter when he or she causes the death of another person knowingly, recklessly under circumstances manifesting extreme indifference to human life, or negligently in the course of and in furtherance of specified felonies but there are mitigating circumstances which provide a defense to murder liability. In addition to committing first degree manslaughter, a person accused of aggravated manslaughter must be proven to be: 1) reckless as the decedent's status as a protected person; 2) have caused the death with the purpose of harming the victim because of their status as a law enforcement officer, public safety employee, participant in a citizen patrol, District official or employee, or family member of a District official or employee; or 3) have, in fact, caused the death by means of a dangerous weapon. The RCC aggravated manslaughter offense replaces, in part, the manslaughter statute, D.C. Code §22-2105. Specifically, in conjunction with first degree manslaughter, the RCC aggravated manslaughter offense replaces the voluntary manslaughter offense recognized under current District law. Insofar as they are applicable to current manslaughter offenses, the revised aggravated manslaughter offense also partly replaces the protection of District public officials statute[254] and six penalty enhancements: the enhancement for senior citizens;[255] the enhancement for citizen patrols;[256] the enhancement for minors;[257] the enhancement for taxicab drivers;[258] the enhancement for transit operators and Metrorail station managers,[259] and the while-armed enhancement.[260]*

Subsection (a)(1) specifies that a person commits aggravated manslaughter is if he or she knowingly causes the death of another. The culpable mental state for subsection (a)(1) is knowledge, a term defined at RCC § 22A-206 to mean that the accused must have been aware to a practical certainty or consciously desired that he would cause the death of another person. This form of aggravated manslaughter is identical to knowingly causing the death of another under first degree murder although the presence of a mitigating circumstance is a defense to this form of first degree murder. [261]

Subsection (a)(2) specifies that a second way a person commits aggravated manslaughter is if that person recklessly, under circumstances manifesting extreme indifference for human life, causes death of another. The culpable mental state for subsection (a)(2) is recklessness under circumstances manifesting extreme difference for human life, a term defined at RCC § 22A-206

[254] D.C. Code § 22-851.
[255] D.C. Code § 22-3601.
[256] D.C. Code § 22-3602.
[257] D.C. Code § 22-3611.
[258] D.C. Code §§ 22-3751; 22-3752.
[259] D.C. Code §§ 22-3751.01; 22-3752.
[260] D.C. Code § 22-4502.
[261] *See* Commentary to RCC § 22A-1101.

to mean that the accused was consciously aware of a substantial risk of death or bodily injury. However, recklessness alone does not suffice; the accused must also have acted under circumstances manifesting extreme indifference to human life. The term "under circumstances manifesting extreme indifference" is a defined term requiring "an extreme deviation from the standard of care that a reasonable person would observe in the person's situation."[262] This form of aggravated manslaughter is identical to the "depraved heart" version of second degree murder although the presence of a mitigating circumstance is a defense to this form of second degree murder.[263]

Subsection (a)(3) specifies that a third way a person commits aggravated manslaughter is if he or she negligently causes the death of another 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]. This form of aggravated manslaughter is identical to the felony murder version of second degree murder although the presence of a mitigating circumstance is a defense to this form of first degree murder.[264]

Subsection (a)(4) specifies that in addition to causing the death of another in a manner listed under subsections (a)(1)-(a)(3), one of three additional elements must be proven.

Subsection (a)(4)(A) specifies that a person commits aggravated manslaughter if he or she was reckless as to whether the victim was a protected person. Recklessness is defined at RCC § 22A-206 and requires that the accused was aware of a substantial risk that the victim was a protected person, and that the accused's conduct grossly deviated from the standard of care that a reasonable person would observe in that person's situation. The term "protected person" is defined under RCC § 22A-1001.

Subsection (a)(4)(B) specifies that a person commits aggravated manslaughter if he or she caused the death of another with purpose of harming the victim because of the victim's status as a law enforcement officer, public safety employee, participant in a citizen patrol, District official or employee, or family member of a District official or employee. This element requires that the accused acted with "purpose" a term defined at RCC § 22A-206, which means that accused must consciously desire to harm that person because of his or her status as a law enforcement officer, public safety employee, participant in a citizen patrol, district official or employee, or family member of a District official or employee. "Law enforcement officer," "public safety employee," "citizen patrol," "District official or employee," and "family member" are all defined terms in RCC § 22A-1001.

Subsection (a)(4)(C) specifies a person commits aggravated manslaughter if he or she, in fact, caused the death of another by means of a dangerous weapon. The term "dangerous weapon" is defined at RCC § 22A-1001(5). The phrase "by means of" requires that the accused actually used the dangerous weapon to cause the death of another. Merely being armed with or having readily available, a dangerous weapon would not be sufficient.[265] The term "in fact"

[262] RCC § 22A-206 (c)(4).
[263] *See* Commentary to RCC § 22A-1101.
[264] *See* Commentary to RCC § 22A-1101. As a practical matter, it is unlikely that mitigation will ever arise when a person causes the death of another while committing one of the specified felonies.
[265] However, per the revised possession of a dangerous weapon during a crime of violence offense, RCC 22A-XXXX, the revised criminal code will still provide for additional punishments when committing a homicide while possessing, but not using or displaying, a dangerous weapon.

specifies that no culpable mental state is required as to whether the implement used was a "dangerous weapon," or whether use of the weapon itself caused the death.[266]

Subsection (d) states that aggravated manslaughter is a [Class X offense… RESERVED]

Subsection (e) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised aggravated manslaughter statute changes current law in six main ways, two of which track changes in the RCC murder statutes,*[267] *that improve the proportionality of penalties.*

First, the revised aggravated manslaughter statute incorporates multiple penalty enhancements based on the status of the victim into a new gradation. The current District manslaughter statute, D.C. Code §22-2105, does not distinguish degrees of manslaughter or otherwise specify the elements of the offense, although District case law recognizes two distinct forms of manslaughter, voluntary and involuntary. However, various separate statutes in the current D.C. Code authorize enhanced penalties for manslaughter based on the victim's status, as a minor,[268] as an elderly adult[269], as a specified transportation worker,[270] or as a citizen patrol member.[271] A separate protection of District public officials offense also criminalizes harming a District employee or official, or family member, while the employee or official is engaged in official duties, or on account of those duties.[272] By contrast, the RCC establishes a separate aggravated manslaughter gradation, which requires proof of at least one additional element, but is otherwise identical to first degree manslaughter. A person commits aggravated manslaughter if he or she satisfies the elements of first degree manslaughter, and was either reckless as to the victim being a "protected person," or had purpose to harm to victim because of the victim's status as a participant in a citizen patrol, District official or employee, or family member of a District official or employee. The term "protected person" is defined under RCC § 22A-1001.[273]

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[266] Although there is no mental state required as to whether the weapon itself caused death, aggravated manslaughter still requires that the defendant knowingly caused death of another, recklessly caused death of another under circumstances manifesting extreme indifference to human life, or negligently caused death of another while committing or attempting to commit a specified felony.

[267] Under current law and the RCC, causing the death of another in a manner that constitutes murder also constitutes voluntary manslaughter. Consequently, RCC changes in the scope of murder liability accordingly change the scope of voluntary manslaughter.

[268] 22-3611 (enhancement for specified crimes committed against minors).

[269] D.C. Code §§ 22-3601 (enhancement for specified crimes committed against senior citizens);

[270] D.C. Code § 22-3751 (enhancement for specified crimes committed against taxicab drivers); D.C. Code § 22-3751.01 (enhancement for specified crimes committed against transit operator or Metrorail station manager).

[271] D.C. Code § 22-3602 (enhancement for specified crimes committed against citizen patrol members).

[272] D.C. Code §22-851. Specifically, the offense criminalizes intimidating, impeding, interfering with, retaliating against, stalking, assaulting, kidnapping, injuring a District official or employee or family member of an official or employee, or damages or vandalizes the property of a District official or employee or family member of an official or employee.

[273] RCC § 22A-1001(18) ("Protected person" means a person who is:
(A) Less than 18 years old, and, in fact, the defendant is at least 18 years old and at least 2 years older than the other person;
(B) 65 years old or older;
(C) A vulnerable adult;
(D) A law enforcement officer, while in the course of official duties;
(E) A public safety employee while in the course of official duties;
(F) A transportation worker, while in the course of official duties;
(G) A District official or employee, while in the course of official duties; or
(H) A citizen patrol member, while in the course of a citizen patrol.).

Because the various types of victim-specific enhancements applicable to manslaughter are all joined in the revised aggravated manslaughter offense, it is not possible to "stack" enhancements based on the status of the victim. This improves the revised penalty's proportionality by ensuring the main offense elements and gradations are the primary determinant of penalties rather than stacked enhancements. Incorporating into a gradation of manslaughter separate penalty enhancements, and the offense for harming a District employee or official also reduces unnecessary overlap between offenses and improves the clarity of the code.

Second, the revised aggravated manslaughter statute provides heightened penalties, as compared to first degree manslaughter, if the accused was reckless as to the decedent being a law enforcement officer or public safety employee engaged in the course of official duties,[274] or had purpose to harm the victim because of the victim's status as a law enforcement officer or public safety employee. Currently, there is no separate manslaughter of a law enforcement officer offense, or any separate statute that provides for enhanced penalties for manslaughter of a law enforcement officer or public safety employee. By contrast, the revised aggravated manslaughter statute provides for more severe penalties than first degree manslaughter when the victim was a law enforcement officer or public safety employee. This change improves the proportionality and consistency of the criminal code by ensuring that punishment is proportionate when manslaughter is committed against a law enforcement officer or public safety employee in a manner consistent with aggravating factors applied to other offenses against persons in the RCC.

Third, the revised aggravated manslaughter statute integrates penalty enhancements for using a dangerous weapon to kill the other person and bars the application of both a weapon enhancement and other enhancements based on the victim's status. Current D.C. Code § 22-4502 provides enhanced penalties for committing manslaughter "while armed" or "having readily available" a dangerous weapon. Current District case law on D.C. Code § 22-4502 holds that the penalty enhancements are authorized if the accused either had "actual physical possession of [a weapon]";[275] or if the weapon was merely in "close proximity or easily accessible during the commission of the underlying [offense],"[276] provided that the accused also constructively possessed the weapon.[277] There is no further requirement under current law that the accused actually used the weapon or caused any injury.[278] The D.C. Code is silent as to whether or how the current while-armed penalty enhancement may "stack" on top of other penalty enhancements based on the status of the victim, and current case law has not specifically addressed the issue.[279] Currently, manslaughter with a while-armed penalty enhancement is

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[274] The term "protected person" includes law enforcement officers and public safety employees engaged in the course of official duties. RCC § 22A-1001 (15).

[275] *Johnson v. United States*, 686 A.2d 200, 205 (D.C. 1996).

[276] *Clyburn v. United States*, 48 A.3d 147, 154 (D.C. 2012) (reversing sentencing enhancement under D.C. Code § 22-4502 when rifle was located in a different room from where defendant committed the underlying offense); *cf. Guishard v. United States*, 669 A.2d 1306, 1310 (D.C. 1995) (affirming sentencing enhancement under D.C. Code § 22-4502 when firearm was in a dresser drawer in the same room as the underlying offense).

[277] *Cox v. United States*, 999 A.2d 63, 69 (D.C. 2010) ("to have a weapon 'readily available,' one must at a minimum have constructive possession of it. To prove constructive possession, the prosecution was required to show that Cox knew the pistol was present in the car, and that he had not merely the ability, but also the intent to exercise dominion or control over it.").

[278] *See*, *Morton v. United States*, 620 A.2d 1338, 1340 (D.C. 1993) (affirming sentencing enhancement under D.C. Code § 22-4502 when firearm was within arm's length, but no evidence that the firearm was ever used to further any crime).

[279] However, current District practice appears to allow for such stacking of a while-armed and enhancements based on the age of the victim. [See Commentary at XXX, providing relevant statistics.]

subject to an additional penalty with a mandatory minimum term of at least 5 years and a maximum term of up to 30 years.[280]

By contrast, in the RCC aggravated manslaughter offense the accused must actually cause death "by means of" a dangerous weapon. Merely being armed with or having readily available, a dangerous weapon would not be sufficient.[281] Because the use of a dangerous weapon is a means of committing aggravated manslaughter in the RCC, it is not possible to "stack" enhancements based on use of a dangerous weapon and the status of the victim. Integrating dangerous weapon penalty enhancements improves the consistency of reformed offenses, which similarly grade by use of a dangerous weapon. Also, including enhancements for use of a dangerous weapon within the revised statute improves the proportionality of punishment by matching more severe penalties to those homicides that involve actual use of a dangerous weapon (compared to mere possession on one's person), by tailoring the penalty for use of a dangerous weapon enhancement to the underlying degree of homicide,[282] and by ensuring the main offense elements and gradations are the primary determinant of penalties rather than stacked enhancements.

Fourth, the revised aggravated manslaughter statute includes felony murder predicated on a specified felony as a form of manslaughter. The DCCA has not clarified whether the current manslaughter offense includes felony murder. In *Comber v. United States,* the DCCA stated that "in all voluntary manslaughters, the perpetrator acts with the state of mind which, but for the presence of legally recognized mitigating circumstances, would constitute malice aforethought, *as the phrase has been defined for the purposes of second-degree murder.*"[283] In defining malice-aforethought for the purposes of second degree murder, the DCCA noted that *first degree* murder liability attaches when the defendant accidentally kills another while committing a specified felony, and does not further clarify whether felony murder malice is included within the voluntary manslaughter offense.[284] In a later case, the DCCA noted that "this court has never explicitly recognized voluntary manslaughter to be a lesser-included-offense of first-degree felony murder" and declined to decide the issue in that case.[285] The RCC resolves this ambiguity by defining aggravated manslaughter to include felony murder. In doing so, the aggravated manslaughter statute also incorporates all changes to felony murder included in the revised second degree murder statute.

Fifth, the revised aggravated manslaughter statute incorporates the revised second degree murder statute's changes to felony murder liability by requiring that the accused cause the death of another while acting "in furtherance" of the predicate felony.[286] Under current law felony murder does not require that the killing be "in furtherance" of the predicate felony. By contrast, the revised aggravated manslaughter statute changes current law by requiring that the accused caused the death of another while acting "in furtherance" of the underlying felony, just as the

[280] D.C. Code § 22-4502(a).
[281] However, per the revised possession of a dangerous weapon during a crime of violence offense, RCC 22A-XXXX, the revised criminal code will still provide for additional punishments when committing a homicide while possessing, but not using or displaying, a dangerous weapon.
[282] Current D.C. Code § 22-4502(a)(3) provides the same while-armed enhancement to both first and second degree murder, raising the statutory maximum for both grades of murder to life without parole.
[283] *Comber*, 584 A.2d at 37 (emphasis added).
[284] The *Comber* court explicitly declined to decide whether accidentally causing the death of another while committing or attempting to commit any *non-enumerated* felony constitutes second degree murder.
[285] *West v. United States*, 499 A.2d 860, 864 (D.C. 1985).
[286] *See* Commentary to RCC § 22A-1101.

revised second degree murder statute requires the killing be "in furtherance" of the underlying felony.[287] This change to the aggravated manslaughter offense improves the proportionality and consistency of the revised homicide offenses by ensuring that the punishment is proportionate to the accused's culpability, and maintaining aggravated manslaughter as a lesser-included offense of murder offenses.

Sixth, the revised aggravated manslaughter statute incorporates the revised second degree murder statute's five changes to the specified felonies that can serve as a predicate to felony murder. The current first degree murder statute includes as predicates for felony murder liability: (1) all conduct constituting "robbery," currently an ungraded offense; (2) first degree child cruelty; (3) any "felony involving a controlled substance;"[288] (4) mayhem, a common law offense; and (5) "any housebreaking while armed with or using a dangerous weapon," although it is unclear which specific crimes constitute such "housebreaking."[289] By contrast, the revised aggravated manslaughter statute changes current law by clarifying or limiting these predicate crimes to match liability as described in the revised second degree murder statute.[290] This change to the aggravated manslaughter offense improves the proportionality and consistency of the criminal code, by ensuring that the punishment is proportionate to the accused's culpability, and maintaining aggravated manslaughter as a lesser-included offense of murder offenses.

Beyond these six changes to current District law, three other aspects of the revised aggravated manslaughter statute may constitute substantive changes of law.

Three changes to felony murder liability provided in the revised second degree murder statute may constitute substantive changes to the current law of manslaughter: 1) requiring a negligence mental state as to causing death for felony murder; 2) barring felony murder liability when the decedent was an accomplice to the underlying felony; and 3) barring application of felony murder liability when a third party committed the fatal act. These three changes limit the scope of felony murder to ensure that the doctrine is only applied when warranted by the accused's culpability, and when innocent bystanders are killed.[291] To the extent that these revisions change the scope of felony murder, they also change the scope of aggravated manslaughter. These possible changes to current law improve the proportionality and consistency of the criminal code. They ensure that the punishment is proportionate to the accused's culpability and maintaining aggravated manslaughter as a lesser-included offense of murder offenses.

Relation to National Legal Trends. *The above mentioned changes to current District law are not supported by state criminal codes. Although nearly all jurisdictions define voluntary manslaughter, which is analogous to the RCC's first degree manslaughter offense, as causing the death of another under circumstances that would constitute murder, no other jurisdictions integrate aggravating circumstances applicable to voluntary manslaughter into a separate aggravated manslaughter offense. However, CCRC staff did not research what penalty enhancements other jurisdictions apply to voluntary manslaughter.*

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[287] For further discussion of these changes, see Commentary to the revised second degree murder.
[288] D.C. Code §22-2101.
[289] *See* footnotes 219, above, for further description of offenses that may constitute "housebreaking."
[290] For discussion of these changes, see Commentary to the revised second degree murder statute.
[291] *See* Commentary to the revised second degree murder statute RCC § 22A-1101.

RCC § 22A-1102(b). First degree manslaughter.

Explanatory Note. *This section establishes the first degree manslaughter offense for the Revised Criminal Code (RCC). A person commits first degree manslaughter if he or she causes the death of another in a manner that would otherwise constitute murder but for the presence of mitigating circumstances. Specifically, killing another person knowingly, recklessly under circumstances manifesting extreme indifference to human life, or negligently in the course of and in furtherance of specified felonies constitutes first degree manslaughter where there are mitigating circumstances. However, the presence of mitigating circumstances is not a required element of first degree manslaughter, and in a first degree manslaughter prosecution the government is not required to prove that mitigating circumstances were present. The RCC first degree manslaughter offense replaces, in part, the manslaughter statute, D.C. Code §22-2105. Specifically, in conjunction with the RCC aggravated manslaughter offense, the RCC first degree manslaughter offense replaces the voluntary manslaughter offense recognized under current District law. In addition, the revised first degree manslaughter offense also incorporates penalty enhancements applicable to involuntary manslaughter, which corresponds to the RCC's second degree manslaughter statute. A person also commits first degree manslaughter if he or she satisfies the elements of second degree manslaughter, plus at least one additional element that corresponds to a penalty enhancement under current law. Insofar as they are applicable to current manslaughter offenses, the revised first degree manslaughter offense also partly replaces the protection of District public officials statute[292] and six penalty enhancements: the enhancement for senior citizens;[293] the enhancement for citizen patrols;[294] the enhancement for minors;[295] the enhancement for taxicab drivers;[296] the enhancement for transit operators and Metrorail station managers,[297] and the while-armed enhancement.[298]*

Subsection (b)(1) specifies that one way a person commits first degree manslaughter is if he or she knowingly causes the death of another. The culpable mental state for subsection (a)(1) is knowledge, a term defined at RCC § 22A-206 to mean that the accused must have been aware to a practical certainty or consciously desired that he would cause the death of another person. This form of first degree manslaughter is identical to knowingly causing the death of another under first degree murder, although the presence of a mitigating circumstance is a defense to this form of first degree murder.

Subsection (b)(2) specifies that a second way a person commits first degree manslaughter is if that person recklessly, under circumstances manifesting extreme indifference for human life, causes death of another. The culpable mental state for subsection (a)(2) is recklessness under circumstances manifesting extreme difference for human life, a term defined at RCC § 22A-206 to mean that the accused was consciously aware of a substantial risk of death or bodily injury. However, recklessness alone does not suffice; the accused must also have acted under circumstances manifesting extreme indifference to human life. The term "under circumstances manifesting extreme indifference" is a defined term requiring "an extreme deviation from the

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[292] D.C. Code § 22-851.
[293] D.C. Code § 22-3601.
[294] D.C. Code § 22-3602.
[295] D.C. Code § 22-3611.
[296] D.C. Code §§ 22-3751; 22-3752.
[297] D.C. Code §§ 22-3751.01; 22-3752.
[298] D.C. Code § 22-4502 (enhancement for specified crimes committed against citizen patrol members).

standard of care that a reasonable person would observe in the person's situation."[299] This form of first degree manslaughter is identical to the "depraved heart" version of second degree murder,[300] although the presence of a mitigating circumstance is a defense to this form of second degree murder.

Subsection (b)(3) specifies that a third way a person commits the offense of first degree manslaughter is if he or she negligently causes the death of another 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]. This form of first degree manslaughter is identical to the felony murder version of second degree murder,[301] although the presence of mitigating circumstances is a defense to this form of first degree murder.

Subsection (b)(4) specifies that a person commits first degree manslaughter if that person recklessly causes the death of another and at least one of three additional circumstances listed in subsections (b)(4)(A)-(C) were present. This form of first degree manslaughter is identical to second degree manslaughter, except for the addition of at least one element listed under subsections (b)(4)(A)-(C). The culpable mental state for subsection (b)(4) is recklessness, a term defined at RCC § 22A-206 to mean that the accused was consciously aware of a substantial risk of death, and the accused's conduct grossly deviated from the ordinary standard of care.

Subsection (b)(4)(A) specifies that a person commits first degree manslaughter if that person was reckless as to the decedent being a protected person. The culpable mental state for subsection (b)(4) is recklessness, a term defined at RCC § 22A-206 to mean that the accused was consciously aware of a substantial risk that the victim was a protected person, and the accused's conduct grossly deviated from the ordinary standard of care. The term "protected person" is defined under RCC § 22A-1001.

Subsection (b)(4)(B) specifies that a person commits first degree manslaughter if the death was caused with the purpose of harming the victim due to the victim's status as a law enforcement officer, public safety employee, participant in a citizen patrol, District official or employee, or family member of a District official or employee. This element requires that the accused acted with "purpose" a term defined at RCC § 22A-206, which means that accused must consciously desire to harm that person because of his or her status as a law enforcement officer, public safety employee, participant in a citizen patrol, district official or employee, or family member of a District official or employee.[302] "Law enforcement officer," "public safety employee," "citizen patrol," "District official or employee," and "family member" are all defined terms in RCC § 22A-1001.

Subsection (b)(4)(C) specifies that a person commits first degree manslaughter if he or she, in fact, causes the death of another by means of a dangerous weapon. The term "dangerous weapon" is defined under RCC § 22A-1001. The term "in fact" specifies that no culpable mental state is required as to whether the implement used was a "dangerous weapon," or whether use of the weapon itself caused the death.

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[299] RCC § 22A-206 (c)(4).

[300] *See* Commentary to RCC § 22A-1101.

[301] *See* Commentary to RCC § 22A-1101.

[302] Although the accused must have had purpose to harm the victim due to the victim's status, only recklessness is required as to causing the victim's death. For example, if a person intends to injure an off-duty police officer in retaliation for a prior arrest by engaging the officer in a fist fight, which causes injuries that are ultimately fatal, the person could be convicted of first degree manslaughter.

Subsection (c) states that first degree manslaughter is a [Class X offense… RESERVED]
Subsection (d) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised first degree manslaughter statute changes current law in five main ways, two of which track changes in the RCC murder statutes*[303] *and improve the proportionality of penalties.*

First, the revised first degree manslaughter statute includes felony murder predicated on a specified felony. As discussed above in the Commentary to the revised aggravated manslaughter statute, it is unclear under current law whether felony murder constitutes manslaughter.[304] The RCC resolves this ambiguity by defining first degree manslaughter to include felony murder predicated on a specified felony. In doing so, the aggravated manslaughter statute also incorporates all changes to felony murder included in the revised second degree murder statute.

Second, the revised first degree manslaughter statute incorporates the revised second degree murder statute's change to felony murder liability by requiring that the accused cause the death of another while acting "in furtherance" of the predicate felony.[305] Under current District case law felony murder does not require that the killing be "in furtherance" of the predicate felony.[306] By contrast, the revised first degree manslaughter statute changes current law by requiring that the accused caused the death of another while acting "in furtherance" of the underlying felony, just as the revised second degree murder statute requires the killing be "in furtherance" of the underlying felony.[307] This change to the first degree manslaughter offense improves the proportionality and consistency of the revised homicide offenses, by ensuring that the punishment is proportionate to the accused's culpability, and maintaining first degree manslaughter as a lesser-included offense of murder offenses.

Third, the revised first degree manslaughter statute incorporates the revised second degree murder statute's five changes to the specified felonies that can serve as a predicate to felony murder. The current first degree murder statute includes as predicates for felony murder liability: (1) all conduct constituting "robbery," currently an ungraded offense; (2) first degree child cruelty; (3) any "felony involving a controlled substance;"[308] (4) mayhem, a common law offense; and (5) "any housebreaking while armed with or using a dangerous weapon," although it is unclear which specific crimes constitute such "housebreaking."[309] By contrast, the revised first degree manslaughter statute changes current law by clarifying or limiting these predicate crimes to match liability as described in the revised second degree murder statute.[310] This change to the first degree manslaughter offense improves the proportionality and consistency of the criminal

[303] Under current law and the RCC, causing the death of another in a manner that constitutes murder also constitutes voluntary manslaughter. Consequently, RCC changes in the scope of murder liability accordingly change the scope of voluntary manslaughter.

[304] *West v. United States*, 499 A.2d 860, 864 (D.C. 1985) (Noting that "this court has never explicitly recognized voluntary manslaughter to be a lesser-included-offense of first-degree felony murder" and declining to decide the issue in that case.).

[305] *See* Commentary to RCC § 22A-1101.

[306] *Butler v. United States*, 614 A.2d 875, 887 (D.C. 1992) ("[t]here is no requirement in the law . . . that the government prove the killing was done in furtherance of the felony in order to convict the actual killer of felony murder").

[307] For further discussion of these changes, see Commentary to the revised second degree murder.

[308] D.C. Code §22-2101.

[309] See footnote 219, above, for further description of offenses that may constitute "housebreaking."

[310] For discussion of these changes, see Commentary to the revised second degree murder statute.

code, by ensuring that the punishment is proportionate to the accused's culpability, and maintaining first degree manslaughter as a lesser-included offense of murder offenses.

Fourth, the revised first degree manslaughter statute incorporates multiple penalty enhancements based on the status of the victim. The current District manslaughter statute, D.C. Code §22-2105, does not distinguish degrees of manslaughter or otherwise specify the elements of the offense. However, various separate statutes in the current D.C. Code authorize enhanced penalties for both voluntary and involuntary manslaughter based on the victim's status, including his or her age,[311] status as a specified transportation worker,[312] or status as a citizen patrol member.[313] A separate protection of District public officials offense also criminalizes harming a District employee or official, or family member, while the employee or official is engaged in official duties, or on account of those duties.[314] By contrast, the RCC's second degree manslaughter offense, which replaces the involuntary manslaughter offense under current law, can be elevated to first degree manslaughter if there is proof of at least one additional element. A person commits first degree manslaughter if he or she satisfies the elements of second degree manslaughter, and was either reckless as to the victim being a "protected person," or had purpose to harm to victim because of the victim's status as a participant in a citizen patrol, District official or employee, or family member of a District official or employee. The term "protected person" is defined under RCC § 22A-1001.[315] Because the various types of victim-specific enhancements applicable to manslaughter are all joined in revised first degree manslaughter offense it is not possible to "stack" enhancements based on the status of the victim. It is also not possible to "stack" enhancements based on the status of the victim and based on the accused using a dangerous weapon. This improves the revised penalty's proportionality by ensuring the main offense elements and gradations are the primary determinant of penalties rather than stacked enhancements. Incorporating into a gradation of manslaughter separate penalty enhancements, and the offense for harming a District employee or official also reduces unnecessary overlap between offenses and improves the clarity of the code.

Fifth, the revised first degree manslaughter statute integrates penalty enhancements for using a dangerous weapon to kill the other and bars the application of both a weapon enhancement and other enhancements based on the victim's status. Current D.C. Code § 22-

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[311] D.C. Code §§ 22-3601 (enhancement for specified crimes committed against senior citizens); 22-3611 (enhancement for specified crimes committed against minors).

[312] D.C. Code § 22-3751 (enhancement for specified crimes committed against taxicab drivers); D.C. Code § 22-3751.01 (enhancement for specified crimes committed against transit operator or Metrorail station manager).

[313] D.C. Code § 22-3602 (enhancement for specified crimes committed against citizen patrol members). However, this enhancement only applies to voluntary manslaughter, not involuntary manslaughter.

[314] D.C. Code §22-851. Specifically, the offense criminalizes intimidating, impeding, interfering with, retaliating against, stalking, assaulting, kidnapping, injuring a District official or employee or family member of an official or employee, or damages or vandalizes the property of a District official or employee or family member of an official or employee.

[315] RCC § 22A-1001(18) ("Protected person" means a person who is:
(A) Less than 18 years old, and, in fact, the defendant is at least 18 years old and at least 2 years older than the other person;
(B) 65 years old or older;
(C) A vulnerable adult;
(D) A law enforcement officer, while in the course of official duties;
(E) A public safety employee while in the course of official duties;
(F) A transportation worker, while in the course of official duties;
(G) A District official or employee, while in the course of official duties; or
(H) A citizen patrol member, while in the course of a citizen patrol.).

4502 provides enhanced penalties for committing manslaughter "while armed" or "having readily available" a dangerous weapon. Current District case law on D.C. Code § 22-4502 holds that the penalty enhancements are authorized if the accused either had "actual physical possession of [a weapon]";[316] or if the weapon was merely in "close proximity or easily accessible during the commission of the underlying [offense],"[317] provided that the accused also constructively possessed the weapon.[318] There is no further requirement under current law that the accused actually used the weapon or caused any injury.[319] The D.C. Code is silent as to whether or how the current while-armed penalty enhancement may "stack" on top of other penalty enhancements based on the status of the victim, and current case law has not specifically addressed the issue.[320] Currently, manslaughter with a while-armed penalty enhancement is subject to an additional penalty with a mandatory minimum term of at least 5 years and a maximum term of up to 30 years.[321]

By contrast, in the RCC first degree manslaughter offense the accused must actually cause death "by means of" a dangerous weapon. Merely being armed with or having readily available, a dangerous weapon would not be sufficient.[322] Because the use of a dangerous weapon is a means of committing first degree manslaughter in the RCC, it is not possible to "stack" enhancements based on use of a dangerous weapon and the status of the victim. Integrating dangerous weapon penalty enhancements improves the consistency of reformed offenses, which similarly grade by use of a dangerous weapon. Also, including enhancements for use of a dangerous weapon within the revised statute improves the proportionality of punishment by matching more severe penalties to those homicides that involve actual use of a dangerous weapon (compared to mere possession on one's person), by tailoring the penalty for use of a dangerous weapon enhancement to the underlying degree of homicide,[323] and by ensuring the main offense elements and gradations are the primary determinant of penalties rather than stacked enhancements.

Beyond these four changes to current District law, three other aspects of the revised first degree manslaughter statute may constitute substantive changes of law.

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[316] *Johnson v. United States*, 686 A.2d 200, 205 (D.C. 1996).

[317] *Clyburn v. United States*, 48 A.3d 147, 154 (D.C. 2012) (reversing sentencing enhancement under D.C. Code § 22-4502 when rifle was located in a different room from where defendant committed the underlying offense); *cf. Guishard v. United States*, 669 A.2d 1306, 1310 (D.C. 1995) (affirming sentencing enhancement under D.C. Code § 22-4502 when firearm was in a dresser drawer in the same room as the underlying offense).

[318] *Cox v. United States*, 999 A.2d 63, 69 (D.C. 2010) ("to have a weapon 'readily available,' one must at a minimum have constructive possession of it. To prove constructive possession, the prosecution was required to show that Cox knew the pistol was present in the car, and that he had not merely the ability, but also the intent to exercise dominion or control over it.").

[319] *See*, *Morton v. United States*, 620 A.2d 1338, 1340 (D.C. 1993) (affirming sentencing enhancement under D.C. Code § 22-4502 when firearm was within arm's length, but no evidence that the firearm was ever used to further any crime).

[320] However, current District practice appears to allow for such stacking of a while-armed and enhancements based on the age of the victim. See Advisory Group Memorandum #10, Penalty Enhancements, Appendices C and D providing relevant statistics.

[321] D.C. Code § 22-4502(a).

[322] However, per the revised possession of a dangerous weapon during a crime of violence offense, RCC 22A-XXXX, the revised criminal code will still provide for additional punishments when committing a homicide while possessing, but not using or displaying, a dangerous weapon.

[323] Current D.C. Code § 22-4502(a)(3) provides the same while-armed enhancement to both first and second degree murder, raising the statutory maximum for both grades of murder to life without parole.

Three changes to felony murder liability provided in the revised second degree murder statute may constitute substantive changes to the current law of manslaughter: 1) requiring a negligence mental state as to causing death for felony murder; 2) barring felony murder liability when the decedent was an accomplice to the underlying felony; and 3) barring application of felony murder liability when a third party committed the fatal act. These three changes limit the scope of felony murder to ensure that the doctrine is only applied when warranted by the accused's culpability, and when innocent bystanders are killed.[324] To the extent that these revisions change the scope of felony murder, they also change the scope of first degree manslaughter. These possible changes to current law improve the proportionality and consistency of the criminal code. They ensure that the punishment is proportionate to the accused's culpability, and maintaining first degree manslaughter as a lesser-included offense of murder offenses.

Relation to National Legal Trends. *The above mentioned changes to current District law are not supported by state criminal codes. Although nearly all jurisdictions define voluntary manslaughter, which is analogous to the RCC's first degree manslaughter offense, as causing the death of another under circumstances that would constitute murder, no other jurisdictions integrate aggravating circumstances applicable to voluntary manslaughter into a separate aggravated manslaughter offense. However, CCRC staff did not research whether or how these other states may have separate penalty enhancements that affect second degree murder.*

[324] See Commentary to the revised second degree murder statute RCC § 22A-1101.

RCC § 22A-1102(c). Second degree manslaughter.

Explanatory Note. *This subsection establishes the second degree manslaughter offense for the Revised Criminal Code (RCC). This offense criminalizes recklessly causing the death of another person. The RCC second degree manslaughter offense replaces, in part, the manslaughter statute, D.C. Code §22-2105. Specifically, the RCC second degree manslaughter offense replaces the two types of involuntary manslaughter recognized under current District case law: criminal negligence manslaughter,*[325] *and misdemeanor manslaughter.*[326]

Subsection (c) specifies that a person commits second degree manslaughter if he or she recklessly causes the death of another. The culpable mental state of recklessness, a term defined at RCC § 22A-206, requires that the accused was consciously aware of a substantial risk of causing death, and that the accused's conduct grossly deviated from the standard of care that a reasonable person would observe in the person's situation.[327]

Subsection (d) states that voluntary manslaughter is a [Class X offense… RESERVED]

Subsection (e) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised second degree manslaughter statute changes existing law in two ways that improve the proportionality of penalties and the clarity of the offense.*

First, the revised second degree manslaughter statute replaces the "misdemeanor manslaughter" type of manslaughter liability with a requirement that requires that the accused recklessly caused the death of another. The current District manslaughter statute, D.C. Code §22-2105, does not distinguish degrees of manslaughter or otherwise specify the elements of the offense, including the culpable mental state required. The DCCA has held that one way a person commits involuntary manslaughter is if he or she causes the death of another person while committing or attempting to commit any offense that is "dangerous in and of itself,"[328] which requires that the offense creates "an inherent danger of physical injury[.]"[329] The DCCA has further required that the offense be committed "in a way which is dangerous under the particular circumstances of the case,"[330] meaning "the manner of its commission entails a reasonably foreseeable risk of appreciable injury."[331] This form of involuntary manslaughter in the current D.C. Code is commonly called "misdemeanor manslaughter." By contrast, under the revised

[325] *Morris v. United States*, 648 A.2d 958, 959-60 (D.C. 1994).
[326] *Walker*, 380 A.2d at 1391.
[327] *See* Commentary to RCC § 22A-206.
[328] *Walker*, 380 A.2d at 1391.
[329] *Comber*, 584 A.2d at 50.
[330] *Id.* at 51. This additional restriction was adopted to avoid injustice in cases where the underlying offense is inherently dangerous in the abstract, but can be committed in non-violent ways. For example, simple assault may generally be deemed "dangerous in and of itself," but under current law a person can commit simple assault by making non-violent but unwanted physical contact with another person. Such a non-violent assault would not be committed "in a way which is dangerous under the particular circumstances of the case," and death resulting from a non-violent simple assault would not constitute misdemeanor manslaughter.
[331] *Donaldson v. United States*, 856 A.2d 1068, 1076 (D.C. 2004) (citing *Comber*, 584 A.2d at 49 n. 33). This requirement is intended to prevent injustice when "death freakishly results" from conduct that constitutes an inherently dangerous offense, such as simple assault, that can be committed in ways that do not create a foreseeable risk of appreciably injury. *Comber*, A.2d at 50.

second degree manslaughter statute there is no requirement that the accused committed or attempted to commit any other "dangerous" offense, only that the accused recklessly caused the death of another. Recklessness is defined under RCC § 22A-206, and requires that the accused consciously disregarded a substantial risk of death, and that the accused's conduct grossly deviated from the ordinary standard of care that a reasonable person would observe in that situation. This change improves the clarity and consistency of the criminal code by codifying a culpable mental state requirement using defined terms, and improves the proportionality of the homicide statutes by creating an intermediate grade between negligent and depraved heart killings.

Second, the revised second degree manslaughter statute eliminates the "criminal negligence" type of involuntary manslaughter liability. The DCCA, relying on common law precedent, has held that a second way a person commits involuntary manslaughter is if that person causes the death of another by engaging in conduct that creates an "extreme risk of death . . . under circumstances in which the actor should have been aware of the risk."[332] The DCCA has explained that "the only difference between risk-creating activity sufficient to sustain a 'depraved heart' murder conviction and [an involuntary manslaughter] conviction 'lies in the quality of [the actor's] awareness of the risk.'"[333] Whereas depraved heart murder requires that the accused consciously disregard the risk, negligent manslaughter only requires that the accused should have been aware of the risk.[334] By contrast, the revised second degree manslaughter statute requires that the accused consciously disregarded a substantial, though not necessarily extreme, risk of death. In addition, the accused's conduct must have constituted a gross deviation from the ordinary standard of care, but need not have occurred "under circumstances manifesting extreme indifference to human life." Negligently causing the death of another continues to be criminalized as negligent homicide, per RCC § 22A-1103. This change improves the proportionality of the revised homicide statutes by more finely grading the offense. Actors who are genuinely unaware of the risk they create, even extreme risks, are less culpable than those who are consciously aware of the risk they create.

Relation to National Legal Trends. *The revised second degree manslaughter offense's two above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, eliminating the "misdemeanor manslaughter" form of involuntary manslaughter is generally consistent with state criminal codes. Although a slight majority of all states retain a version of "misdemeanor manslaughter" twenty of the twenty-nine reformed code jurisdictions, and the MPC,[335] do not define involuntary manslaughter to include "misdemeanor manslaughter."[336]

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[332] *Smith v. United States*, 686 A.2d 537, 545 (D.C. 1996).

[333] *Comber*, 584 A.2d at 49 (quoting *Dixon v. United States*, 419 F.2d 288, 293 (D.C. Cir. 1969)).

[334] *Id.* at 48-49.

[335] MPC § 210.3.

[336] Alaska Stat. Ann. § 11.41.120; Ariz. Rev. Stat. Ann. § 13-1103; Colo. Rev. Stat. Ann. § 18-3-104; Conn. Gen. Stat. Ann. § 53a-56; Del. Code Ann. tit. 11, § 632; Haw. Rev. Stat. Ann. § 707-702; Ky. Rev. Stat. Ann. § 507.040; Me. Rev. Stat. tit. 17-A, § 203; Mo. Ann. Stat. § 565.024; Mont. Code Ann. § 45-2-101 (note that Montana does not criminalize recklessly causing the death of another, and only includes a negligent homicide offense); N.H. Rev. Stat. Ann. § 630:2; N.J. Stat. Ann. § 2C:11-4; N.Y. Penal Law § 125.15; N.D. Cent. Code Ann. § 12.1-16-02; Or. Rev. Stat. Ann. § 163.125; S.D. Codified Laws § 22-16-20; Tex. Penal Code Ann. § 19.04; Utah Code Ann. § 76-5-205; Wash. Rev. Code Ann. § 9A.32.060; Wis. Stat. Ann. § 940.06.

Second, eliminating the "criminal negligence" form of involuntary manslaughter is also consistent with state criminal codes. A majority of states do not include a criminal negligence form of involuntary manslaughter, including twenty three of the twenty nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereinafter "reformed jurisdictions").[337]

In general, defining second degree manslaughter as recklessly causing the death of another is consistent with state criminal codes. A majority of states, the Model Penal Code (MPC)[338], and the proposed Federal Criminal Code[339] define involuntary manslaughter as recklessly causing the death of another. This is also the clear majority approach across the twenty-nine reformed jurisdictions, of which twenty-two define involuntary manslaughter as recklessly causing the death of another.[340]

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[337] Alaska Stat. Ann. § 11.41.120; Ariz. Rev. Stat. Ann. § 13-1103; Ark. Code Ann. § 5-10-104; Colo. Rev. Stat. Ann. § 18-3-104; Conn. Gen. Stat. Ann. § 53a-55; Del. Code Ann. tit. 11, § 632; Fla. Stat. Ann. § 782.07; Haw. Rev. Stat. Ann. § 707-702; 720 Ill. Comp. Stat. Ann. 5/9-3; Ind. Code Ann. § 35-42-1-4; Ky. Rev. Stat. Ann. § 507.040; Mo. Ann. Stat. § 565.024; Mont. Code Ann. § 45-5-104; N.D. Cent. Code Ann. § 12.1-16-02; Neb. Rev. Stat. Ann. § 28-305; N.H. Rev. Stat. Ann. § 630:2; N.J. Stat. Ann. § 2C:11-4; N.Y. Penal Law § 125.15; Ohio Rev. Code Ann. § 2903.04; Or. Rev. Stat. Ann. § 163.118; S.D. Codified Laws § 22-16-20; Tex. Penal Code Ann. § 19.04; Utah Code Ann. § 76-5-205; Wis. Stat. Ann. § 940.06.

[338] MPC § 210.3.

[339] Proposed Federal Criminal Code § 1602.

[340] Ala. Code § 13A-6-4; Ark. Code Ann. § 5-10-104; Colo. Rev. Stat. Ann. § 18-3-104; Conn. Gen. Stat. Ann. § 53a-55; Del. Code Ann. tit. 11, § 632; Haw. Rev. Stat. Ann. § 707-702; 720 Ill. Comp. Stat. Ann. 5/9-3; Kan. Stat. Ann. § 21-5405; Ky. Rev. Stat. Ann. § 507.040; Me. Rev. Stat. tit. 17-A, § 203; Mo. Ann. Stat. § 565.024; N.H. Rev. Stat. Ann. § 630:2; N.J. Stat. Ann. § 2C:11-4; N.Y. Penal Law § 125.15; N.D. Cent. Code Ann. § 12.1-16-02; Or. Rev. Stat. Ann. § 163.118; S.D. Codified Laws § 22-16-20; Tex. Penal Code Ann. § 19.04; Utah Code Ann. § 76-5-205; Wash. Rev. Code Ann. § 9A.32.060.

Chapter 11. Homicide.

RCC § 22A-1101 Murder.
RCC § 22A-1102 Manslaughter.
RCC § 22A-1103 Negligent Homicide.

RCC § 22A-1103 Negligent Homicide.

(a) A person commits the offense of negligent homicide when that person negligently causes the death of another person

(b) *Penalties*. Negligent homicide is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions*. The term "negligently" has the meaning specified in § 22A-206.

RCC § 22A-1103. Negligent homicide.

Commentary

Explanatory Note. *This subsection establishes the negligent homicide offense for the Revised Criminal Code (RCC). This offense criminalizes negligently causing the death of another person. The revised offense replaces the current negligent homicide statute in D.C. Code § 50-2203.01, the criminal negligence version of involuntary manslaughter offense recognized under current District case law, and, in relevant part, the misdemeanor manslaughter version of involuntary manslaughter offense recognized under current District case law.*

Subsection (a) specifies that a person commits negligent homicide if he or she negligently causes the death of another. The section specifies a culpable mental state of "negligence" a term defined in RCC § 22A-206 to mean that the accused should have been aware of a substantial risk of death, and the accused's conduct must have grossly deviated from the standard of care that a reasonable person would observe in the accused's situation.

Subsection (b) states that voluntary manslaughter is a [Class X offense… RESERVED]

Subsection (c) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised negligent homicide offense changes current District law in three main ways that improves the proportionality of the offense and reduces an unnecessary gap in current law.*

First, the revised negligent homicide offense requires that the accused acted with criminal negligence, as defined under RCC § 22A-206, rather than the civil standard of negligence required in tort actions. The District's current negligent homicide statute requires that the accused operate a vehicle in a "careless, reckless, or negligent manner[.]"[341] The DCCA has interpreted this language to require that the accused operated a vehicle without "that degree of care that a person of ordinary prudence would exercise under the same or similar circumstances . . . It is a failure to exercise ordinary care."[342] This standard is borrowed directly from civil tort cases.[343] Although the DCCA does not always clearly define the test,[344] in accordance with general principles of tort law, the standard of care is determined by weighing the degree of risk and severity of potential harm against the benefit of the risk-creating activity (or, the cost of abstaining from or preventing the risk-creating activity).[345]

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[341] D.C. Code § 50-2203.01; *see Stevens v. United States*, 249 A.2d 514, 514-15 (D.C. 1969) ("In prosecutions for negligent homicide, the Government must prove three elements: (1) the death of a human being, (2) by instrumentality of a motor vehicle, (3) operated at an immoderate speed or in a careless reckless, or negligent manner, but not willfully or wantonly.").

[342] *Butts v. United States*, 822 A.2d 407, 416 (D.C. 2003).

[343] *See Sanderson v. United States*, 125 A.2d 70, 73 (D.C. 1956) (citing to a tort case, *Am. Ice Co. v. Moorehead*, 66 F.2d 792, 793 (D.C. Cir. 1933), to determine whether defendant was criminally liable under the negligent homicide statute). *See also*, D.C. Crim. Jur. Instr. § 4-214 (noting that the instruction defining negligence was "based primarily on instructions found in the Standardized Civil Jury Instructions for the District of Columbia").

[344] At times, District courts simply assert that conduct was "negligent" without actually discussing the relevant standard of care, and whether the defendant deviated from it. *E.g.*, *Sanderson v. United States*, 125 A.2d 70, 73 (D.C. 1956) ("Defendant admitted that he did not see the lady pedestrian until he was even with the south curb-line of P Street, when she was 3 to 5 feet away, and that he could not account for his failure to see her sooner. This was clearly negligence.").

[345] *See D.C. v. Walker*, 689 A.2d 40, 45 (D.C. 1997) (stating that to determine if officer's pursuing fleeing suspect acted negligently, court should inquire "whether the need to apprehend [the fleeing suspect's car] was outweighed by the foreseeable hazards of the pursuit."); *see generally*, Restatement (Second) of Torts § 282 (1965). The DCCA

By contrast, the revised negligent homicide statute requires criminal negligence under the RCC, a more exacting standard than civil law negligence. Whereas tort negligence requires that the accused failed "to exercise ordinary care . . . that a person of ordinary prudence would exercise under the same or similar circumstances,"[346] negligence under the RCC requires that the accused *grossly deviated* from the ordinary standard of care.[347] The RCC's definition of negligence also requires that the accused created a "substantial" risk, whereas tort negligence has no substantial risk requirement.[348] The revised negligent homicide statute's use of the RCC definition of criminal "negligence" improves the clarity and consistency of the homicide statutes by using a codified, standardized culpable mental state definition used in other offenses. The revised statute's use of the RCC definition of criminal "negligence" also improves the proportionality of the revised homicide statutes by requiring at least a culpable mental state of criminal negligence for felony liability.[349]

Second, the revised negligent homicide offense is not limited to killings by means of a vehicle. The current negligent homicide offense only applies if the accused causes the death of another "by operation of any vehicle in a careless, reckless, or negligent manner[.]"[350] By contrast, the revised negligent homicide offense criminalizes negligently causing the death of another regardless of whether a vehicle was involved. This change improves the proportionality of the revised negligent homicide offense insofar as negligently causing the death of another by operation of a motor vehicle is not more culpable than negligently causing the death of another by other means.

Third, revised negligent homicide offense requires a lower culpable mental state than that required under the current "criminal negligence" form of involuntary manslaughter. The current "criminal negligence" form of involuntary manslaughter requires that the accused causes the death of another by engaging in conduct that creates an "extreme risk of death . . . under

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also has stated "a fundamental legal principle to which this court has adhered . . . [is that] the greater the danger, the greater the care which must be exercised." *Pannu v. Jacobson*, 909 A.2d 178, 198 (D.C. 2006) (internal quotations omitted).

[346] *Butts v. United States*, 822 A.2d 407, 416 (D.C. 2003).

[347] Commentary to RCC § 22A-206.

[348] RCC § 22A-206. A defendant who causes the death of another by creating a very slight risk of death cannot be guilty of the revised negligent homicide, even if his risk-creating activity is of very little or no social value. The substantial risk requirement however overlaps significantly with the "gross deviation" requirement in the definition of negligence. It is unlikely a person can grossly deviate from the ordinary standard of care without also creating a sufficiently substantial risk of death.

[349] Requiring more than civil negligence for felony crimes is a norm of American criminal law has deep roots, dating back to English common law. *See Morissette v. United States*, 342 U.S. 246, 251-52 (1952) ("A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.' Common-law commentators of the Nineteenth Century early pronounced the same principle, although a few exceptions not relevant to our present problem came to be recognized."). Similarly, the DCCA has recently relied on "the principle that neither simple negligence nor naivete ordinarily forms the basis of felony liability." *Owens v. United States,* 90 A.3d 1118, 1121 (D.C. 2014) (citing *DiGiovanni v. United States,* 580 A.2d 123, 126 (D.C. 1990) (J. Steadman, concurring)). However, using civil negligence as a basis for criminal liability is not unheard of, nor does applying simple negligence necessarily violate Due Process. *See State v. Hazelwood*, 946 P.2d 875, 878-79 (Alaska 1997) ("there must be some level of mental culpability on the part of the defendant. However, this principle does not preclude a civil negligence standard.").

[350] D.C. Code § 50-2203.01.

circumstances in which the actor should have been aware of the risk."[351] The DCCA has explained that "the only difference between risk-creating activity sufficient to sustain a 'depraved heart' murder conviction and [an involuntary manslaughter] conviction 'lies in the quality of [the actor's] awareness of the risk.'"[352] Whereas depraved heart murder requires that the accused consciously disregard the risk, negligent manslaughter only requires that the accused should have been aware of the risk.[353] By contrast, the revised negligent homicide uses a less exacting standard than the current involuntary homicide case law indicates, and does not require that the accused created an extreme risk of death. Any conduct that would have satisfied the "criminal negligence" form of involuntary manslaughter would satisfy the revised negligent homicide offense. This change improves the clarity and consistency of the criminal code by codifying a culpable mental state requirement using defined terms, and improves the proportionality of the homicide statutes by creating an intermediate grade that requires less culpability than reckless manslaughter, but more than negligence required in tort law.

Relation to National Legal Trends. *The revised negligent homicide statute's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, changing the negligent homicide offense to require that the accused acted with criminal negligence and not merely civil negligence is strongly supported by state criminal codes. Only six states provide homicide liability on the basis of civil negligence.[354] The other forty-four jurisdictions do not have an analogous negligent homicide offense[355]; require gross or criminal negligence[356]; or require civil negligence plus an additional aggravating factor, such as intoxication[357], or violation of a state or local traffic law.[358] The American Law Institute's Model Penal Code negligent homicide offense also requires criminal negligence.[359]

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[351] *Smith v. United States*, 686 A.2d 537, 545 (D.C. 1996).
[352] *Comber*, 584 A.2d at 49 (quoting *Dixon v. United States*, 419 F.2d 288, 293 (D.C. Cir. 1969)).
[353] *Id.* at 48-49.
[354] Cal. Penal Code § 193; Conn. Gen. Stat. Ann. § 14-222a; Haw. Rev. Stat. § 701-107; Mass. Gen. Laws Ann. ch. 90; § 24G, Nev. Rev. Stat. Ann. § 193.150; Okla. Stat. Ann. tit. 47, § 11-903.
[355] These states are: Georgia, Illinois, Indiana, Michigan (previously had a negligent homicide offense that applied simple negligence, but that statute was repealed in 2010); Nebraska, New Jersey, Rhode Island, South Dakota, West Virginia, and Maryland.
[356] Alaska Stat. Ann. § 11.41.130; Ala. Code § 13A-6-4; Ariz. Rev. Stat. Ann. § 13-1102; Colo. Rev. Stat. Ann. § 18-3-105; Conn. Gen. Stat. Ann. § 53a-58 ; Del. Code Ann. tit. 11, § 631; Ky. Rev. Stat. Ann. § 507.050 (Kentucky uses the term "recklessness" in place of "negligence"); La. Rev. Stat. Ann. 14:32; Me. Rev. Stat. tit. 17-A, § 203 (criminalized as a form of manslaughter, equivalent to recklessly causing the death of another); Mo. Ann. Stat. § 565.024; Miss. Code. Ann. § 97-3-47 (included as a form of manslaughter); Mont. Code Ann. § 45-5-104; N.C. Gen. Stat. Ann. § 14-18, *State v. Hudson*, 483 S.E.2d 436, 439 (N.C. 1997); N.D. Cent. Code Ann. § 12.1-16-03; N.H. Rev. Stat. Ann. § 630:3; N.M. Stat. Ann. § 30-2-3 (included as a form of manslaughter); N.Y. Penal Law § 125.10; Ohio Rev. Code Ann. § 2903.05 (but requires use of a firearm and ordinance); Okla. Stat. Ann. tit. 21, § 716; Or. Rev. Stat. Ann. § 163.145; 75 Pa. Cons. Stat. Ann. § 3732 (West); *Commonwealth v. Sloat*, 11 Pa. D. & C.3d 745, 747 (Pa. Com. Pl. 1979) ("the legislature has acted to fill the gap and to make punishable conduct which is more blameworthy than civil negligence yet which is not encompassed within involuntary manslaughter under the Pennsylvania Crimes Code with its requirement for acting in a reckless or grossly negligent manner while causing the death of another").; S.C. Code Ann. § 16-3-60 (included as a form of manslaughter); Tenn. Code Ann. § 39-13-212; Tex. Penal Code Ann. § 12.35; Utah Code Ann. § 76-5-206; *State v. Viens*, 144-45, 978 A.2d 37, 42-43 (Vt. 2009); Wash. Rev. Code Ann. § 9A.32.070 (included as a form of manslaughter); Wyo. Stat. Ann. § 6-2-107.
[357] *E.g.,* Utah Code Ann. § 76-5-207 (West) (requiring that defendant operates a motor vehicle in a negligent manner causing the death of another *and* that the defendant had a blood alcohol concentration above .08 grams, or was under the influence of alcohol or drugs to a degree that renders the person incapable of safely operating a vehicle).

Second, broadening the negligent homicide offense by omitting the requirement that the accused operated a vehicle is also generally supported by state criminal codes. The Model Penal Code,[360] the Proposed Federal Criminal Code[361], and twenty one of the twenty-nine states that have comprehensively reformed criminal codes influenced by the MPC and have a general part[362] criminalize negligently causing the death of another, regardless of whether a vehicle was used.[363]

Third, replacing the "criminal negligence" version of manslaughter with the revised negligent homicide offense is consistent with national legal trends. A majority of states define involuntary manslaughter as recklessly causing the death of another.[364] A minority of states, by statute, define manslaughter to include negligently causing the death of another.[365] However, CCRC staff has not comprehensively reviewed case law in other jurisdictions to determine how many states still recognize a criminal negligence version of manslaughter.

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[358] *E.g.*, N.C. Gen. Stat. Ann. § 15A-1340.23 (West) (requires that the defendant was "engaged in the violation of any State law or local ordinance applying to the operation or use of a vehicle or to the regulation of traffic").

[359] Model Penal Code § 210.4.

[360] *Id*.

[361] Proposed Federal Criminal Code § 1603.

[362] *See* Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[363] Alaska Stat. Ann. § 11.41.130; Ala. Code § 13A-6-4; Ariz. Rev. Stat. Ann. § 13-1102; Ark. Code Ann. § 5-10-105; Colo. Rev. Stat. Ann. § 18-3-105; Conn. Gen. Stat. Ann. § 53a-58; Del. Code Ann. tit. 11, § 631; Ky. Rev. Stat. Ann. § 507.050; Minn. Stat. Ann. § 609.205; Mo. Ann. Stat. § 565.024; Mont. Code Ann. § 45-5-104; N.H. Rev. Stat. Ann. § 630:3; N.Y. Penal Law § 125.10; N.D. Cent. Code Ann. § 12.1-16-03; Ohio Rev. Code Ann. § 2903.05 (though Ohio's negligent homicide requires that the defendant used a deadly weapon or dangerous ordinance); Or. Rev. Stat. Ann. § 163.145; 18 Pa. Stat. Ann. § 2504; Tenn. Code Ann. § 39-13-212; Tex. Penal Code Ann. § 12.35; Utah Code Ann. § 76-5-206; Wash. Rev. Code Ann. § 9A.32.070.

[364] Alaska Stat. Ann. § 11.41.120; Ala. Code § 13A-6-4; Ark. Code Ann. § 5-10-104; Ariz. Rev. Stat. Ann. § 13-1103; Colo. Rev. Stat. Ann. § 18-3-104; Conn. Gen. Stat. Ann. § 53a-55; Del. Code Ann. tit. 11, § 632; Haw. Rev. Stat. Ann. § 707-702; 720 Ill. Comp. Stat. Ann. 5/9-3; Kan. Stat. Ann. § 21-5405; Ky. Rev. Stat. Ann. § 507.040; Me. Rev. Stat. tit. 17-A, § 203; Mo. Ann. Stat. § 565.024; N.D. Cent. Code Ann. § 12.1-16-02; N.H. Rev. Stat. Ann. § 630:2; N.J. Stat. Ann. § 2C:11-4; N.Y. Penal Law § 125.15; Or. Rev. Stat. Ann. § 163.118; S.C. Code Ann. § 16-3-60; S.D. Codified Laws § 22-16-20; Tex. Penal Code Ann. § 19.04; Utah Code Ann. § 76-5-205; Wis. Stat. Ann. § 940.06; Wyo. Stat. Ann. § 6-2-105.

[365] Fla. Stat. Ann. § 782.07; Idaho Code Ann. § 18-4006; *Cox v. State*, 534 A.2d 1333, 1335-36 (1988); Md. Code Ann., Crim. Law § 2-209; Me. Rev. Stat. tit. 17-A, § 203; *In re Gillis*, 512 N.W.2d 79, 80 (Mich. 1994); Minn. Stat. Ann. § 609.205; Miss. Code. Ann. § 97-3-27; Mo. Ann. Stat. § 565.024 (but requires operation of a motor vehicle, otherwise manslaughter requires recklessness); State v. Hudson, 483 S.E.2d 436, 439 (N.C. 1997); Okla. Stat. Ann. tit. 21, § 716; 18 Pa. Stat. Ann. § 2504; *State v. Ortiz*, 824 A.2d 473, 485-86 (R.I. 2003); S.C. Code Ann. § 16-3-60 (but negligence is defined as "reckless disregard for the safety of others"); *State v. Viens*, 978 A.2d 37, 42-43 (Vt. 2009); Wash. Rev. Code Ann. § 9A.32.070.