First Draft of Report #67 – Entrapment, Duress, and Mental Disease or Defect Defenses

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 22E 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 #67 – Entrapment, Duress, and Mental Disease or Defect Defenses is November 9, 2020. Oral comments and written comments received after this date may not be reflected in the next draft or final recommendations. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

RCC § 22E-501. Duress.

(a) *Affirmative defense*. It is an affirmative defense that, in fact:
  (1) The actor reasonably believes another person communicated to the actor that the person will cause a criminal bodily injury, sexual act, sexual contact, or confinement to any person;
  (2) The actor reasonably believes the conduct constituting the offense is necessary, in its timing, nature, and degree, to avoid the threatened criminal harm; and
  (3) A reasonable person of the same background and in the same circumstances as the actor would comply.

(b) *Exceptions.* This defense is not available when, in fact:
  (1) The person recklessly brings about the situation requiring a choice of harms;
  (2) Negligence is the culpable mental state for an objective element of the offense and the person is negligent in bringing about the situation requiring a choice of harms;
  (3) The conduct constituting the offense is expressly addressed by another available defense, affirmative defense, or exclusion from liability; or
  (4) The conduct constituting the offense is an escape from a correctional facility or officer under RCC § 22E-3401 and the person does not make reasonable efforts to safely return to custody.

(c) *Definitions*. The term "objective element" has the meaning specified in RCC § 22E-201; the terms "recklessly" and "negligent" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "bodily injury," "sexual act," and "sexual contact" have the meanings specified in RCC § 22E-701.

COMMENTARY

Explanatory Note. *This section establishes a duress defense for the Revised Criminal Code (RCC). The defense applies when a person is coerced to commit an offense by threat of unlawful force against himself or another. The RCC duress defense is the first codification of such a defense in the District.*

Subsection (a) establishes the requirements for the affirmative defense. Under RCC § 22E-201(b), a defendant bears the burden of proving the affirmative defense by a preponderance of the evidence. However, the defense does not require an admission of guilt.[1] This defense is distinct from any culpable mental state requirements of a given offense and even if the elements of duress are not satisfied, evidence of duress may be relevant in determining if the defendant had the requisite mental state for a particular

[1] *See McClam v. United States*, 775 A.2d 1100, 1104 (D.C. 2001) ("Once the defendant requests an instruction, it is not necessary that the evidentiary basis for the instruction stem from the defendant's evidence; it may also be derived from the government's evidence.").

offense.[2] The term "in fact" indicates that no culpable mental state need be proven for the defense requirements in subsection (a).[3]

Paragraph (a)(1) requires that the defendant reasonably believe that someone has threatened to cause a criminal bodily injury, sexual act, sexual contact, or confinement to the actor or to another person. As in the revised criminal threats offense,[4] the verb "communicates" is intended to be broadly construed, encompassing all speech[5] and other messages[6] that are received and understood by another person.

Paragraph (a)(2) requires that the defendant reasonably believe the conduct constituting the offense is necessary to prevent the threatened harm from occurring. The person's belief that the threat is genuine may be mistaken, but it must be objectively reasonable. Similarly, the person's belief that their conduct will prevent the harm may be mistaken but must be reasonable.[7] Reasonableness is an objective standard that takes into account relevant characteristics of the actor.[8] Conduct is not necessary if it can be avoided by a reasonable[9] "legal alternative available to the defendants that does not involve violation of the law."[10]

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[2] Belief that another person threatened to inflict criminal harm may be relevant to determining whether a defendant satisfied the blameworthiness requirements for recklessness and negligence mental states under RCC § 22E-206, as well as the "extreme indifference" required for certain homicide and assault offenses. Extreme indifference, recklessness, and negligence all require risk creation *and* a finding that the actor was sufficiently blameworthy. Factfinders may consider the reasons an actor engaged in risky behavior in determining whether the actor was sufficiently blameworthy. For example, if a person drives at high speed under threat of being beaten and crashes the car causing property damage, even if the requirements of duress are not satisfied, the threat of being beaten is relevant in determining whether the person's conduct was sufficiently blameworthy.

[3] RCC § 22E-207.

[4] RCC § 22E-1204.

[5] The term "speech" is defined in RCC § 22E-701 and means oral or written language, symbols, or gestures.

[6] A person may communicate through non-verbal conduct such as displaying a weapon. *See State v. Murphy*, 545 N.W.2d 909, 915 (Minn. 1996) ("Many physical acts considered in context communicate a terroristic threat. We may find our examples in the case law, such as drawing a finger across one's throat or discharging a firearm over the telephone; in the movies, such as boiling a rabbit on the stove in the tranquil setting of former paramour's new family home, or placing a severed horse's head in a bed; or as here, depositing dead animals at a residence or planting a fake bomb. Life is replete with such examples, and whatever the source, the principle is the same: physical acts communicate a threat that its originator will act according to its tenor." (Internal quotations omitted.)).

[7] For example, a person does not lose a duress defense if the threatened harm is carried out.

[8] *See* Commentary to RCC § 22E-401, Lesser Harm; Model Penal Code § 3.02 cmt. at 241-42 (1985) (concerning the necessity defense) ("…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed…The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts.") (Citations omitted).

[9] Not every legal alternative will foreclose the defense. It must be reasonable to expect the actor to recognize a feasible opportunity to avoid criminal harm.

[10] *See* Commentary to RCC § 22E-401, Lesser Harm; *Griffin v. U.S.*, 447 A.2d 776, 778 (D.C. 1982) (citing *United States v. Bailey*, 444 U.S. 394, 410 (1980) ("Under any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, "a chance both to refuse to do the criminal act and also to avoid the threatened harm," the defenses will fail.")).

Paragraph (a)(3) requires that a reasonable person of the same background and in the same circumstances as the actor would comply. In determining whether a reasonable person would comply, factfinders should consider the nature of the potential harm to the defendant or another, the defendant's particular circumstances and background, and the nature of the conduct constituting the offense. A potential harm may satisfy this element of the defense as to a particular defendant, but not another.[11] In addition, harms that would compel a reasonable person to commit a particular offense may not necessarily be sufficient to compel a reasonable person to commit a more serious offense.

Subsection (b) establishes four exceptions to the duress defense.

Paragraph (b)(1) precludes application of the defense if the defendant is reckless in bringing about the situation that places the defendant under duress. "Reckless" is defined in in RCC § 22E-206 and here requires that the person consciously disregard a substantial risk that they would cause the coercion to occur and that the person's disregard of the risk is clearly blameworthy.[12]

Paragraph (b)(2) precludes application of the defense if the defendant is negligent in bringing about the situation requiring the choice of harms an objective element of the offense requires only a negligence mental state. Negligence are defined in in RCC § 22E-206 and here requires that the person should be aware of a substantial risk that they would cause the coercion to occur and that the person's failure to perceive the risk is clearly blameworthy.

Paragraph (b)(3) specifies that the defense does not apply in circumstances where the legislature has more specifically addressed the conduct in question in another codified defense or exclusion from liability.

Paragraph (b)(4) narrows the availability of a duress defense for the offense of escape from a correctional facility or officer under RCC § 22E-3401. For this offense, a defendant must not only prove that duress not only caused them to leave custody but also prove inhibited them from safely returning.[13] The defendant must make reasonable efforts to safely return.

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

Relation to Current District Law. *The revised duress defense statute clearly changes current District law in one main way.*

The revised statute does not categorically require that the harm to be avoided be immediate. The current D.C. Code does not codify a duress defense, however District case law requires a reasonable belief that the actor would suffer immediate harm.[14] In contrast, the RCC statute requires the conduct be necessary in its timing, nature, and degree, but does not specify that harm to be avoided must be imminent. In unusual circumstances,

[11] For example, a threat to punch the actor may be sufficient to cause an infirm and elderly person to comply, but not necessarily a healthy younger person.

[12] For example, if a defendant agrees to engage in a highly dangerous criminal endeavor, and a co-conspirator then threatens the defendant to commit an additional crime in furtherance of the conspiracy, the duress defense may not be available, if the defendant was aware of a substantial risk that a co-conspirator would compel him to commit an additional crime.

[13] *See Stewart v. U.S.*, 370 A.2d 1374, 1376–77 (D.C. 1977).

[14] *McClam v. U.S.*, 775 A.2d 1100, 1104 (D.C. 2001).

conduct may be necessary to avoid a much later but otherwise inevitable harm.[15] This change improves the proportionality of the revised statutes.

Beyond this change to current District law, six other aspects of the revised statute may constitute substantive changes to District law.

First, the revised statute requires the defendant prove the affirmative defense by a preponderance of the evidence. The current D.C. Code does not codify a duress defense, and the District of Columbia Court of Appeals ("DCCA") has not addressed whether duress is a traditional defense that must be disproven by the government if it is supported by any evidence, "however weak,"[16] or an affirmative defense that must be proven by the defendant by a preponderance of the evidence. In federal court, a defendant must affirmatively present sufficient evidence of duress.[17] To resolve this ambiguity, the RCC specifies that the defendant must prove this defense by a preponderance of the evidence. This change clarifies the revised statute and improves its consistency and proportionality.

Second, the revised statute includes acting under threat of a criminal bodily injury, sexual act, sexual contact, or confinement. The current D.C. Code does not codify a duress defense. District case law has recognized a duress defense when a person fears serious bodily injury or death,[18] however it is unclear whether other harms may also be predicates for a duress defense. To resolve this ambiguity, the RCC statute specifies a range of threatened conduct that may place a person in duress, including behavior such as a severe beating, rape, or kidnapping. This recognizes that, in some circumstances, a criminal threat of a lesser injury might serve as a powerful incentive to participate in a crime.[19] This change improves the clarity and proportionality of the revised statutes.

Third, the revised statute includes threats to harm a third person other than the defendant. The current D.C. Code does not codify a duress defense. The DCCA has recognized a duress defense where a person fears their own death or serious bodily injury[20] but has not yet addressed whether the defense applies when a person fears harm to another person. There are instances in which a criminal threat of a harm to a third person might serve as a powerful incentive to participate in a crime.[21] To resolve this ambiguity, the RCC excuses conduct that is the result of a credible threat to harm another person. This change improves the clarity and proportionality of the revised statutes.

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[15] As the Model Penal Code commentary to Necessity explains, "[I]t is a mistake to erect imminence as an absolute requirement, since there may be situations in which an otherwise illegal act is necessary to avoid an evil that may occur in the future. If, for example, A and B have driven in A's car to a remote mountain location for a month's stay and B learns that A plans to kill him near the end of the stay, B would be justified in escaping with A's car although the threatened harm will not occur for three weeks." The revised defense applies in this scenario. *See* Model Penal Code § 3.02 cmt. at 17 (1985).

[16] *See* D.C. Crim. Jur. Instr. § 9.100.

[17] *Dixon v. U.S.*, 548 U.S. 1 (2006); *but see In re Warner*, 905 A.2d 233, 240 n.6 (D.C. 2006).

[18] *McClam v. U.S.*, 775 A.2d 1100, 1104 (D.C. 2001); *Stewart v. United States*, 370 A.2d 1374, 1376 (D.C. 1977) (recognizing in *dicta* that other jurisdictions include sexual attacks as a possible predicate for a duress defense but then describing only serious bodily injury and death as predicates in the District).

[19] Consider, for example, Person A threatens that he will beat B severely, if B does not close curtains to conceal A assaulting C. B reluctantly agrees and is charged as an accomplice to A's felonious assault. Under the revised statute, B may defend on grounds of duress even if B feared only a bodily injury or significant bodily injury.

[20] *McClam v. U.S.*, 775 A.2d 1100, 1104 (D.C. 2001).

[21] Consider, for example, a threat to rape a family member.

Fourth, the RCC duress defense does not apply when the person is reckless as to bringing about the choice of harms or, for negligence offenses, when the person is negligent about bringing about the choice of harms. The current D.C. Code does not codify a duress defense and current District case law on the duress defense does not address the actor's culpability where the actor is reckless or negligent in bringing about the circumstances requiring a choice of harms. Resolving this ambiguity, the RCC duress defense expressly limits the defense when the actor recklessly or negligently created or appraised the underlying situation that appeared to require a choice of evils. This change improves the clarity and proportionality of the revised statutes.

Fifth, the revised defense does not apply where the conduct constituting the offense is expressly addressed by another available defense, affirmative defense, or exclusion from liability. The current D.C. Code does not codify a duress defense and current District case law on the duress defense does not address whether the defense is available when other general defenses are available. To resolve this ambiguity, the revised statute bars use of the duress defense when the conduct is expressly addressed by another defense, affirmative defense, or exclusion from liability. The duress defense is broadly worded given the wide range of circumstances in which it may be invoked, but it is not intended to replace or be an alternative to more specific requirements for defenses, affirmative defenses, or exclusions from liability that have been codified by the legislature. This change eliminates a possible gap in liability in the revised statutes.

Sixth, the revised defense requires a person to reasonably believe the conduct constituting the offense is necessary but imposes no further culpable mental state requirement. The current D.C. Code does not codify a duress defense and current District case law on the duress defense does not address what state of mind, if any, must be proven regarding the necessity for the otherwise criminal conduct. To resolve this ambiguity, the RCC duress defense clarifies that there is no culpable mental state for the defense besides proof that the person "reasonably believes that the conduct constituting the offense is necessary, in its timing, nature, and degree" to prevent the threatened harm. A reasonable mistake as to the facts of the situation and available alternatives does not negate the defense. This change clarifies the revised statutes.

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

The revised statute requires that a person accused of escape[22] make "reasonable efforts to safely return." District case law requires that an escapee defending on grounds of duress "must have immediately returned to custody once the threat of harm was no longer imminent."[23] However, federal law more precisely requires a bona fide *effort* to return to custody as soon as the claimed duress had lost its coercive force.[24] The revised statute requires a reasonable effort to return. This change clarifies the revised statute.

Relation to National Legal Trends. *Statutory codification of a duress defense is broadly supported by national legal trends.*

[22] RCC § 22E-3401.
[23] *See Stewart v. U.S.*, 370 A.2d 1374, 1377 (D.C. 1977).
[24] *U.S. v. Bailey*, 444 U.S. 394, 412–13 (1980).

Of the 29 reform jurisdictions,[25] 27 codify a duress (or "coercion") defense.[26] Ten reform states specify that duress is an affirmative defense that the defendant bears the burden of proving.[27] Twenty-one reform jurisdictions provide that the defense of duress is available to a defendant if the threatened harm is directed toward a third person.[28] Twenty-three reform jurisdictions limit the defense when the actor was reckless or negligent or a coconspirator.[29] Twenty-five reform jurisdictions specify that the actor's conduct must be reasonable.[30]

[25] Twenty-nine states ("reform jurisdictions") have comprehensively modernized their criminal laws based in part on the Model Penal Code. The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *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).

[26] Ala. Code § 13A-3-30; Alaska Stat. Ann. § 11.81.440; Ariz. Rev. Stat. Ann. § 13-412; Ark. Code Ann. § 5-2-208; Colo. Rev. Stat. Ann. § 18-1-708; Conn. Gen. Stat. Ann. § 53a-14; Del. Code Ann. tit. 11, § 431; Haw. Rev. Stat. Ann. § 702-231; 720 Ill. Comp. Stat. Ann. 5/7-11; Ind. Code Ann. § 35-41-3-8; Kan. Stat. Ann. § 21-5206; Ky. Rev. Stat. Ann. § 501.090; Me. Rev. Stat. tit. 17-A, § 103-A; Minn. Stat. Ann. § 609.08; Mo. Ann. Stat. § 562.071; Mont. Code Ann. § 45-2-212; N.J. Stat. Ann. § 2C:2-9; N.Y. Penal Law § 40.00; N.D. Cent. Code Ann. § 12.1-05-10; Or. Rev. Stat. Ann. § 161.270; 18 Pa. Stat. and Cons. Stat. Ann. § 309; S.D. Codified Laws § 22-5-1; Tenn. Code Ann. § 39-11-504; Tex. Penal Code Ann. § 8.05; Utah Code Ann. § 76-2-302; Wash. Rev. Code Ann. § 9A.16.060; Wis. Stat. Ann. § 939.46.

[27] Alaska Stat. Ann. § 11.81.440; Ark. Code Ann. § 5-2-208; Del. Code Ann. tit. 11, § 431; Haw. Rev. Stat. Ann. § 702-231; Mo. Ann. Stat. § 562.071; N.J. Stat. Ann. § 2C:2-9; N.Y. Penal Law § 40.00; N.D. Cent. Code Ann. § 12.1-05-10; Tex. Penal Code Ann. § 8.05; Wis. Stat. Ann. § 939.46.

[28] Ala. Code § 13A-3-30; Alaska Stat. Ann. § 11.81.440; Ariz. Rev. Stat. Ann. § 13-412; Ark. Code Ann. § 5-2-208; Colo. Rev. Stat. Ann. § 18-1-708; Conn. Gen. Stat. Ann. § 53a-14; Haw. Rev. Stat. Ann. § 702-231; 720 Ill. Comp. Stat. Ann. 5/7-11; Ind. Code Ann. § 35-41-3-8; Kan. Stat. Ann. § 21-5206; Ky. Rev. Stat. Ann. § 501.090; Me. Rev. Stat. tit. 17-A, § 103-A; Mo. Ann. Stat. § 562.071; N.J. Stat. Ann. § 2C:2-9; N.Y. Penal Law § 40.00; Or. Rev. Stat. Ann. § 161.270; 18 Pa. Stat. and Cons. Stat. Ann. § 309; S.D. Codified Laws § 22-5-1; Tenn. Code Ann. § 39-11-504; Tex. Penal Code Ann. § 8.05; Utah Code Ann. § 76-2-302.

[29] Ala. Code § 13A-3-30; Alaska Stat. Ann. § 11.81.440; Ariz. Rev. Stat. Ann. § 13-412; Ark. Code Ann. § 5-2-208; Colo. Rev. Stat. Ann. § 18-1-708; Conn. Gen. Stat. Ann. § 53a-14; Del. Code Ann. tit. 11, § 431; Haw. Rev. Stat. Ann. § 702-231; Ind. Code Ann. § 35-41-3-8; Kan. Stat. Ann. § 21-5206; Ky. Rev. Stat. Ann. § 501.090; Me. Rev. Stat. tit. 17-A, § 103-A; Mo. Ann. Stat. § 562.071; N.J. Stat. Ann. § 2C:2-9; N.Y. Penal Law § 40.00; N.D. Cent. Code Ann. § 12.1-05-10; Or. Rev. Stat. Ann. § 161.270; 18 Pa. Stat. and Cons. Stat. Ann. § 309; Tenn. Code Ann. § 39-11-504; Tex. Penal Code Ann. § 8.05; Utah Code Ann. § 76-2-302; Wash. Rev. Code Ann. § 9A.16.060; Wis. Stat. Ann. § 939.46.

[30] Alaska Stat. Ann. § 11.81.440; Ariz. Rev. Stat. Ann. § 13-412; Ark. Code Ann. § 5-2-208; Colo. Rev. Stat. Ann. § 18-1-708; Conn. Gen. Stat. Ann. § 53a-14; Del. Code Ann. tit. 11, § 431; Haw. Rev. Stat. Ann. § 702-231; 720 Ill. Comp. Stat. Ann. 5/7-11; Ind. Code Ann. § 35-41-3-8; Kan. Stat. Ann. § 21-5206; Ky. Rev. Stat. Ann. § 501.090; Me. Rev. Stat. tit. 17-A, § 103-A; Minn. Stat. Ann. § 609.08; Mo. Ann. Stat. § 562.071; Mont. Code Ann. § 45-2-212; N.J. Stat. Ann. § 2C:2-9; N.Y. Penal Law § 40.00; N.D. Cent. Code Ann. § 12.1-05-10; 18 Pa. Stat. and Cons. Stat. Ann. § 309; S.D. Codified Laws § 22-5-1; Tenn. Code Ann. § 39-11-504; Tex. Penal Code Ann. § 8.05; Utah Code Ann. § 76-2-302; Wash. Rev. Code Ann. § 9A.16.060; Wis. Stat. Ann. § 939.46.

Seventeen reform states require a threat of an immediate harm[31] and 11 require a threat of serious bodily injury or death.[32]

[31] Ala. Code § 13A-3-30; Ariz. Rev. Stat. Ann. § 13-412; Conn. Gen. Stat. Ann. § 53a-14; 720 Ill. Comp. Stat. Ann. 5/7-11; Ind. Code Ann. § 35-41-3-8; Kan. Stat. Ann. § 21-5206; Me. Rev. Stat. tit. 17-A, § 103-A; Minn. Stat. Ann. § 609.08; Mo. Ann. Stat. § 562.071; Mont. Code Ann. § 45-2-212; N.Y. Penal Law § 40.00; N.D. Cent. Code Ann. § 12.1-05-10; Tenn. Code Ann. § 39-11-504; Tex. Penal Code Ann. § 8.05; Utah Code Ann. § 76-2-302; Wash. Rev. Code Ann. § 9A.16.060; Wis. Stat. Ann. § 939.46.

[32] Ala. Code § 13A-3-30; Ariz. Rev. Stat. Ann. § 13-412; 720 Ill. Comp. Stat. Ann. 5/7-11; Ind. Code Ann. § 35-41-3-8; Kan. Stat. Ann. § 21-5206; Me. Rev. Stat. tit. 17-A, § 103-A; Minn. Stat. Ann. § 609.08; Mont. Code Ann. § 45-2-212; Tenn. Code Ann. § 39-11-504; Wash. Rev. Code Ann. § 9A.16.060; Wis. Stat. Ann. § 939.46.

RCC § 22E-503. Entrapment.

(a) *Affirmative defense.* It is an affirmative defense that, in fact, a law enforcement officer acting under color or pretense of official right, or a person acting directly or indirectly at the encouragement of such a law enforcement officer purposely commanded, requested, or tried to persuade the actor to engage in the conduct constituting the offense.
(b) *Exception.* This defense is not available when, in fact, the actor was predisposed to engage in the specific conduct constituting the offense.
(c) *Definitions*. The term "purposely" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the term "law enforcement officer" has the meaning specified in RCC § 22E-701.

COMMENTARY

Explanatory Note. *This section establishes an entrapment defense for the Revised Criminal Code (RCC). The defense applies when law enforcement induces a person to commit a particular crime. The defense is not available if the person was otherwise predisposed to commit the particular crime. The RCC entrapment defense is the first codification of such a defense in the District.*

Subsection (a) provides the requirements of the entrapment defense. The term "in fact" indicates that no culpable mental state need be proven for the defense requirements in subsection (a).[1] Under RCC § 22E-201(b), a defendant bears the burden of proving the affirmative defense by a preponderance of the evidence. However, the defense does not require an admission of guilt.[2] The subsection specifies that the defense requires action by a law enforcement officer or a person acting at the encouragement of a law enforcement officer.[3] The term "law enforcement officer" is defined in RCC § 22E-701. It does not include other state actors outside the definition of law enforcement.[4] A person acting "at

[1] RCC § 22E-207.
[2] *See, e.g., McClam v. United States*, 775 A.2d 1100, 1104 (D.C. 2001) ("Once the defendant requests an instruction, it is not necessary that the evidentiary basis for the instruction stem from the defendant's evidence; it may also be derived from the government's evidence.").
[3] *See Johnson v. United States*, 317 F.2d 127, 128 (D.C. Cir. 1963) ("The entrapment defense does not extend to inducement by a private citizen; yet it has found general application to cases where the officer acts through a private citizen.").
[4] Both the exclusionary rule and the entrapment defense serve as a deterrent to government overreach and police misconduct. However, the RCC entrapment statute is limited to the sphere of criminal investigations by law enforcement officers, whereas the exclusionary rule applies more broadly to other state action. *See New Jersey v. T. L. O.*, 469 U.S. 325, 335 (1985) (explaining the protections of the Fourth Amendment go beyond operations conducted by the police); *Michigan v. Tyler*, 436 U.S. 499, 506 (U.S. 1978); *City of Ontario v. Quon*, 560 U.S. 746, 755-756 (2010); *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 530 (1967); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 613-614 (1989).

the encouragement[5] of a law enforcement officer" includes both a person who does so knowingly[6] and a person who does so unknowingly.[7]

Subsection (a) also requires that the law enforcement officer was acting under the color or pretense of official right. The phrase "under color or pretense of official right" has the same meaning as used in the abuse of government power penalty enhancement,[8] and as the term "under color of law" in 42 U.S.C. § 1983, 18 U.S.C. § 242, and elsewhere in the United States Code.[9] It includes not only acts done within a law enforcement officer's lawful authority, but also acts done beyond the bounds of lawful authority when there is a nexus between the conduct and the position given to him by the State.[10] For example, the entrapment defense may apply to conduct by a law enforcement officer that violates department policy[11] or who is off-duty at the time of the inducement.[12] The phrase "under color or pretense of official right" does not include purely personal conduct.[13]

Subsection (a) also requires that the officer or person acting at the encouragement of an officer commanded, requested, or tried to persuade[14] the defendant to engage in the conduct constituting the offense. The phrase "commanded, requested, or tried to persuade" should be construed to have the same meaning as in RCC § 22E-302, Criminal Solicitation.[15]

Subsection (a) requires that the officer or person acting at the encouragement of an officer act purposely. The term "purposely" is defined in RCC § 22E-206 and here requires that the person consciously desire that they are conveying a command, request, or effort to persuade the defendant to engage in the criminal conduct. Although the solicitor need not explicitly state the elements of the offense,[16] the evidence must demonstrate that the solicitation was for the very conduct constituting the offense charged and not for some

[5] The word "encouragement" should be construed to have the same meaning here as in RCC § 22E-210(a)(2), Accomplice Liability, and the accompanying commentary.

[6] For example, a confidential informant who is knowingly following directions from a police officer.

[7] For example, a target of an investigation who is unknowingly following directions from an undercover police officer.

[8] RCC § 22E-610.

[9] Unlike 42 U.S.C. § 1983 and 18 U.S.C. § 242, however, the entrapment defense does not apply to private persons acting under color of law.

[10] *See West v. Atkins*, 487 U.S. 42, 49–50 (1988) ("It is firmly established that a defendant…acts under color of state law when he abuses the position given to him by the State.")

[11] For example, reportedly, Officer Brian Trainer was found to have violated department policy when he pursued motorcyclist Terrence Sterling before fatally shooting him in the neck and back. *See* Delia Goncalves, Officer 'broke policy' in fatal shooting of Terrence Sterling, WUSA 9 (December 5, 2017).

[12] For example, reportedly, Officer James Haskel was off duty and looking for his stolen minibike, when he fatally shot 14-year-old Deonte Rawlings, suspected of stealing the bike, in the back of the head. *See* Timeline: The Deonte Rawlings Shooting, WASHINGTON POST; see also *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir. 2000) (holding a state employee who accesses confidential information through a government-owned computer acts under state law, even when the motives are entirely personal).

[13] For example, the defense is not available to a person hired to commit murder when the person soliciting the murder happens to be a law enforcement officer acting in a purely personal capacity when committing the crime of solicitation of murder.

[14] Persuasion can take many forms including threats, coercive tactics, harassment, promises of reward (e.g., money, sex, immunity), or pleas based on need, sympathy or friendship.

[15] *See also* Commentary to RCC § 22E-302.

[16] Consider, for example, an undercover officer who uses the phrase "Let's make this move" as slang for "let's commit a robbery together."

lesser or different conduct. The defense does not apply where the officer did not seek to solicit or induce the criminal behavior.[17]

Subsection (a) specifies that it includes both a person acting who is acting directly at the encouragement of a law enforcement officer and a person who is acting indirectly at the encouragement of a law enforcement officer.[18] However, the defense is strictly limited to the conduct that was solicited and to the solicitations that were encouraged.[19]

Subsection (b) provides an exception to the entrapment defense. The defense is not available if the defendant was predisposed to engage in the conduct constituting the offense. If there is any evidence present that the exception should apply, the government must prove beyond a reasonable doubt that the defendant was predisposed in conduct constituting the offense. The defense is not available if the defendant was ready and willing to commit these crimes whenever an opportunity presented itself.[20] A defendant's disposition is a temporary condition, not an immutable characteristic.[21] Subsection (b) applies only when the defendant is predisposed to engage in all of the conduct constituting the offense[22] or enhancement[23] that was induced.

Subsection (b) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised statute does not make any clear changes to District law, however four aspects of the revised statute may constitute substantive changes of law.*

First, the revised statute applies standardized definitions for the "purposely" culpable mental state and uses "in fact" to indicate strict liability. The D.C. Code does not codify an entrapment defense, however D.C. Court of Appeals (DCCA) case law generally

[17] Consider, for example, an undercover officer instructs the defendant to rob a convenience store and the defendant inexplicably burns the store down after robbing it. The defendant does not have an entrapment defense to the arson under RCC § 22E-2501 because the officer did not solicit a fire, explosion, or property damage.

[18] Consider, for example, a law enforcement officer who runs a sting operation to take down a fraudulent college admissions scheme. The officer arrests the owner of the business running the scheme and, by offering a plea bargain, persuades the owner to wear a wire and ask a desperate parent to sign up her child to participate. The parent subsequently agrees and then convinces her child to participate in the scheme. In this hypothetical the owner is a person acting *directly* at the encouragement of a law enforcement officer. The parent may raise an entrapment defense on the ground that the owner persuaded her (but must also satisfy subsection (b)). With respect to their child, the parent is a person acting *indirectly* at the encouragement of a law enforcement officer. The child may raise an entrapment defense on the ground that the parent persuaded her (but must also satisfy subsection (b)).

[19] Consider the example in the preceding footnote. The owner, parent, and child do not have an entrapment defense for any other deeds that are not the creature of the agent's purpose.

[20] *See, e.g., Hampton v. U.S.*, 425 U.S. 484 (1976); *U.S. v. Russell*, 411 U.S. 423 (1973).

[21] *See U.S. v. Vaughn*, 80 F.3d 549 (D.C. Cir. 1996) (explaining that *Jacobson v. U.S.*, 503 U.S. 540 (1992) allows a jury to consider the possibility that a defendant's disposition to commit a crime changed over time).

[22] For example, if a defendant is charged with trafficking of a controlled substance on a possession with intent to distribute theory, the entrapment defense applies even if the defendant is predisposed to possessing a controlled substance, but not predisposed to distributing a controlled substance.

[23] For example, if a defendant is charged with trafficking of a controlled substance with an enhanced penalty for possessing a firearm, if the defendant was not predisposed to possess a firearm, the entrapment defense applies to the penalty enhancement. The defendant may only be convicted of trafficking of a controlled substance, not subject to the enhanced penalty.

recognizes the existence of the defense.[24] DCCA case law does not clearly specify a culpable mental state as to the law enforcement officer's conduct or other requirements, however, the United States Supreme Court has explained that the defense is available when the act for which defendant was prosecuted was instigated by a law enforcement officer and "was the creature of his purpose," without defining the word "purpose."[25] Resolving this ambiguity, the revised statute uses the RCC's general provisions that define "purposefully" and "in fact" and specify that culpable mental states and strict liability apply until the occurrence of a new culpable mental state or strict liability in the offense.[26] These changes clarify and improve the consistency of District statutes.

Second, the revised statute applies the RCC definition of "law enforcement officer." The D.C. Code does not codify an entrapment defense. However, District case law has held that the entrapment defense is available only where conduct was induced by a law enforcement official or by private persons who occupy semi-official status in the scheme of law enforcement but does not extend to inducement by a private citizen.[27] It remains unclear however, whether the law enforcement official must be on-duty or engaged in officially-sanctioned action to invoke entrapment. To resolve this ambiguity, the revised statute defines the meaning of a "law enforcement officer" and requires such a person to be "acting under color or pretense of official right." The phrase "acting under color or pretense of official right" has the same meaning as "under color of law" in 42 U.S.C. § 1983, 18 U.S.C. § 242, and elsewhere in the United States Code and in RCC § 22E-610, Abuse of Government Power Penalty Enhancement. The phrase includes not only acts done within an official's lawful authority, but also acts done beyond the bounds of lawful authority while the official is purporting or pretending to act in the performance of their official duties. The RCC definition of law enforcement officer includes both sworn officers and others, such as special police officers, acting in a semi-official role. This change clarifies and improves the consistency of District statutes.

Third, the revised statute requires that the defendant prove the elements of entrapment by a preponderance of the evidence, but that the government prove predisposition beyond a reasonable doubt in order for the exception to apply. The DCCA has not addressed whether entrapment is a traditional defense that must be disproven by the government if it is supported by any evidence, "however weak,"[28] or an affirmative defense that must be proven by the defendant by a preponderance of the evidence. In federal court, a defendant must affirmatively present sufficient evidence of inducement and the government must present sufficient evidence of predisposition.[29] However, the current practice in the Superior Court for the District of Columbia is to require the government to disprove both elements.[30] The RCC specifies that if the defendant bears the burden of proving the elements of entrapment by a preponderance of the evidence, but in order for the exception to apply, the government must prove beyond a reasonable doubt that the

[24] *See, e.g., Williams v. United States*, 342 A.2d 367 (D.C. 1975); *Minor v. United States*, 623 A.2d 1182, 1187 (D.C. 1993).
[25] *Sorrells v. United States*, 287 U.S. 435, 441 (1932).
[26] RCC §§ 22E-206 and 207.
[27] *See Johnson v. United States*, 317 F.2d 127, 128 (D.C. Cir. 1963).
[28] *See* D.C. Crim. Jur. Instr. § 9.100.
[29] *U.S. v. Glover*, 153 F.3d 749, 754 (D.C. Cir. 1998); *U.S. v. Jenrette*, 744 F.2d 817, 821–22 (D.C. Cir. 1984).
[30] D.C. Crim. Jur. Instr. § 9.310.

defendant was predisposed to engage in the specific criminal conduct.[31] This change clarifies the revised statute.

Fourth, the revised statute clarifies the scope of a derivative entrapment defense. DCCA has not yet addressed whether an entrapment defense is available in cases in which unwitting intermediaries deliver the government's inducement to another party. However, the District of Columbia Circuit has held that such a defense is available only if the alleged inducement communicated by the unwitting intermediary is the *same* inducement, directed at the *same* target as the inducement that the government agent directs the intermediary to communicate.[32] Resolving this ambiguity, the revised statute requires that the conduct is the result of the same encouragement, inducement, or creative activity—that is, it does not apply where an intermediary deviates from the government's plan—but it does not require that the inducement be directed at the same target.[33] This change improves the clarity of the revised statute.

Relation to National Legal Trends. *Statutory codification of an entrapment defense is strongly supported in other jurisdictions' statutes, however, the burden of proof for the defense and the scope of a derivative entrapment defense are largely left to case law.*

Of the 29 reform jurisdictions,[34] 24 have codified an entrapment defense.[35] Of those 24 jurisdictions, 11 states specify that the defense is an affirmative defense or that the

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[31] RCC § 22E-201(b)(2).

[32] *U.S. v. Washington*, 106 F.3d 983, 993 (D.C. Cir. 1997); *see also United States v. Luisi*, 482 F.3d 43 (1st Cir. 2007) (requiring requires the government to attempt to induce the defendant, fail, and then use an unsuspecting middleman who then puts pressure on the defendant); *United States v. Hollingsworth*, 27 F.3d 1196 (7th Cir. 1994).

[33] Consider, for example, a law enforcement officer who runs a sting operation to take down a fraudulent college admissions scheme. The officer arrests the owner of the business running the scheme and, by offering a plea bargain, persuades the owner to wear a wire and ask a desperate parent to sign up her child to participate. The parent subsequently agrees and then convinces her child to participate in the scheme. In this hypothetical the owner is a person acting *directly* at the encouragement of a law enforcement officer. The parent may raise an entrapment defense on the ground that the owner persuaded her (but must also satisfy subsection (b)). With respect to their child, the parent is a person acting *indirectly* at the encouragement of a law enforcement officer. The child may raise an entrapment defense on the ground that the parent persuaded her (but must also satisfy subsection (b)).

[34] Twenty-nine states ("reform jurisdictions") have comprehensively modernized their criminal laws based in part on the Model Penal Code. The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *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).

[35] Ala. Code § 13A-3-31; Alaska Stat. Ann. § 11.81.450; Ariz. Rev. Stat. Ann. § 13-206; Ark. Code; Ann. § 5-2-209, Colo. Rev. Stat. Ann. § 18-1-709; Conn. Gen. Stat. Ann. § 53a-15, Del. Code Ann. tit. 11, § 432; Haw. Rev. Stat. Ann. § 702-237, 720 Ill. Comp. Stat. Ann. 5/7-12, Ind. Code Ann. § 35-41-3-9; Kan. Stat. Ann. § 21-5208; Ky. Rev. Stat. Ann. § 505.010; Mo. Ann. Stat. § 562.066; Mont. Code Ann. § 45-2-213; N.H. Rev. Stat. Ann. § 626:5; N.J. Stat. Ann. § 2C:2-12; N.Y. Penal Law § 40.05; N.D. Cent. Code Ann. § 12.1-05-11; Or. Rev. Stat. Ann. § 161.275; 18 Pa. Stat. and Cons. Stat. Ann. § 313; Tenn. Code Ann. § 39-11-505, Tex. Penal Code Ann. § 8.06; Utah Code Ann. § 76-2-303; Wash. Rev. Code Ann. § 9A.16.070.

defendant bears the burden of proving inducement,[36] however, they do not address whether the government has the burden of proving predisposition. Twenty-three reform jurisdictions specify that a person can be entrapped by an agent of the government or a person cooperating with the government,[37] however, they do not address in the statutory text whether the inducement can also be indirect.

[36] Alaska Stat. Ann. § 11.81.450; Ariz. Rev. Stat. Ann. § 13-206; Ark. Code; Ann. § 5-2-209, Del. Code Ann. tit. 11, § 432; Haw. Rev. Stat. Ann. § 702-237, Mo. Ann. Stat. § 562.066; N.H. Rev. Stat. Ann. § 626:5; N.J. Stat. Ann. § 2C:2-12; N.Y. Penal Law § 40.05; N.D. Cent. Code Ann. § 12.1-05-11; 18 Pa. Stat. and Cons. Stat. Ann. § 313.

[37] Alaska Stat. Ann. § 11.81.450; Ariz. Rev. Stat. Ann. § 13-206; Ark. Code; Ann. § 5-2-209, Colo. Rev. Stat. Ann. § 18-1-709; Conn. Gen. Stat. Ann. § 53a-15, Del. Code Ann. tit. 11, § 432; Haw. Rev. Stat. Ann. § 702-237, 720 Ill. Comp. Stat. Ann. 5/7-12, Ind. Code Ann. § 35-41-3-9; Kan. Stat. Ann. § 21-5208; Ky. Rev. Stat. Ann. § 505.010; Mo. Ann. Stat. § 562.066; Mont. Code Ann. § 45-2-213; N.H. Rev. Stat. Ann. § 626:5; N.J. Stat. Ann. § 2C:2-12; N.Y. Penal Law § 40.05; N.D. Cent. Code Ann. § 12.1-05-11; Or. Rev. Stat. Ann. § 161.275; 18 Pa. Stat. and Cons. Stat. Ann. § 313; Tenn. Code Ann. § 39-11-505, Tex. Penal Code Ann. § 8.06; Utah Code Ann. § 76-2-303; Wash. Rev. Code Ann. § 9A.16.070.

RCC § 22E-504. Mental Disease or Defect Affirmative Defense.

(a) *Affirmative defense*. It is an affirmative defense in a criminal proceeding that, in fact, as a result of a mental disease or defect, the actor lacked substantial capacity to:
  (1) Conform the actor's conduct to the requirements of the law; or
  (2) Recognize the wrongfulness of the actor's conduct.

(b) *Effect of defense*. An actor who is not guilty by reason of mental disease or defect shall be civilly committed under D.C. Code § 24-501.

(c) *Definitions*.
  (1) The term "actor" has the meaning specified in RCC § 22E-701.
  (2) In this section, the term "mental disease or defect" means an abnormal condition of the mind, regardless of its medical label, that affects mental or emotional processes and substantially impairs a person's ability to regulate and control their conduct.

(d) *Interpretation of statute.* This section shall not be construed to limit the court's ability, on its own initiative, to order a psychiatric examination or to raise a mental disease or defect defense.

COMMENTARY

Explanatory Note. *This section establishes a mental disease or defect affirmative defense for the Revised Criminal Code (RCC). This affirmative defense applies in a criminal proceeding when a person satisfies all the elements of an offense but is deemed excused from responsibility because the person lacks substantial capacity to conform their conduct to the law or recognize the wrongfulness of the offending actions as a result of a mental disease or defect. The RCC mental disease or defect statute codifies the current insanity defense recognized in District caselaw.*[1]

Subsection (a) establishes the requirements for the affirmative defense in a criminal proceeding. Under RCC § 22E-201(b), a person bears the burden of proving an affirmative defense by a preponderance of the evidence.[2] This defense is distinct from any culpable mental state requirements of a given offense and does not require proof of the negation of

[1] *See* Model Penal Code § 4.01 ("A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct too the requirements of law."); *Bethea v. United States*, 365 A.2d 64, 78-80 (D.C. 1976) (adopting the MPC standard "with certain minor modifications," These modifications include using the word "recognize" rather than "know" or "appreciate" and using the word "wrongfulness" rather than "criminality.").

[2] *Pegues v. United States*, 415 A.2d 1374, 1377 (D.C. 1980) ("In this jurisdiction, the defendant has the burden of proving insanity by a preponderance of the evidence…If he fails to present a prima facie case, the judge is justified in removing the issue from the jury.").

a culpable mental state.[3] The mental disease or defect affirmative defense is available only in criminal trials and is unavailable in juvenile delinquency proceedings.[4]

Subsection (a) requires that the actor must be suffering a "mental disease or defect," a defined term, at the time the offense is committed.[5] The disease or defect may affect either volitional control,[6] under paragraph (a)(1), or cognitive understanding,[7] under paragraph (a)(2).[8] Volitional incapacity as a result of a mental disease or defect is distinct from a mere lack of voluntariness as defined under RCC § 22E-203. Voluntariness applies to the conduct elements of an offense and requires only that the conduct be the product of

[3] While a mental disease or defect can affect a person's ability to form a culpable state of mind, the court in *Bethea v. United States* explicitly declined to allow expert medical testimony regarding insanity to be used to establish that a defendant lacked the ability to form the requisite state of mind, rejecting a "diminished capacity" defense. 365 A.2d 64, 83 (D.C. 1976); *see also O'Brien v. United States*, 962 A.2d 282, 300-301 (D.C. 2008) (characterizing *Bethea* as announcing "a general rule for this jurisdiction prohibiting differentiation of a defendant's intellectual abilities outside the context of the insanity defense."); *Jackson v. United States*, 76 A.3d 920, 935 (D.C. 2013).

[4] *Matter of C. W. M.*, 407 A.2d 617, 622 (D.C. 1979) ("Nevertheless, it is well settled now that unlike a criminal trial a juvenile factfinding hearing does not result in a determination of criminal responsibility."); *see also Kent v. United States*, 383 U.S. 541, 554 (1966); *District of Columbia v. M.E.H.*, 312 A.2d 561, 562 (D.C. 1973); *Pee v. United States*, 274 F.2d 556 (D.C. 1959) ("Nor is the succeeding dispositional hearing intended to result in the imposition of any penal sanction on the child. Rather, the purpose is to determine the treatment required to rehabilitate him. Accordingly, the insanity defense would be superfluous in a juvenile delinquency proceeding.")

[5] *Id*. ("To establish a prima facie case, the defendant must present evidence to show that, *at the time of the criminal conduct*, as a result of a mental illness or defect, he lacked substantial capacity to recognize the wrongfulness of his act or to conform his conduct to the requirements of the law." (*Emphasis added*.)).

[6] The classic formulation of volitional impairment is the actor who suffers from an "irresistible impulse;" that is, one who is unable to control themselves despite knowing that their action is morally wrong or criminal. *See* Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82(2) Colum. L. Rev. Ch.5 § 173 (e)(2).

[7] A cognitive impairment excuses when it prevents a person from being able to "'perceive the physical nature or consequences' of [the] conduct constituting the offense." *See* Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82(2) Colum. L. Rev. Ch.5 § 173 (c) (March 1982) (internal quotations omitted). That is, the actor's ability to distinguish the reality of their circumstances or the consequences of their own actions is substantially impaired to such a degree that they cannot fairly be held responsible for their actions. Professor Robinson offers the example of actors *A* and *B*, both of whom suffer from schizophrenia. *A* chops off a victim's head because he believes it to be a block of wood as a result of hallucination; his impairment prevents him from perceiving the physical nature of his circumstances. *B* chops off a victim's head while the victim sleeps because *B* thinks it would be funny to see the victim search for his head when he wakes up; his impairment causes a delusion that prevents him from understanding the consequences of the act. *See* Robinson, *Criminal Law Defenses: A Systematic Analysis*, Ch.5 § 173 (c)(1). Both *A* and *B* are included in the cognitive prong under paragraph (a)(1), despite the difference in expression of their impairments.

[8] The RCC provision is heavily influenced by the MPC approach, which also includes both a volitional and a cognitive prong. *See* Model Penal Code § 4.01; *Bethea v. United States*, 365 A.2d at 78-79 (D.C. 1976) ("Accordingly, we join those jurisdictions which have adopted either [the MPC's] language or its fundamental principles.") The volitional prong relates to the actor's ability to control their impulses while the cognitive prong relates to the actor's ability to understand or appreciate the morality or consequences of their actions. Furthermore, the RCC statute and the MPC approach require only "substantial" impairment of the actor's mental faculties, not total incapacity. This approach is distinguished from the "irresistible impulse" approach, which requires total volitional incapacity, and the M'Naghten approach, which does not account for volitional incapacity at all and requires total cognitive incapacity. *See* Wayne LaFave, *Substantive Criminal Law* § 7.1(a) (3d ed).

conscious effort or determination.[9] However, the volitional prong of the mental disease or defect affirmative defense specifically applies to circumstances where the criminal conduct either is still "the product of conscious effort or determination" or "subject to the person's control" to some degree, but a mental disease or defect substantially prevents the person from exercising control over their actions and abstaining from the conduct, or the criminal conduct would be "the product of conscious effort or determination" or "subject to the person's control" but for a mental disease or defect.[10]

Under both the volitional and cognitive prongs of subsection (a), a person must lack "substantial" capacity but need not be *totally* unable to either conform their conduct to the requirements of law[11] or *totally* unable to appreciate the wrongfulness of their actions.[12] The degree of incapacity that qualifies as "substantial" is not defined by the statute and is intended to be broad enough to account for the inevitable evolution of psychiatric medicine and the inherent uncertainty in dealing with the complexities of the human mind.

Subsection (a) also requires that the mental incapacity exists "as a result of" the mental disease or defect existing at the time that the offense was committed. This requires that the mental disease or defect is the cause of the actor's substantial inability to conform their conduct to the requirements of law or recognize the wrongfulness of their conduct.[13]

Subsection (b) refers to D.C. Code § 24-501, which describes the procedural effects of an acquittal by reason of mental disease or defect. D.C. Code § 24-501 requires that a defendant who is found not guilty by reason of insanity (now "not guilty by reason of mental disease or defect") is to be civilly committed to a hospital for the mentally ill with a hearing within 50 days of confinement (unless waived) to determine whether the defendant is eligible for release.

Subsection (c) cross-references applicable definitions in the RCC and provides a definition for "mental disease or defect." While medical evidence is highly relevant to the question of the existence of a mental disease or defect, the provision that this definition

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[9] For further explanation of the voluntariness requirement for criminal liability, see Commentary to RCC § 22E-203.

[10] RCC § 22E-203(b)(1).

[11] This differs from the so-called "irresistible impulse" test. *See* Robinson, *Criminal Law Defenses: A Systematic Analysis*, Ch.5 § 173 (e)(2); *see also State v. Parsons*, 81 Ala. 577, 597 (Holding that a person with knowledge of right and wrong may be found not guilty by reason of insanity "[i]f, by reason of the duress of [a] mental disease, he had so far lost the *power to choose* between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed"). The classic "irresistible impulse test requires that the ability to choose be entirely "destroyed" and that the criminal conduct was "the product of [the mental disease] *solely*." *Id*.

[12] This differs from the so-called "M'Naghten" test. *See* M'Naghten's Case, 8 Eng. Rep. 718 (1843) ("[T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing off the act the party accused was laboring under such defect of reason, from disease of the mind, as to not know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.") *See* Paul H. Robinson, et. al., The American Criminal Code: General Defenses, 7 J. Legal Analysis 37, 68 (2015) (*available at* https://www.law.upenn.edu/live/files/4100-american-criminal-code-general-defenses).

[13] It is insufficient that an actor merely suffers from a mental condition; the mental condition must precipitate the actor's substantial incapacity to comply with the law under subparagraph (a)(1)(A) or (a)(1)(B). *See Howard v. United States*, 954 A.2d 415, 420 (D.C. 2008) ("The existence of a mental illness does not suffice, as a defendant must establish a 'causal relationship between the criminal conduct and his mental disease.'" (quoting *Pegues*, 415 A.2d at 1378)).

relates to "any abnormal condition of the mind, *regardless of medical label*"[14] specifies that the legal standard for a relevant mental incapacitation is not identical to the medical definition of a mental disease or defect.[15] "Mental disease or defect" does not include voluntary intoxication.[16]

Subsection (d) provides that this section not be construed to limit the court's ability, on its own initiative, to order a psychiatric examination or to raise a mental disease or defect defense.[17]

Relation to Current District Law. *The revised statute changes current District law in one main way.*

The revised statute does not categorically exclude abnormalities "manifested only by repeated criminal or otherwise antisocial conduct" from the definition of "mental disease or defect." Current DCCA case law, following a provision in the Model Penal Code, holds that: "[T]he terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct."[18] Specifically, D.C. courts have held that this exclusion prevents expert witnesses from testifying that the illegal act alone is sufficient to establish a mental disease or defect.[19] Similar provisions in other jurisdictions have been interpreted to exclude psychopaths or those suffering from antisocial personality disorder from the protection of an insanity defense.[20] In contrast, the RCC statute does not impose a blanket exclusion from the defense for psychopathic diseases. Such exclusion provisions have been heavily criticized by experts as being

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[14] A mental disease or defect is defined in current District practice as including "any abnormal condition of the mind, regardless of medical label, which affects mental or emotional processes and substantially impairs a person's ability to regulate and control his/her conduct." 1 Criminal Jury Instructions for DC Instruction 9.400. "Mental disease" and "mental defect" are distinguished from each other based on the permanence of the abnormal mental condition. A disease may be temporary and is capable of improvement or deterioration. A defect is inherent in the actor and permanent, though it may be treatable. *See Id*.

[15] *McDonald v. United States*, 312 F.2d 847, 851 (D.C. 1963) ("What psychiatrists may consider a 'mental disease or defect' for clinical purposes, where their concern is treatment, may or may not be the same as mental disease or defect for the jury's purpose in determining criminal responsibility."). As discussed earlier under note 7, *supra*, it is not sufficient for the basis of an insanity defense that the defendant is medically diagnosed with a mental condition. *See Howard*, 954 A.2d at 420. It is for finder of fact to determine whether a mental disability sufficiently affects the relevant mental processes as to constitute legal insanity.

[16] *McNeil v. United States*, 933 A.2d 354, 365 (D.C. 2007) ("[w]hen drug or alcohol abuse is proffered as the basis for a mental disease or defect, there is significant tension between the insanity defense and the universally-accepted tenet that voluntary intoxication does not excuse criminal behavior.").

[17] If a judge finds that the defendant is capable of making a voluntary and intelligent decision to forego an insanity defense, the judge must respect the defendant's decision and permit the jury's verdict to stand. If, on the other hand, the judge is convinced that the defendant cannot or has not made such a voluntary and intelligent waiver, the judge has the discretion to raise that defense *sua sponte*. *Frendak v. United States*, 408 A.2d 364, 380 (D.C. 1979); *see also Briggs v. United States*, 525 A.2d 583, 594 (D.C. 1987).

[18] *Bethea*, 365 A.2d at 79.

[19] *Bethea*, 365 A2.d at 81 (explaining such testimony would allow the expert witness to "come to close to the ultimate question of responsibility"); *see also Jackson*, 76 A.3d at 920, 939 (D.C. 2013) ("If a defendant were allowed to prove his mental disease from the mere fact of criminal behavior, the court reasoned, then an expert could testify that he was 'satisfied that an illegal act alone conclusively establishes a mental illness or defect,' a determination that, without more, would 'come too close to the ultimate question of responsibility.'") (quoting Bethea, 365 A.2d at 81).

[20] Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82(2) Colum. L. Rev. Ch.5 § 173 (b)(2) (March 1982).

unsupported by current medical understanding.[21] Modern medical evidence suggests that psychopathy and many personality disorders may well affect cognitive and volitional functions that fall squarely within the ambit of the insanity defense as formulated in the MPC insanity provision (depending, as with all mental conditions, on severity).[22] Under the RCC statute, the availability of a mental disease or defect affirmative defense will rely solely on the requirement that the conduct occurred as a result of either cognitive understanding or volitional control be substantially impaired, without categorical exclusion for specific disorders or symptoms. This change allows for expert testimony as to whether a mental disease or defect exists, though the sufficiency of such testimony remains subject to jury determination. This change improves the clarity and proportionality of the revised statutes.

Relation to National Legal Trends. *Statutory codification of an insanity defense is strongly supported in other jurisdictions' statutes, however, the scope of the revised statute, which follows the Model Penal Code and current District case law, is a minority approach.*

A majority of states currently follow a narrower insanity defense rule closer to the M'Naghten rule requiring total cognitive incapacity,[23] with six additional states following an even narrower approach of entirely abolishing insanity as an affirmative defense.[24]

Of the 29 reform jurisdictions,[25] only six states clearly follow the MPC approach or a modified version that includes both a cognitive and a volitional prong and requires only substantial incapacity.[26] There are an additional 4 states that require only substantial incapacity but do not acknowledge volitional incapacity as a basis for the defense.[27] New

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[21] *See, e.g.*, Ralph Slovenko, *Commentary: Personality Disorders and Criminal Law*, 37 J. Am. Acad. Psych. Law 182, 183 (2009). It is widely suggested among critics of this provision that such categorical exclusions are not based on current medical evidence and seek to reinforce a laymen's understanding of moral culpability against individuals with real mental impairments, supported by scientific evidence.

[22] Joseph Langerman, *The Montwheeler Effect: Examining the Personality Disorder Exclusion in Oregon's Insanity Defense*, 22 Lewis & Clark L. Rev. 1027, 1049-50 (2018). *See also* Robert Kinscherff, Proposition: A Personality Disorder May Nullify Responsibility for A Criminal Act, 38 J. L. Med. & Ethics 745, 748 (2010).

[23] Insanity defense rules can be categorized on multiple axes, primarily according to whether they allow for volitional as well as cognitive incapacity to excuse criminal conduct and whether they require absolute or substantial impairment of said mental ability. Paul H. Robinson, et. al., The American Criminal Code: General Defenses, 7 J. Legal Analysis 37, 67-68 (2015) (*available at* https://www.law.upenn.edu/live/files/4100-american-criminal-code-general-defenses). A majority of 28 jurisdictions require absolute impairment and a majority of 29 jurisdictions do not include a volitional prong, not including the 6 jurisdictions that have abolished the insanity defense.

[24] *Robinson*, *supra* at 70; *see also Kahler v. Kansas*, 140 S.Ct. 1021, 1037 (upholding the constitutionality of abolishing the insanity defense).

[25] Twenty-nine states ("reform jurisdictions") have comprehensively modernized their criminal laws based in part on the Model Penal Code. The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *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).

[26] Arkansas, Connecticut, Delaware, Hawaii, Kentucky, and Wisconsin.

[27] Illinois, Maine, New York, and Oregon.

Hampshire alone retains the Durham rule,[28] which the D.C. Court of Appeals considered to be an outdated formulation of substantially the same standard as the MPC-like formulation adopted by the court in *Bethea*.[29] Fourteen reform states follow M'Naghten in excusing only absolute cognitive incapacity[30] and the remaining four states are among those that have effectively abolished the insanity defense, allowing evidence of insanity only as evidence that the defendant did not have the required state of mind to commit the offense.[31]

The MPC approach followed by the District occurs in a minority of U.S. jurisdictions. The majority of states decline to acknowledge, or give great weight to, the potential impact of volitional incapacity or substantial incapacity as well as absolute cognitive impairment. This majority approach runs counter to both medical evidence and the legal principles underlying the existence of the insanity, excluding defendants whose mental capacities are significantly impaired from this defense. The RCC substantially retains the District's current insanity rule in the revised mental disease or defect affirmative defense.

[28] *See State v. Fichera*, 153 N.H. 588 (2006).

[29] *See Bethea*, 365 A.2d at 90-91 ("Our shift from the *Durham-McDonald* formula to that of the Model Penal Code as supplemented by *McDonald* represents not so much a change in the substantive concepts of criminal responsibility as a rephrasing of existing principles.").

[30] Alabama, Alaska, Arizona, Colorado, Indiana, Minnesota, Missouri, New Jersey, Ohio, Pennsylvania, South Dakota, Tennessee, Texas, and Washington.

[31] Kansas, Montana, North Dakota, and Utah.