Second Draft of Report #19 - Homicide Offenses

SUBMITTED FOR ADVISORY GROUP REVIEW
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DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
441 FOURTH STREET, NW, SUITE 1C001 SOUTH
WASHINGTON, DC 20001
PHONE: (202) 442-8715
www.ccrc.dc.gov

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 main parts: (1) draft statutory text for an enacted Title 22 (Title 22E) of the D.C. Code; and (2) commentary on the draft statutory text. The commentary explains the meaning of each provision and considers whether existing District law would be changed by the provision.

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 Second Draft of Report #19 - Homicide Offenses is June 19, 2020.

Oral comments and written comments received after these dates 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-1101. Murder.

(a) *First Degree.* A person commits first degree murder when that person purposely, with premeditation and deliberation, causes the death of another person.

(b) *Second Degree*. A person commits second degree murder when that person:

(1) Recklessly, with 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 one of the following offenses:

(A) First or second degree arson as defined in RCC § 22E-2501;

(B) First degree sexual abuse as defined in RCC § 22E-1303;

(C) First degree sexual abuse of a minor as defined in RCC § 22E-1304;

(D) First and second degree criminal abuse of a minor as defined in RCC § 22E-1501;

(E) First degree burglary as defined in RCC § 22E-2701 when committed while possessing a dangerous weapon on his or her person;

(F) First, second, third, or fourth degree robbery as defined in RCC § 22E-1501; or

(G) First or second degree kidnapping as defined in RCC § 22E-1401.

(c) *Voluntary Intoxication*. A person shall be deemed to have consciously disregarded the risk required to prove that the person acted with extreme indifference to human life in paragraph (b)(1) if the person, is unaware of the risk due to self-induced intoxication, but would have been aware had the person been sober.

(d) *Penalties.* Subject to the merger provisions in RCC § 22E-214 and subsection (h) of this section:

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

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

(3) *Enhanced Penalties*. In addition to any penalty enhancements under this title, the penalty classification for first degree murder and second degree murder is increase in severity by one penalty class when a person commits first degree murder or second degree murder and the person:

(A) Is reckless as to the fact that the decedent is a protected person;

(B) Commits the murder with the purpose of harming the decedent because of the decedent's status as a law enforcement officer, public safety employee, or District official;

(C) Commits the murder with intent to avoid or prevent a lawful arrest or effecting an escape from custody;

(D) Knowingly commits the murder for hire;

(E) Knowingly inflicts extreme physical pain or mental suffering for a prolonged period of time immediately prior to the decedent's death;

(F) Knowingly mutilates or desecrates the decedent's body;

(G) In fact, commits the murder after substantial planning;

(H) The murder was a drive-by or random shooting; or

(I) Commits the murder with the purpose of harming the decedent because was or had been a witness in any criminal investigation or judicial proceeding, or the decedent was capable of providing or had provided assistance in any criminal investigation or judicial proceeding.

(e) *Evidence of Extreme Pain, Mental Suffering, Mutilation, or Desecration.* Notwithstanding any other provision of law, a person charged with penalty enhancements under subparagraph (c)(3)(E) or (c)(3)(F) shall be subject to a bifurcated criminal proceeding with the same jury or fact finder serving in both stages of the proceeding. In the first stage of the proceeding, the factfinder must determine if the defendant committed either first degree murder as defined under subsection (a) or second degree murder as defined under subsection (b). In the first stage of the proceeding, evidence of penalty enhancements under subparagraph (c)(3)(E) or (c)(3)(F) is inadmissible except if such evidence is relevant to determining whether the defendant committed first degree murder or second degree murder. In the second stage of the proceeding, after the defendant has been found guilty of either first degree murder or second degree murder, the factfinder may consider any evidence relevant to penalty enhancements under subparagraphs (c)(3)(E) or (c)(3)(F).

(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 subsection (a) and paragraph (b)(1) of 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 actor's situation under the circumstances as the actor believed them to be;

(B) Acting with an unreasonable belief that the use of deadly force was necessary to prevent a person from unlawfully causing imminent death or serious bodily injury to the actor or another person; or

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

(2) *Burden of Proof for Mitigation Defense.* If any 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.* If the government fails to prove the absence of mitigating circumstances beyond a reasonable doubt, but proves all other elements of murder, the actor is not guilty of murder, but is guilty of voluntary manslaughter.

(g) *Affirmative Defense to Felony Murder.* It is an affirmative defense to prosecution under paragraph (b)(2) of this section that the actor, in fact, does not commit the lethal act and either:

(1) Believes that no participant in the predicate felony intends to cause death or serious bodily injury; or

(2) Makes reasonable efforts to prevent another participant from causing the death or serious bodily injury of another.

(h) *Sentencing.* [RESERVED. For purposes of imprisonment following revocation of release authorized by § 24-403.01(b)(7), murder in the first degree, and murder in the second degree are Class A felonies.]

(i) *Definitions.* The terms "knowingly," "negligently," "purposely," "recklessly," and have the meanings specified in RCC § 22E-206; the terms "actor," "law enforcement officer," "possess," "protected person," "public safety employee," and "District official," have the meanings specified in RCC § 22E-701; and the terms "intoxication" and "self-induced intoxication" have the meanings specified in RCC § 22E-209.

COMMENTARY

Explanatory Note. *This section establishes the first degree and second degree murder offenses for the Revised Criminal Code (RCC).*

The revised first degree murder offense criminalizes purposely, with premeditation and deliberation, causing the death of another person. The RCC's murder statute replaces the current first degree and second degree murder statutes,[1] the special form of first degree murder by obstruction of a railroad, D.C. Code § 22-2102, and the special form of first degree murder of a law enforcement officer, D.C. Code § 22-2106. The revised first degree murder statute also replaces penalty enhancements authorized under §§ 22-2104.01 and 24-403.01(b-2). An actor who knowingly causes the death of another under aggravating circumstances is subject to the enhanced penalty provision under subsection (c). In addition, insofar as they are applicable to current first degree murder offense, the revised first degree murder statute also partly replaces the protection of District public officials statute[2] and six penalty enhancements: the enhancement for committing an offense while armed;[3] the enhancement for senior citizens;[4] the enhancement for citizen patrols;[5] the enhancement for minors;[6] the enhancement for taxicab drivers;[7] and the enhancement for transit operators and Metrorail station managers.[8]

The revised second degree murder offense specifically criminalizes two forms of murder: 1) recklessly, under circumstances manifesting extreme indifference to human life, causing the death of another person (commonly known as "depraved heart murder"), or 2) negligently

[1] 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 offense replaces: purposely causing the death of another with premeditation and deliberation form of murder.

[2] D.C. Code § 22-851.

[3] D.C. Code § 22-4502.

[4] D.C. Code § 22-3601.

[5] D.C. Code § 22-3602.

[6] D.C. Code § 22-3611.

[7] D.C. Code §§ 22-3751; 22-3752.

[8] D.C. Code §§ 22-3751.01; 22-3752.

causing the death of another person in the course of, and in furtherance of, certain[9] *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.*[10] *In addition, the revised second degree murder statute replaces penalties authorized under §§ 22-2104.01 and 24-403.01(b-2). An actor who commits second degree murder under aggravating circumstances is subject to the enhanced penalty provision under subsection (c). In addition, insofar as they are applicable to the current second degree murder statute, the revised second degree murder statute also partly replaces the protection of District public officials statute*[11] *and six penalty enhancements: the enhancement for committing an offense while armed;*[12] *the enhancement for senior citizens;*[13] *the enhancement for citizen patrols;*[14] *the enhancement for minors;*[15] *the enhancement for taxicab drivers;*[16] *and the enhancement for transit operators and Metrorail station managers.*[17]

This re-organization of murder offenses clarifies and improves the consistency and penalty proportionality of the revised offenses.

Paragraph (a)(1) specifies that a person commits first degree murder if he or she purposely, with premeditation and deliberation, causes the death of another person. The paragraph specifies that a "purposely" culpable mental state applies, which requires that the actor consciously desired to cause the death of another person. The means of causation, whether by obstruction of a railway[18] or otherwise, are irrelevant. In addition, paragraph (a)(1) requires that the person acted with premeditation and deliberation, terminology that is incorporated in the revised offense and is defined by current D.C. Court of Appeals (DCCA) case law. Premeditation requires "giv[ing] thought before acting to the idea of taking a human life and [reaching] a definite decision to kill[.]"[19] Such premeditation "may be instantaneous, as quick as thought itself"[20] and only requires that the accused formed the intent prior to committing the act.

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[9] 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

[10] 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."

[11] D.C. Code § 22-851.

[12] D.C. Code § 22-4502.

[13] D.C. Code § 22-3601.

[14] D.C. Code § 22-3602.

[15] D.C. Code § 22-3611.

[16] D.C. Code §§ 22-3751; 22-3752.

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

[18] D.C. Code § 22-2102.

[19] *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).

[20] *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.

Deliberation 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."[21]

Paragraph (b)(1) specifies that a person commits second degree murder if he or she recklessly, with extreme indifference to human life, causes the death of another person. This paragraph requires a "reckless" culpable mental state, a term defined at RCC § 22E-206, which here means that the accused consciously disregards a substantial risk of causing death of another, and the risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, its disregard is clearly blameworthy. However, recklessness alone is insufficient. The accused must also act "with extreme indifference to human life." This language is intended to codify current D.C. Court of Appeals (DCCA) case law defining what is commonly known as "depraved heart murder."[22] In contrast to the "substantial" risks required for ordinary recklessness, depraved heart murder requires that the accused consciously disregarded an "*extreme* risk of causing death or serious bodily injury."[23] For example, the DCCA has recognized there to be an extreme indifference to human life when a person caused the death of another by: driving at speeds in excess of 90 miles per hour, and turning onto a crowded onramp in an effort to escape police[24]; firing ten bullets towards an area where people were gathered[25]; and providing a weapon to another person, knowing that person would use it to injure a third person.[26] Although it is not possible to specifically define the degree and nature of risk that is "extreme," it need not be that it is more likely than not that death or serious bodily injury would occur.[27] The "extreme indifference" language in paragraph (b)(1) codifies DCCA case law that recognizes those types of unintentional homicides that warrant criminalization as second degree murder.

Although consciously disregarding an extreme risk of death or serious bodily injury is necessary for depraved heart murder liability, it is not necessarily sufficient. There may be some instances in which a person causes the death of another person by consciously disregarding an extreme risk of death or serious bodily injury that do not constitute extreme indifference to human life. Whether an actor engages in conduct with extreme indifference to human life depends not only on the degree and nature of the risk consciously disregarded, but also on other factors that relate to the actor's culpability.

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

[22] *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).

[23] *Comber*, 584 A.2d at 39 (emphasis added).

[24] *Powell v. United States*, 485 A.2d 596, 598 (D.C. 1984).

[25] *Jennings v. United States*, 993 A.2d 1077, 1081 (D.C. 2010).

[26] *Perez v. United States*, 968 A.2d 39, 102 (D.C. 2009) (note that the defendant was guilty of second degree murder on an accomplice theory).

[27] For example, if an actor kills another person by playing Russian roulette, this may constitute an extreme risk of death or serious bodily injury, even though there was a 1 in 6 chance of causing death or serious bodily injury.

Specifically, the same factors that determine whether an actor's conscious disregard of a substantial risk is "clearly blameworthy" as required for ordinary recklessness[28] also bear on the determination of whether an actor's conscious disregard of an extreme risk of death or serious bodily injury manifests extreme indifference to human life. These factors are: (1) the extent to which the actor's disregard of the risk was intended to further any legitimate social objectives[29]; and (2) any individual or situational factors beyond the actor's control[30] that precluded his or her ability to exercise a reasonable level of concern for legally protected interests. In cases where these factors negate a finding that the actor exhibited extreme indifference to human life, a fact finder may nonetheless find that the actor behaved recklessly, provided that the actor's conduct was clearly blameworthy.

Under the hierarchical relationship of culpable mental states defined in RCC § 22E-206, a person who purposely or knowingly causes the death of another satisfies the culpable mental state required in paragraph (b)(1).[31]

Paragraph (b)(2) specifies that a person commits second degree murder if he or she negligently causes the death of another person, other than an accomplice,[32] while committing or attempting to commit one of the enumerated felonies listed in subparagraphs (b)(2)(A)-(G). The statute specifies that a culpable mental state of "negligently" applies, a term defined at RCC § 22E-206 that here means that the actor should have been aware of a substantial risk that death would result from his or her conduct, and the risk is of such a nature and degree, that, considering the purpose of the person's conduct and the circumstances known to the person, the person's failure to perceive the risk is clearly blameworthy.[33] The negligently culpable mental state does not, however, apply to the enumerated felonies in paragraph (b)(2), which have their own culpable mental state requirements which must be proven. 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.[34] There also must be "some causal connection between the homicide and the underlying felony."[35] The death must have been caused by an act "in furtherance" of the

[28] See Commentary to RCC § 22E-206.

[29] For example, consider a person who causes a fatal car crash by driving at extremely high speeds as he rushes his child, who has suffered a painful compound fracture, to a hospital. The actor's intent to seek medical care and to alleviate his child's pain may weigh against finding that he acted with extreme indifference to human life.

[30] For example, consider a person who is habitually abused by her husband, who drives at extremely high speeds under threat of further abuse (insufficient to afford a duress defense) from her husband if she slows down. If that person then causes a fatal car crash, her emotional state and external coercion from her husband may weigh against finding that she acted with extreme indifference to human life.

[31] RCC § 22E-206 specifies that "When the law requires recklessness as to a result element or circumstance element, the requirement is also satisfied by proof of intent, knowledge, or purpose." Moreover, absent any applicable defense, any time a person purposely or knowingly causes the death of another, that person manifests extreme indifference to human life.

[32] For example, if in the course of an armed robbery, the accused accidentally fires his gun, striking and killing his accomplice who was acting as a lookout, there would be no felony murder liability.

[33] RCC 22E-206(e).

[34] *Head v. United States*, 451 A.2d 615, 625 (D.C. 1982).

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

underlying felony.[36] The revised statute codifies this case law by requiring that the death be "in the course of and in furtherance of committing, or attempting to commit" an enumerated offense.[37]

Subsection (c) specifies rules for imputing a conscious disregard of the risk required to prove that the person acted with extreme indifference to human life. Under the principles of liability governing intoxication under RCC § 22E-209, when an offense requires recklessness as to a result or circumstance, that culpable mental state may be imputed even if the person lacked actual awareness of a substantial risk due to his or her self-induced intoxication.[38] However, as discussed above, extreme indifference to human life in paragraph (b)(1) of the RCC murder statute requires that the person consciously disregarded an *extreme* risk of death or serious bodily injury, a greater degree of risk than is required for recklessness alone. While RCC § 22E-209 does not authorize fact finders to impute awareness of an extreme risk, this subsection specifies that a person shall be deemed to have been aware of an extreme risk required to prove that the person acted with extreme indifference to human life when the person was unaware of that risk due to self-induced intoxication, but would have been aware of the risk had the person been sober. The terms "intoxication" and "self-induced intoxication" have the meanings specified in RCC § 22E-209.[39]

Even when a person's conscious disregard of an extreme risk of death or serious bodily injury is imputed under this subsection, in some instances the person may still not have acted with extreme indifference to human life. It is possible, though unlikely, that a person's self-induced intoxication is non-culpable, and weighs against finding that the person acted with extreme indifference to human life.[40] In these cases, although the awareness of risk may be

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[36] It is not required that the death itself facilitated commission or attempted commission of the predicate felony. However, the conduct constituting 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.

[37] Causing death of another is in furtherance of the predicate felony if it facilitated commission or attempted commission of the felony, or avoiding apprehension or detection of the felony. *E.g.*, *Lovette v. State*, 636 So. 2d 1304, 1307 (Fla. 1994) ("These killings lessened the immediate detection of the robbery and apprehension of the perpetrators and, thus, furthered that robbery.").

[38] Imputation of recklessness under RCC § 22E-209 also requires that the person was negligent as to the result or circumstance.

[39] For further discussion of these terms, see Commentary to RCC § 22E-209.

[40] This is perhaps clearest where a person's self-induced intoxication is pathological—i.e., "grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible." Model Penal Code § 2.08(5)(c). The following hypothetical is illustrative. X consumes a single alcoholic beverage at an office holiday party, and immediately thereafter departs to the metro. While waiting for the train, X begins to experience an extremely high level of intoxication—unbeknownst to X, the drink has interacted with an allergy medication she is taking, thereby producing a level of intoxication ten times greater than what X normally experiences from that amount of alcohol. As a result, X has a difficult time standing straight, and ends up stumbling into another train-goer, V, who falls onto the tracks just as the train is approaching. If X is subsequently charged with depraved heart murder on these facts, her self-induced state of intoxication—when viewed in light of the surrounding circumstances— may weigh against finding that she manifested extreme indifference to human life. It may be true that X, but for her intoxicated state, would have been more careful/aware of V's proximity. Nevertheless, X is only liable for depraved heart murder under the RCC if X's conduct manifested an extreme indifference to human life.

It is also possible, under narrow circumstances, for a person's self-induced intoxication to negate his or her blameworthiness even when it is not pathological. This is reflected in the situation of X, who consumes an extremely large amount of alcohol by herself on the second level of her two-story home. Soon thereafter, X's sister,

imputed, the person could still be acquitted of second degree murder. However, finding that the person did not act with extreme indifference to human life does not preclude finding that the person acted recklessly as required for involuntary manslaughter[41], provided that his or her conduct was clearly blameworthy.

Subsection (d) establishes the penalties for first and second degree murder. Paragraph (d)(1) specifies that first degree murder is a [Class X offense…RESERVED]. Paragraph (d)(2) specifies that second degree murder is a [Class X offense . . . RESERVED.]

Paragraph (d)(3) provides enhanced penalties for both first and second degree murder. If the government proves the presence of at least one aggravating factor listed under paragraph (d)(3), the penalty classification for first degree murder and second degree murder may be increased in severity by one penalty class. These penalty enhancements may be applied in addition to any penalty enhancements authorized by RCC Chapter 8.

Subparagraph (d)(3)(A) specifies that recklessness as to whether the decedent is a protected person is an aggravating circumstance. Recklessness is defined at RCC § 22E-206, and requires that the actor was aware of a substantial risk that the deceased was a protected person, and that the risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, its disregard is clearly blameworthy. The term "protected person" is defined in RCC § 22E-701.[42]

Subparagraph (d)(3)(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, or district official is an aggravating circumstance. This aggravating circumstance requires that the accused acted with "purpose," a term defined at RCC § 22E-206, which means that the actor must consciously desire to harm that person because of his or her status as a law enforcement officer, public safety employee, or District official.[43] Harm may include, but does not require bodily injury. Harm should be construed more broadly to include causing an array of

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V, makes an unannounced visit to X's home, lets herself in, and then announces that she's going to walk up to the second story to have a conversation with X. A few moments later, X stumbles into V at the top of the stairs, unaware of V's proximity, thereby causing V to fall to her death. If X is charged with depraved heart murder, under current law evidence of her voluntary intoxication could *not* be presented to negate the culpable mental state required for second degree murder. *Wheeler v. United States, 832 A.2d 1271, 1273 (D.C. 2003) (quoting Bishop v. United States, 71 App. D.C. 132, 107 F.2d 297 (D.C. Cir. 1939)).* In the RCC, however, evidence of the actor's voluntary intoxication could be present in the case and considered by the jury to presume awareness of the risk but also to negate finding that she acted with extreme indifference to human life.

[41] RCC § 22E-1102.

[42] RCC § 22E-701 "Protected person" means a person who is:

(A) Under 18 years of age old, when, in fact, the actor is 18 years of age or older and at least 4 years older than the complainant;

(B) 65 years old or older, when, in fact, the actor is under the age of 65 years and at least 10 years younger than the complainant;

(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; or

(G)A District official, while in the course of official duties.

[43] 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.

adverse outcomes.[44] "Law enforcement officer," "public safety employee," and "District official" are all defined terms in RCC § 22E-701. Per RCC § 22E-205, the object of the phrase "with the purpose" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. Here, it is not necessary to prove that the complainant who was harmed was a law enforcement officer, public safety employee, or District official, only that the actor believed to a practical certainty that the complainant that he or she would harm a person of such a status.

Subparagraph (d)(3)(C) 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 § 22E-206, which means that the actor must consciously desire to avoid or prevent a lawful arrest, or to escape from custody.

Subparagraph (d)(3)(D) specifies that murder committed for hire is an aggravating circumstance. This aggravating circumstance is satisfied if the actor received anything of pecuniary value from another person in exchange for causing the death. This subsection also specifies that the culpable mental state required for this aggravating circumstance is "knowingly," a term defined under RCC § 22E-206 to mean that the actor must have been practically certain that he or she would receive anything of value in exchange for causing the death of another.

Subparagraph (d)(3)(E) 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.[45] This subsection also specifies that the culpable mental state required for this aggravating circumstance is "knowingly," a term defined under RCC § 22E-206 to mean that the actor must have been practically certain 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.

Subparagraph (d)(3)(F) specifies that mutilating or desecrating the decedent's body is an aggravating circumstance.[46] This subsection also specifies that the culpable mental state required for this aggravating circumstance is "knowingly," a term defined under RCC § 22E-206 to mean that the actor must be practically certain that he or she mutilated or desecrated the body after death.

Subparagraph (d)(3)(G) specifies that substantial planning is an aggravating circumstance. Substantial planning requires more than mere premeditation and deliberation. The term "substantial planning" is intended to have the same meaning as under current law.[47] Although substantial planning does not require an intricate plot, the accused must have formed the intent to kill a substantial amount of time before committing the murder.[48] This

[44] For example, if a person fires several shots above a police officer's head with the purpose of frightening the officer, and accidentally hits and kills the officer, the aggravating factor under (c)(3)(B) may apply, even if the person did not have the purpose of causing bodily injury.

[45] 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.

[46] 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.

[47] D.C. Code §§ 22-2104.01, 22-2403.01(b-2).

[48] 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.

subparagraph uses the term "in fact," which specifies that no culpable mental state applies to this aggravating circumstance.

Subparagraph (d)(3)(H) specifies that committing a murder by a drive-by or random shooting is an aggravating circumstance. The term "drive-by shooting" is intended to cover murders committed by firing shots from a motor vehicle while it is being operated. Random shootings are intended to include murders in which the actor did not have a target in mind, or in which the shooting was committed in a manner that indiscriminately endangered bystanders.

Subparagraph (d)(3)(I) specifies that committing a murder with the purpose of harming the decedent because he was or had been a witness in any criminal investigation or judicial proceeding, or the decedent was capable of providing or had provided assistance in any criminal investigation or judicial proceeding is an aggravating circumstance.

Subsection (e) provides for a bifurcated proceeding when a person is charged with penalty enhancements under subparagraphs (c)(3)(E) or (c)(3)(F). In the first stage of the proceeding, the fact finder shall only consider evidence relevant to determining whether the accused committed either first or second degree murder. Evidence that is relevant to determining whether aggravating factors under subparagraphs (c)(3)(E) or (c)(3)(F) are not admissible at this stage, unless it is relevant to determining whether the accused committed either first or second degree murder. In the second stage of the proceeding, the fact finder may consider evidence relevant to determining whether aggravating factors under subparagraphs (c)(3)(E) or (c)(3)(F). This bifurcated procedure limits the admissibility of unfairly prejudicial evidence during the first stage. This subsection also specifies that the same jury or fact finder will serve at both stages of the proceeding.

Paragraph (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, or second degree depraved heart murder. This paragraph provides a non-exhaustive definition of mitigating circumstances.[49]

Subparagraph (f)(1)(A) first 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."[50] Subparagraph (e)(1)(A) further specifies that the reasonableness of the cause of the disturbance shall be determined from the viewpoint of a reasonable person in the actor's situation under the circumstances as the actor believed them to be. The "actor's situation" includes some of the actor's personal traits, such as physical disabilities[51], or temporary emotional states,[52] which should be taken into account in determining reasonableness. However, the actor's idiosyncratic values or moral judgments are irrelevant.[53]

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[49] Other circumstances that are not explicitly listed in paragraph (e)(1) may constitute mitigating circumstances. However, subparagraph (e)(1)(C) is drafted broadly to include nearly any circumstance that would constitute a mitigating circumstance.

[50] *See* Commentary to MPC § 210.3 at 60.

[51] 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.

[52] 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.

[53] 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

Subparagraph (e)(1)(A) also specifies that reasonableness shall be determined from the accused's situation "as the actor believed them to be." This language clarifies that the actor's *factual* beliefs, even if inaccurate, must be taken into account in determining whether the cause of the extreme emotional disturbance was reasonable.[54] 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."[55]

Subparagraph (f)(1)(B) defines mitigating circumstances to include acting under an unreasonable belief that the use of deadly force was necessary to prevent imminent 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.[56] A person is justified in using 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.[57] Use of deadly force with such a reasonable belief is a complete defense to liability.[58] If the actor genuinely believes these circumstances exist, but that belief in either circumstance is unreasonable¸ subparagraph (e)(1)(B) clarifies that the actor is not guilty of murder, but is guilty of voluntary manslaughter.[59]

Subparagraph (f)(1)(C) further defines mitigating circumstances to broadly include any other legally-recognized partial defense to murder. 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.[60]

Paragraph (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

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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.

[54] For example, a classic heat of passion fact pattern involves a person discovering his or her spouse having sexual relations with another person. An actor 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.

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

[56] *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.'").

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

[58] See RCC § 22E-4XX [forthcoming] Defense of Person.

[59] If an actor uses lethal force reasonably believing that the decedent was threatening an imminent use of deadly force, but the belief that use of lethal force was necessary to repel the attack was unreasonable because it was obvious that the person could have easily retreated with no risk to his safety, an imperfect self-defense claim would be available to mitigate the offense from murder to manslaughter. In addition, belief that the use of lethal force was necessary may be unreasonable if the actor used excessive force. For example, if the actor genuinely believed that the decedent was threatening an imminent use of deadly force, but *non-lethal* force would have been sufficient to repel the attack, an imperfect self-defense claim would be available to mitigate the offense from murder to manslaughter. *See*, *Dorsey v. United States*, 935 A.2d 288, 293 (D.C. 2007).

[60] 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.").

reasonable doubt. This paragraph is intended to codify current District law, which specifies the government's burden of proof.[61]

Paragraph (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 is not guilty of murder but is guilty of voluntary manslaughter.[62]

Subsection (g) provides an affirmative defense to prosecution under paragraph (b)(2). RCC § 22E-201 specifies the burden of proof and production for all affirmative defenses in the RCC. Under RCC § 22E-201, the actor bears the burden of proving the elements of the defense by a preponderance of the evidence. The affirmative defense under subsection (g) includes two components. First, the defense requires that the actor does not commit the lethal act. This element may be satisfied when someone other than the actor, either a fellow participant in a predicate felony, the person who is the target of the predicate felony, or a third party, commits the lethal act.[63] Second, the defense requires one of two additional elements described in paragraphs (g)(1) and (g)(2). Paragraph (g)(1) requires that the actor believes that no participant in the felony intends to cause death or serious bodily injury. This element may be satisfied when the actor is an accomplice and believes that the principal does not intend to cause death or serious bodily injury, or if the actor commits the predicate offense alone and the actor does not intend to cause death or serious bodily injury. "Intent" is a defined term that here requires that the actor believes that no participant in the predicate felony consciously desires or is practically certain that he or she will cause death or serious bodily injury in the course of the felony. This element may be satisfied even if the actor believes that a participant in the predicate felony intends to engage in conduct that creates a *risk* of causing death or serious injury.[64] Although the actor must genuinely hold this belief, the belief need not be objectively reasonable.[65] Alternatively, paragraph (g)(2) requires that the actor made reasonable efforts to prevent another participant in the predicate felony from causing death or serious bodily injury. This element of

[61] *Comber*, 584 A.2d at 41 (D.C. 1990) ("The absence of justification, excuse, or mitigation is thus an essential component of malice, and in turn of second-degree murder, on which the government bears the ultimate burden of persuasion."). *See also*, *Davis v. United States*, 724 A.2d 1163, 1170 (D.C. 1998) (noting that if there is any evidence, however weak, of mitigating circumstances, if requested the trial court must provide a voluntary manslaughter instruction in a murder prosecution). *But see*, *Edwards v. United States*, 721 A.2d 938, 942 (D.C. 1998) (defendant not entitled to a self-defense instruction when as a matter of law, the forced used was excessive).

[62] 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).

[63] For example, if in the course of a robbery of a store, the clerk fires a shot in self defense and hits and kills a bystander, this element of the defense would be satisfied.

[64] For example, if a getaway driver for a robbery knows that the robber intends to brandish a gun to threaten a store clerk, but believes that the robber will only frighten but not harm the clerk, the defense would apply even if the robber kills the clerk. This element of the defense is satisfied even though brandishing a gun creates a risk of death or serious bodily injury.

[65] Requiring that the belief be reasonable would extend felony murder liability to actors who were merely *negligent* as to whether an accomplice or another person intended to cause death or serious bodily injury. When a person does not actually cause the death of another, mere negligence is an insufficient degree of culpability to warrant felony murder liability. Other homicide charges may be brought for a negligent killing.

the defense may be satisfied even if the actor believed a co-felon intended to cause death or serious bodily injury.[66]

Subsection (h) [RESERVED For purposes of imprisonment following revocation of release authorized by § 24-403.01(b)(7), murder in the first degree, and murder in the second degree are Class A felonies.]

Subsection (i) cross references definitions found elsewhere in the revised criminal code.

Relation to Current District Law. *The revised murder statute changes current District law for first and second degree murder in nineteen main ways.*

First, under the revised murder statute, felony murder is graded as second degree murder. Under the current first degree murder statute, a person may be convicted if he or she unintentionally causes the death of another while committing or attempting to commit a specified felony.[67] 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.[68] Moreover, one of the possible aggravating circumstances that enhances penalties for first degree felony murder is that the killing occurred while the accused was committing or attempting to commit "kidnapping,"[69] "robbery, arson, rape, or a sexual offense,"[70] and the DCCA has held that the predicate felony for felony murder can also serve as an aggravating circumstance.[71] Consequently, under current law, an unintentional 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 constitutes second degree murder. This change improves the proportionality of penalties under the RCC by treating killings committed with a lower culpable mental state less severely.

Second, the revised murder 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."[72] The DCCA has held that an "offense punishable by imprisonment in the penitentiary refers to any felony.[73] Under the RCC, the

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[66] For example, A and B kidnap C and hold him for ransom. When C's family refuses to pay the ransom, A decides to kill C. B does not want C to be killed, and alerts the police and physically attempts to prevent B from harming C. If B still manages to kill C, the defense would apply to A, even though he was aware that B intended to kill C.

[67] 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.

[68] Absent any aggravating circumstances, a non-premeditated intentional murder is subject to a maximum sentence of 40 years, whereas felony murder is subject to a 60 year maximum sentence and a 30 year mandatory minimum. D.C. Code § 22-2104.

[69] There is only one grade of kidnapping under current law. The CRCC recommends dividing the kidnapping offense into two penalty grades. RCC § 22E-1401.

[70] D.C. Code § 22-2104.01 (b)(8).

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

[72] D.C. Code § 22-2101.

[73] *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).

grading with respect to general felony conduct is simplified, such that purposely causing the death of another person with premeditation and deliberation is first degree murder, while purposeful killing without premeditation or deliberation will still be covered by the second degree murder offense. This change improves the clarity and proportionality of the revised criminal code.

Third, 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."[74] In contrast, the RCC treats killings caused by obstructing railroads the same as any 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 improves 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.

Fourth, the revised second degree murder statute changes the specified felonies that may serve as a predicate offense for "felony murder" in five ways.[75] The current felony murder predicates include: (1) all conduct constituting "robbery," currently an ungraded offense; (2) first degree child cruelty; (3) any "felony involving a controlled substance;"[76] (4) mayhem; and (5) "any housebreaking while armed with or using a dangerous weapon," although it is unclear which specific crimes constitute such "housebreaking."[77] 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 first degree, second degree, third degree, and fourth degree robbery are predicates for felony murder, but does not include the RCC's fifth degree robbery as a predicate offense, or pickpocketing-type conduct that is treated as theft from a person[78] 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 first degree, second degree, third degree, and

[74] 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[.]"

[75] 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 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.

[76] D.C. Code §22-2101.

[77] 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. However, the DCCA has 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).

[78] Under the RCC, pick pocketing or sudden snatching of property that does not involve threats or physical force, when the property is not taken from the other person's hands or arms, are not criminalized under the robbery statute, but instead are treated as theft from a person, RCC §§ 22E-1201, 22E-2101.

fourth degree robbery.[79] Second, the revised second degree murder offense does not include the current D.C. Code first degree child cruelty, and instead includes the RCC's first and second degree criminal abuse of a minor, but not third degree criminal abuse of a minor. Omitting third degree criminal abuse of a minor changes current law as at least some conduct that constitutes the RCC's third degree criminal abuse of a minor offense would satisfy the elements of the current first degree child cruelty statute.[80] Omitting third degree criminal abuse of a minor as a predicate for felony murder improves the proportionality of the statute, as the RCC third degree criminal abuse of a minor and the current first degree child cruelty statute cover conduct that is not sufficiently dangerous or harmful to warrant felony murder liability.[81] Third, the revised second degree murder offense does not include felonies involving a controlled substance as predicates for felony murder. Omitting controlled substance 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 physical harm to others as compared to the other enumerated felonies.[82] Fourth, the revised second degree murder offense 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 first degree and second degree assault offenses.[83] 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 first or second degree assault can be convicted of second degree murder under a depraved heart theory.[84] Omitting these offenses from the enumerated predicate offenses improves the clarity of

[79] Third degree robbery requires that the defendant took 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.

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

[81] 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 § 22E-1501 for more explanation of the revised child abuse statutes.

[82] 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.

[83] See Commentary to RCC §§ 22E-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

[84] 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 paragraph (b)(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

the code. Lastly, the revised second degree murder offense replaces the phrase "any housebreaking while possessing a dangerous weapon" with "first degree burglary while possessing a dangerous weapon on his or her person." Under current law, only first degree burglary while armed may serve as a predicate offense,[85] and the current first degree burglary offense requires that the accused entered an occupied dwelling. This largely corresponds to the RCC's first degree burglary offense, with only minor changes to current law.[86]

Fifth, the revised second degree murder offense 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."[87] However, while there is no "in furtherance" requirement under current law,[88] the DCCA has held that "[m]ere temporal and locational coincidence"[89] 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*."[90] 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.[91]

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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, or recklessly caused the death of another under circumstances manifesting extreme indifference to human life, either of which culpable mental states would satisfy the requirement for second degree murder per paragraph (b)(2).

[85] *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.).

[86] The RCC's first 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 specifically 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.

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

[88] 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).

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

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

[91] Courts in other states have disagreed about the meaning of "in furtherance" language that is common 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. *E.g.*, *State v. Arias*, 641 P.2d 1285, 1287 (Ariz. 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" to require only 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

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.[92]

Sixth, applying the general culpability principles for self-induced intoxication in RCC § 22E-209 allows a defendant to claim that due to intoxication, he or she did not form the awareness of risk required to act "recklessly, with extreme indifference to human life." However, subsection (c) allows a fact finder to impute awareness of the risk required to prove that the defendant acted with extreme indifference to human life, when the lack of awareness was due to self-induced intoxication. Although self-induced intoxication is generally culpable, and weighs in favor of finding that the person acted with extreme indifference to human life, it is possible, however unlikely, that self-induced intoxication reduces the blameworthiness, and negates finding that the person acted with extreme indifference to human life.[93]

The current murder statutes are silent as to the effect of voluntary intoxication, but the DCCA has held that, although evidence of self-induced intoxication may negate a finding that the defendant acted with premeditation as required for first degree murder, it "may not reduce murder to voluntary manslaughter, nor permit an acquittal of [second degree] murder."[94] The DCCA further clarified that evidence of voluntary intoxication "is not admissible to disprove [the element of] malice' integral to the crime of murder."[95] By contrast, although subsection (c) allows for imputation of the awareness of risk, in some rare cases, a defendant's self-induced intoxication may still negate finding that he or she acted with extreme indifference to human life, as required for second degree murder. This change improves the proportionality of the revised offense.

In addition, to the extent that the voluntary intoxication provision changes current law with respect to any of the predicate offenses for felony murder, the provision also changes current law as to felony murder.[96] If voluntary intoxication negates the requisite culpable mental state required for a predicate offense, there can be no felony murder liability based on that

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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."). The RCC tracks the former approach, requiring the death to have advanced or facilitated the commission of the underlying crime.

[92] 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.

[93] *Infra*, at 41.

[94] *Wheeler v. United States*, 832 A.2d 1271, 1273 (D.C. 2003) (quoting *Bishop v. United States*, 71 App.D.C. 132, 107 F.2d 297 (D.C. Cir. 1939)).

[95] *Id*. (citing *Bishop v. United States*, 107 F.2d 297, 302 (1939)).

[96] For example, the revised arson statute changes current law by allowing evidence of the defendant's voluntary intoxication to be introduced to negate the culpable mental state required for first or second degree arson. See Commentary to RCC § 22E-2501.

offense.[97] These changes improve the clarity, completeness, and proportionality of the revised offense.

Seventh, the penalty enhancements under subsection (d) omit 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.[98] By contrast, the penalty enhancement under subsection (d) omits this aggravating circumstance as unnecessary. In any case in which a person recklessly, with extreme indifference to human life, kills another while committing or attempting to commit kidnapping, the person may be convicted and separately sentenced for kidnapping or attempted kidnapping, which substantially increases the maximum allowable punishment beyond a murder not committed in the course of a kidnapping or attempted kidnapping. Eliminating this aggravating circumstance reduces unnecessary overlap between offenses[99], 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 kidnapping offense.

Eighth, the penalty enhancements under subsection (d) omit 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."[100] The terms "rape" and "sexual offense" are undefined by the current statute, and there is no case law on point.[101] By contrast, the penalty enhancement under subsection (d) 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, which substantially increases the maximum allowable punishment beyond a murder not committed in the course of robbery, arson, rape, or another sexual offense. Eliminating this aggravating circumstance reduces unnecessary overlap between offenses,[102] and improves the clarity and

[97] For example, if a defendant is charged with felony murder predicated on first or second degree arson, evidence of voluntary intoxication may be introduced to negate the requisite culpable mental state for first or second degree arson. If the defendant failed to form the requisite mental state for arson, then by extension the defendant cannot be found guilty of felony murder predicated on arson.

[98] D.C. Code § 22-2104.1(b)(1).

[99] 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.

[100] D.C. Code § 22-2104.01(b)(8).

[101] Arguably, "rape, or sexual offense" at least includes first, second, and third degree sexual abuse, child sexual abuse, and some 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.

[102] 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

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.

Ninth, the penalty enhancements under subsection (d) omit 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."[103] The term "incident" is not defined by the statute, and there is no case law on point. By contrast, the penalty enhancement under subsection (d) 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.[104] Eliminating this aggravating circumstance reduces unnecessary overlap between offenses,[105] 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.

Tenth, the penalty enhancements under subsection (d) omit 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 "involved a drive-by or random shooting."[106] There is no District case law on the meaning of "random." By contrast, the penalty enhancement under subsection (d) omits this aggravating circumstance because the circumstance is vague and drive-by or random shootings are not sufficiently distinguishable from other murders to justify a more severe sentence. It is unclear both what connection would suffice to establish that a murder "involved" a drive-by or random shooting, and what the meaning of "random" is in this context[107]. In addition, 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.[108] Eliminating this aggravating circumstance

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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.

[103] D.C. Code § 22-2104.1(b)(6).

[104] 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 for an aggravating circumstance when the defendant can already receive a proportionate term of imprisonment.

[105] 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.

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

[107] For example, it is unclear whether the aggravator for "random" killing would include any shooting of a firearm in the general direction of an unknown person (assuming the unknown identity of the victim is the critical aspect for determining randomness), whether the lack of a specific motive or reason for shooting a firearm in the general direction of an unknown person is required (assuming the lack of a clear victim-selection mechanism is the critical aspect of randomness), or whether a non-purposeful, unintentional, culpable mental state as to the victim is required (assuming that lack of knowing or purposeful action is the critical aspect of randomness).

[108] 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.

improves the clarity and proportionality of the revised statute by preventing enhanced penalties for murders that are not categorically more heinous or culpable than other types of murder.

Eleventh, the penalty enhancements under subsection (d) omit 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, national origin, sexual orientation, or gender identity or expression[.]"[109] 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…."[110] By contrast, the penalty enhancements under subsection (d) omit this aggravating circumstance as unnecessary because bias motivated murders will be subject to a general penalty enhancement under RCC § 22E-607. Omitting this aggravating circumstance reduces unnecessary overlap between statutes[111] 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.

Twelfth, the penalty enhancements under subsection (d) omit as an aggravating circumstance that the offense was committed because the victim was or had been a witness in any criminal investigation or judicial proceeding or was capable of providing or had provided assistance in any criminal investigation or judicial proceeding. The current first and second degree murder statutes are subject to a penalty enhancement when the murder ".was committed because the victim was or had been a witness in any criminal investigation or judicial proceeding or was capable of providing or had provided assistance in any criminal investigation or judicial proceeding."[112] By contrast, the penalty enhancements under subsection (d) omit this aggravating circumstance as unnecessary because murders committed for these purposes are subject to separate criminal liability under the obstructing justice statute.[113]

Thirteenth, the penalty enhancements under subsection (d) omit 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.[114] 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.)[115] By contrast, the penalty enhancement under

[109] D.C. Code §§ 22-2104.1(b)(7), 24-403.01 (b-2)(2)(A).
[110] D.C. Code §§ 22-3701, 22-3703.
[111] 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.
[112] D.C. Code § 24-403.01 (b-2)(2)(B).
[113] See RCC § 22E-XXXX [pending revision of the obstructing justice statute].
[114] 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.").
[115] D.C. Code §§ 22-1804 and 22-1804a.

subsection (d) omits this aggravating circumstance as unnecessary. The general penalty enhancement for recidivist conduct under RCC § 22E-606 provides for enhanced penalties. Omitting this aggravating circumstance reduces unnecessary overlap between criminal statutes[116] 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.

Fourteenth, the penalty enhancements under subsection (d) include 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, or District official. Harm may include, but does not require bodily injury. Harm should be construed more broadly to include causing an array of adverse outcomes.[117] 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"[118] 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 a citizen patrol."[119] A separate offense criminalizes harming District officials or employees and their family members.[120] By contrast, penalty enhancements under subsection (d) include as an aggravating circumstance that the murder was committed with the purpose of harming the victim because of the victim's status as a law enforcement officer, public safety employee, or District official. Inclusion of this this aggravating circumstance replaces the murder of a law enforcement officer offense that exists under current law.[121] 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.[122] This aggravating circumstance covers only a subset of District employees—District officials—and does not include citizen patrol members, consistent with other provisions in the RCC.[123] Including this aggravating circumstance, and eliminating the separate murder of a law enforcement officer, reduces unnecessary overlap between criminal statutes and improves the clarity and consistency of the revised code.

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[116] 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.

[117] For example, if a person fires several shots above a District official's head with the purpose of frightening the official, and accidentally hits and kills the official, the aggravating factor under (c)(3)(B) may apply, even if the person did not have the purpose of causing bodily injury.

[118] D.C. Code § 22-2106.

[119] D.C. Code § 22-3602(b).

[120] D.C. Code §22-851.

[121] D.C. Code § 22-2106.

[122] 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.

[123] For more information on the RCC definition of "District official," see commentary to RCC § 22E-701.

Fifteenth, the penalty enhancements under subsection (d) include as an aggravating circumstance that the accused was reckless as to the victim's status as a "protected person," a term defined under RCC § 22E-701, 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," or a "District official, while in the course of official duties." 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,[124] or status as a citizen patrol member.[125] Separate statutes also criminalize murder of a law enforcement officer engaged in official duties,[126] and harming District officials or employees and their family members as separate offenses.[127] By contrast, the penalty enhancements under subsection (d) include as an aggravating circumstance that the victim was a "protected person."[128] This term is defined to include persons vulnerable due to youth or old age, a specified transportation worker, or a law enforcement officer engaged in official duties, and replaces the current D.C. Code's separate penalty enhancements, and the murder of a law enforcement officer offense. Under the revised term, a victim's status as a member of a "citizen patrol" no longer is sufficient for an enhanced murder penalty. 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 and consistency of the revised code.

Sixteenth, the penalty enhancements under subsection (d), through use of the term "protected person," change 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. 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.[129] 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[130], 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.[131] By contrast, the penalty enhancements under subsection (d), through use of the term "protected person," include as aggravating circumstances that the victim was less than 18 years old—if the actor is at least 18 years old and at least 4 years older than the complainant—or the victim was 65 years or older—when the actor is under the age of 65 and at least 10 years younger than the complainant.[132] This aggravating circumstance replaces both the age based aggravating circumstances under current law, and the separate statutory penalty enhancements

[124] 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).
[125] D.C. Code § 22-3602 (enhancement for specified crimes committed against citizen patrol members).
[126] 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.
[127] D.C. Code §22-851.
[128] For more information on the RCC definition of "protected person," see commentary to RCC § 22E-701.
[129] D.C. Code § 24-403.01 (b-2)(2)(G).
[130] D.C. Code §22-3601.
[131] D.C. Code § 22-3611.
[132] RCC § 22E-701.

based on the victim's age, insofar as they apply to murder. This change in law improves the consistency of the current and revised code.[133]

Seventeenth, the revised murder statute does not provide enhanced penalties for committing murder while armed with a dangerous weapon. Under current law, murder is subject to heightened penalties if the accused committed the offense "while armed" or "having readily available" a dangerous weapon.[134] In contrast, under the revised statute, committing murder while armed does not increase the severity of penalties. As a practical matter, nearly all murders involve a dangerous weapon, and raising the gradation of murder in all instances using a dangerous weapon would increase liability significantly compared to the current murder statute. Moreover, as a practical matter, it is unclear whether the current code's separate weapon enhancement significantly affect sentences for murder. This change improves the proportionality of the revised code, as murder while armed does not inflict greater harm than unarmed murder, and therefore does not warrant heightened penalty.

Eighteenth, the penalty enhancements under subsection (d) do 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.[135] 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[.]"[136] 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.[137] 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 in "writing one or more aggravating circumstances to be relied upon."[138] D.C. Code §24-403.01(b-2) does not specify whether a separate sentencing hearing must be held. By contrast, the revised murder statute 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.[139] Under the revised murder statute, proof of at least one aggravating circumstance is still an element which must be alleged in the indictment[140] and proven beyond a reasonable doubt at trial.[141] The factfinder is not required to separately produce a written finding that at least one aggravating circumstance was proven beyond a reasonable doubt, however, nor is the hearing described in current law

[133] This aggravating circumstance may also change current law in another way. 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. Under the revised second degree murder offense, first degree child abuse and second degree child abuse are predicate offenses for felony murder. Under the RCC, a second degree felony murder predicated on child abuse is, in addition, subject to a penalty enhancement based on the victim's status as a minor.
[134] D.C. Code § 22-4502.
[135] D.C. Code § 22-2104.
[136] D.C. Code § 22-2104.01.
[137] D.C. Code § 22-2104.01(c).
[138] D.C. Code § 22-403.01 (b-2)(1)(A).
[139] 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.
[140] D.C. Super. Ct. R. Crim. P. 7.
[141] *In re Winship*, 397 U.S. 358 (1970).

required.[142] However, eliminating the statutory notice and hearing requirements applicable to the current District murder statutes does not change applicable Sixth Amendment law which, since the District adopted its statutory notice requirements, has expanded to require proof beyond a reasonable doubt of facts that subject a person to a higher statutory penalty.[143] This change improves the clarity of the criminal code.

The revised 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."[144] However, this provision is unnecessary as the revised murder statute does not require any separate sentencing proceeding. If a conviction for murder with a sentencing enhancement 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 or second degree murder.[145]

Nineteenth, the revised degree murder statute provides an affirmative defense to felony murder when the actor does not commit the lethal act, and either believes that no participant intends to cause death or serious bodily injury, or makes reasonable efforts to prevent a fellow participant from causing death or serious bodily injury. The current D.C. Code murder statute does not include any defense for felony murder where another person committed the lethal act. The DCCA has held that when a person causes the death of another in the course of an enumerated felony, "[a]ll accomplices are culpable for the resulting death, because the intent requirement for murder, in the case against an aider and abettor, is satisfied solely by the aider and abettor's participation in the felony that resulted in the killing."[146] In addition, the DCCA has held that "the accomplice is guilty even though there was an express agreement not to kill, and even if he actually attempts to prevent the homicide."[147] In contrast, the revised murder statute includes an affirmative defense that bars liability for actors who did not commit the lethal act resulting in death of another, and who was less blameworthy, either because they believe that no participant in the predicate felony intends to cause death or serious bodily injury, or because they made reasonable effort to prevent death or serious bodily injury. Applying murder liability

[142] However, as set forth in subsection (e), a separate proceeding will be used to determine if aggravating factors under subparagraphs (c)(3)(E) or (c)(3)(F) were present.

[143] *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).

[144] D.C. Code § 22-2104.01 (d).

[145] Under the RCC, first and second degree murder are lesser included offenses of those respective degrees of murder that are subject to a sentencing enhancement under the elements test set forth in *Byrd v. United States*, 598 A.2d 386 (D.C.1991) (en banc). The sentencing enhancement can only apply if the elements of first or second degree murder have been proven. The revised 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).

[146] *Lee v. United States*, 699 A.2d 373, 385 (D.C. 1997) (quoting *Prophet v. United States*, 602 A.2d 1087, 1095 (D.C.1992)).

[147] *Id.*

to these actors would be disproportionately severe, although other homicide charges may be brought against the actor. This change improves the proportionality of the revised statutes.

Beyond these nineteen changes to current District law, nine other aspects of the revised murder statute may constitute substantive changes in law.

First, the revised 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. 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.[148] The DCCA has not clearly defined what constitutes a "mitigating circumstance," but has held that mitigating circumstances include an accused "act[ing] in the heat of passion caused by adequate provocation."[149] Under common law, cases interpreting what constituted adequate provocation came to recognize "fixed categories of conduct"[150] that "the law recognized as sufficiently provocative to mitigate"[151] murder to the lesser offense of manslaughter.[152]

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.[153] This modern approach "does not provide specific categories of acceptable or unacceptable provocatory conduct."[154] 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"[155] such that "the actor's loss of self-control can be understood in

[148] *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 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.")

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

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

[151] *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.").

[152] *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.").

[153] Commentary to MPC § 210.3 at 49.

[154] *Brown v. United States*, 584 A.2d 537, 542 (D.C. 1990).

[155] *Id*. at 542.

terms that arouse sympathy in the ordinary citizen."[156] Consistent with this modern approach, 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.[157]

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.[158] 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 its differences, the modern approach in many ways is similar to the common law approach. Under both approaches, the accused must have acted with an emotional state that would cause a person to become so "aroused as to kill another"[159] 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."[160] 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.[161]

It is unclear whether adopting the modern "extreme emotional disturbance" approach changes current District law.[162] Although the DCCA has long used the traditional "adequate provocation" formulation[163], 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[.]"[164] 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."[165] Ultimately the DCCA has not fully reconciled its "recognition (or non-recognition) of the Model Penal

[156] Commentary to MPC § 210.3 at 63.
[157] 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.
[158] Commentary to MPC § 210.3 at 49.
[159] *High v. United States*, 972 A.2d 829, 833-34 (D.C. 2009).
[160] *Brown*, 584 A.2d at 543 n. 17.
[161] *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).
[162] *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").
[163] *E.g.*, *High*, 972 A.2d at 833.
[164] *Brown*, 584 A.2d at 542.
[165] *Id*.

Code"[166] approach to provocation, and so it is unclear how adopting the modern approach changes current law.[167]

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.

Second, the revised murder statute recognizes that "acting with an unreasonable belief that the use of deadly force was necessary to prevent a *person* from unlawfully causing death or serious bodily injury" constitutes a mitigating circumstance. Under this language, the actor need not have believed that the *decedent* would unlawfully cause death or serious bodily injury.[168] There is no DCCA case law on point as to whether mitigation applies if the actor believed that the use of lethal force was necessary to prevent someone other than the decedent from causing death or serious bodily injury.[169] The revised statute clarifies that mitigation applies in these circumstances.

Third, the revised murder offense 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.[170] 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.[171] However, the DCCA has not specified when the use of deadly force is justified in other circumstances,[172] 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

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[166] *Simpson v. United States*, 632 A.2d 374, 377 (D.C. 1993).

[167] For example, the DCCA has explicitly declined to decide whether the decedent must have provided the provoking circumstance.

[168] For example, if A shoots at B, unreasonably believing that B is threatening to kill A, but misses and hits bystander C, the offense could be mitigated from murder to voluntary manslaughter.

[169] Commentators have long recognized that "if the circumstances of the killing are such that it would have been manslaughter had the blow fallen on and killed the intended victim, it will also result in manslaughter if a third person is killed." *Homicide by Unlawful Act Aimed at Another*, 18 A.L.R. 917 (Originally published in 1922). It does not appear that the DCCA has squarely addressed whether *perfect* self defense applies when an actor reasonably believes that the use of lethal force is necessary to prevent a person from causing death or serious injury, and accidentally kills a bystander. *See*, *Commonwealth v. Fowlin*, 710 A.2d 1130, 1131 (Pa. 1998) (holding that defendant who shot assailant in self defense, and also struck innocent bystander may not be held criminally liable for injuries to the bystander).

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

[171] *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.

[172] *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.").

mitigating circumstance.[173] 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.

Fourth, in the revised second degree murder offense, felony murder requires that the accused negligently caused the death of another. While 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,[174] while at least one *en banc* decision suggests that a mental state of negligence is required.[175] The RCC second degree murder statute clarifies this ambiguity by requiring negligence as to causing death of another. 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.[176] 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.

Fifth, under the revised second degree murder offense, felony murder liability does not exist if the person killed was an accomplice to the predicate felony.[177] Current statutory language and DCCA case law do not clarify whether a person can be convicted of felony murder

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[173] 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).

[174] 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.

[175] 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."

[176] Even if this revision constitutes a change to current law, the practical effect of this change likely would be slight. 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.

[177] For example, if 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.

when the decedent was an accomplice to the predicate felony.[178] The RCC second degree murder statute resolves this ambiguity under current law, and, to the extent it may change law, 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.

Fifth, under the revised second degree murder offense, felony murder liability does not exist if the person killed was an accomplice to the predicate felony.[179] 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.[180] The RCC second degree murder statute resolves this ambiguity under current law, and, to the extent it may change law, 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.

Sixth, the revised second degree murder offense 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 murder statute's felony murder provisions do not specifically 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.[181] 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.[182] To the extent that it may change current law, 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

[178] Numerous other jurisdictions do not apply the felony murder doctrine when the decedent was an accomplice or participant in the underlying felony. Alaska Stat. Ann. § 11.41.110; N.J. Stat. Ann. § 2C:11-3; N.Y. Penal Law § 125.25; Or. Rev. Stat. Ann. § 163.115; Wash. Rev. Code Ann. § 9A.32.030.

[179] For example, if 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.

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[181] 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]."[181]

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

committing or attempting to commit any felony, regardless of the inherent dangerousness of the felony would be disproportionately severe.[183]

Seventh, the enhanced penalty provisions recognize as aggravating circumstances that that the accused knowingly subjected the decedent to extreme physical pain or mental suffering prior to the victim's death, or mutilated or desecrated the decedent's body. Under current law, first degree murder is subject to enhanced penalties if the murder "was especially heinous, atrocious, or cruel."[184] The phrase "especially heinous, atrocious, or cruel" (EHAC) is not statutorily defined and case law is unclear as to its meaning.[185] The DCCA has held that a murder may be EHAC if it involves inflicting substantial physical pain or mental anguish prior to death,[186] 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."[187] 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.[188] The DCCA also has stated that a murder may be EHAC if the killing is unprovoked,[189] if the accused did not deny his role in the killing,[190] if the murder involved a violation of trust,[191] if the accused's motive for the murder was to avoid returning to prison,[192] or if the murder was committed "for the fun of it."[193] 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.[194]

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[183] 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.).

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

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

[186] *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").

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

[188] *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).

[189] *Parker*, 692 A.2d at 917 n.6.

[190] *Id.*

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

[192] *Id. at* 24.

[193] *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.

[194] *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").

The RCC enhanced penalty provision more clearly identifies murders 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 do not increase penalties for 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, to the extent it may change current law, 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"[195] and the difficulty in distinguishing those murders that are especially heinous, atrocious, or cruel can lead to arbitrary and disproportionate results.[196] By omitting the vague EHAC formulation, the enhanced penalty provision improves penalty proportionality by more clearly defining the class of murders that warrant heightened punishment.

Eighth, through reference to the term "protected person," the RCC enhanced penalty provision applies recklessness as to whether the decedent 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[197] 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[.]"[198] Although the DCCA has clearly held that actual knowledge that the victim was a law enforcement officer or public safety employee is not required[199], the DCCA has not further specified the mental state as to whether the officer or employee was engaged in performance of official duties. RCC subparagraph (c)(3)(A) of the revised 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 decedent being a protected person.[200]

Ninth, 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 an aggravating circumstance to first degree murder (but not second degree) that the victim is a "especially vulnerable due to age or a mental or physical infirmity."[201] Similarly, it is an aggravating circumstance to second degree murder (but not first

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[195] *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.").

[196] *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.").

[197] D.C. Code § 22-2106.

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

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

[200] *E.g.*, RCC § 22E-1202.

[201] D.C. Code § 22-2104.01

degree) that the victim is "vulnerable because of mental or physical infirmity."[202] No current statute, nor DCCA case law, however, clarifies what types of mental or physical infirmities are required to be proven per this language. The relevant statutes are silent and there is no case law on what, if any, culpable mental state is required as to these circumstances under current District law. However, in the RCC murder statutes the penalty enhancements under subsection (c) include as an aggravating circumstance to both first and second degree murder that the victim a "vulnerable adult."[203] This change improves the consistency and proportionality of the RCC, by reflecting the special status these individuals have elsewhere in current District law,[204] and by making enhancement for murder consistent with enhancements for RCC offenses.[205]

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 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[.]" This statutory language is superfluous. Virtually any purposeful murder by means of poison would involve premeditation and deliberation. This change improves the clarity of the revised first degree murder statute.

Second, 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."[206] Yet, under current law, it is not an element of first degree murder that the accused was "of sound memory and discretion."[207] Rather, the words "of sound memory and discretion" only refers to the basic requirement of legal sanity.[208] Under the RCC this statutory

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

[203] RCC § 22E-701 ("'Vulnerable adult' means 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.").

[204] 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.

[205] See, e.g., RCC § 22E-1202.

[206] D.C. Code § 22-2101.

[207] *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[.]"

[208] *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 murder statute.

Third, the revised second degree murder offense explicitly codifies causing the death of another recklessly with extreme indifference to human life (commonly called "depraved heart murder") in paragraph (b)(1). The current second degree murder statute only defines the offense as killing another person "with malice aforethought."[209] 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.[210] The revised statute abandons this archaic legal term of art and instead specifies that causing the death of another recklessly with extreme indifference to human life constitutes second degree murder. This language is not intended to change any current DCCA case law with respect to "depraved heart murder."

Fourth, the revised second degree murder offense 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."[211] However, under the revised second degree murder offense, 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 paragraph (b)(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.

[209] D.C. Code § 22-2103.
[210] *Comber* 584 A.2d at 38-39.
[211] *Comber* 584 A.2d at 38-39.

RCC § 22E-1102. Manslaughter.

(a) *Voluntary Manslaughter*. A person commits voluntary manslaughter when that person:
  (1) Recklessly, with extreme indifference for human life, causes 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 one of the following offenses:
    (A) First or second degree arson as defined in RCC § 22E-2501;
    (B) First degree sexual abuse as defined in RCC § 22E-1303;
    (C) First degree sexual abuse of a minor as defined in RCC § 22E-1304;
    (D) First and second degree criminal abuse of a minor as defined in RCC § 22E-1501;
    (E) First degree burglary as defined in RCC § 22E-2701, when committed while possessing a dangerous weapon on his or her person;
    (F) First, second, third, or fourth degree robbery as defined in RCC § 22E-1501; or
    (G) First or second degree kidnapping as defined in RCC § 22E-1401.

(b) *Involuntary Manslaughter*. A person commits involuntary manslaughter when that person recklessly causes the death of another person.

(c) *Voluntary Intoxication*. A person shall be deemed to have consciously disregarded the risk required to prove that the person acted with extreme indifference to human life in paragraph (a)(1) if the person is unaware of the risk due to his or her self-induced intoxication, but would have been aware had he or she been sober.

(d) *Penalties*.
  (1) Voluntary manslaughter is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) Involuntary manslaughter is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) *Enhanced Penalties for Voluntary and Involuntary Manslaughter*. In addition to any penalty enhancements applicable under this title, the penalty classification for voluntary manslaughter and involuntary manslaughter is increase in severity by one penalty class when a person commits voluntary or involuntary manslaughter and the person:
    (A) Is reckless as to the fact that the decedent is a protected person; or
    (B) Commits the offense with the purpose of harming the decedent because of the decedent's status as a law enforcement officer, public safety employee, or District official.

(e) *Affirmative Defense*. It is an affirmative defense to prosecution under paragraph (a)(2) of this section that the actor, in fact, does not commit the lethal act and either:
  (1) Believes that no participant in the predicate felony intends to cause death or serious bodily injury; or
  (2) Makes reasonable efforts to prevent another participant from causing the death or serious bodily injury of another.

(f) *Definitions*. The terms "negligently," "purposely," and "recklessly" have the meanings specified in RCC § 22E-206; the terms "District official," "law enforcement officer,"

"possess," "protected person," "public safety employee" have the meanings specified in RCC § 22E-701; and the terms "intoxication" and "self-induced intoxication" have the meanings specified in RCC § 22E-209.

COMMENTARY

Explanatory Note. *This section establishes the voluntary and involuntary manslaughter offenses for the Revised Criminal Code (RCC). A person commits voluntary 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. At a minimum, killing another person recklessly with extreme indifference to human life, or negligently in the course of and in furtherance of specified felonies constitutes voluntary manslaughter where there are mitigating circumstances. Committing murder with a more serious culpable mental state (e.g. intentionally or purposely) would also constitute voluntary manslaughter where there are mitigating circumstances. However, the presence of mitigating circumstances is not a required element of voluntary manslaughter, and in a voluntary manslaughter prosecution the government is not required to prove that mitigating circumstances were present. Rather, the presence of mitigating circumstances is a defense to murder that, if proven, lowers the charge to manslaughter.*

The RCC voluntary manslaughter offense replaces, in part, the current manslaughter statute, D.C. Code §22-2105. A person commits involuntary manslaughter if he or she, at a minimum, recklessly causes the death of another person. The RCC involuntary manslaughter offense replaces, in part, the current manslaughter statute, D.C. Code §22-2105. Specifically, the RCC involuntary manslaughter offense replaces the two types of involuntary manslaughter recognized under current District case law: criminal negligence manslaughter,[212] *and misdemeanor manslaughter.*[213] *Insofar as they are applicable to current manslaughter offenses, the revised manslaughter statute also partly replaces the protection of District public officials statute*[214] *and six penalty enhancements: the enhancement for committing an offense while armed;*[215] *the enhancement for senior citizens;*[216] *the enhancement for citizen patrols;*[217] *the enhancement for minors;*[218] *the enhancement for taxicab drivers;*[219] *and the enhancement for transit operators and Metrorail station managers.*[220]

Subsection (a) specifies the elements of voluntary manslaughter. Paragraph (a)(1) specifies that one way a person commits voluntary manslaughter is if that person recklessly, with extreme indifference for human life, causes death of another. This subsection requires a "reckless" culpable mental state, a term defined at RCC § 22E-206, which here requires that the accused consciously disregards a substantial risk of causing death of another, and the risk is of

[212] *Morris v. United States*, 648 A.2d 958, 959-60 (D.C. 1994).
[213] *Walker*, 380 A.2d at 1391.
[214] D.C. Code § 22-851.
[215] D.C. Code § 22-4502.
[216] D.C. Code § 22-3601.
[217] D.C. Code § 22-3602.
[218] D.C. Code § 22-3611.
[219] D.C. Code §§ 22-3751; 22-3752.
[220] D.C. Code §§ 22-3751.01; 22-3752.

such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, its disregard is clearly blameworthy. However, recklessness alone is insufficient. The accused must also act "with extreme indifference to human life." This form of voluntary manslaughter is identical to the "depraved heart"[221] version of second degree murder,[222] although the presence of a mitigating circumstance is a defense to this form of second degree murder. In contrast to the "substantial" risks required for ordinary recklessness, depraved heart murder (and voluntary manslaughter) requires that the accused consciously disregarded an "*extreme* risk of causing death or serious bodily injury."[223] For example, the DCCA has recognized there to be extreme indifference to human life when a person caused the death of another by: driving at speeds in excess of 90 miles per hour, and turning onto a crowded onramp in an effort to escape police[224]; firing ten bullets towards an area where people were gathered[225]; and providing a weapon to another person, knowing that person would use it to injure a third person.[226] Although it is not possible to specifically define the degree and nature of risk that is "extreme," the "extreme indifference" language in subsection (b)(1) codifies DCCA case law that recognizes those types of unintentional homicides that warrant criminalization as second degree murder.

Although consciously disregarding an extreme risk of death or serious bodily injury is necessary for this form of voluntary manslaughter, it is not necessarily sufficient. There may be some instances in which a person causes the death of another person by consciously disregarding an extreme risk of death or serious bodily injury that do not constitute extreme indifference to human life. Whether an actor engages in conduct with extreme indifference to human life depends not only on the degree and nature of the risk consciously disregarded, but also on other factors that relate to the actor's culpability.

Specifically, the same factors that determine whether an actor's conscious disregard of a substantial risk is "clearly blameworthy" as required for ordinary recklessness[227] also bear on the determination of whether an actor's conscious disregard of an extreme risk of death or serious bodily injury manifests extreme indifference to human life. These factors are: (1) the extent to which the actor's disregard of the risk was intended to further any legitimate social objectives[228];

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[221] *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).

[222] *See* Commentary to RCC § 22E-1101.

[223] *Comber*, 584 A.2d at 39 (emphasis added).

[224] *Powell v. United States*, 485 A.2d 596, 598 (D.C. 1984).

[225] *Jennings v. United States*, 993 A.2d 1077, 1081 (D.C. 2010).

[226] *Perez v. United States*, 968 A.2d 39, 102 (D.C. 2009) (note that the defendant was guilty of second degree murder on an accomplice theory).

[227] See Commentary to RCC § 22E-206.

[228] For example, consider a person who causes a fatal car crash by driving at extremely high speeds as he rushes his child, who has suffered a painful compound fracture, to a hospital. The actor's intent to seek medical care and to alleviate his child's pain may weigh against finding that he acted with extreme indifference to human life.

and (2) any individual or situational factors beyond the actor's control[229] that precluded his or her ability to exercise a reasonable level of concern for legally protected interests. In cases where these factors negate a finding that the actor exhibited extreme indifference to human life, a fact finder may nonetheless find that the actor behaved recklessly, provided that the actor's conduct was clearly blameworthy.

Under the hierarchical relationship of culpable mental states defined in RCC § 22E-206, a person who purposely or knowingly causes the death of another satisfies the culpable mental state required in paragraph (a)(1).[230]

Paragraph (a)(2) specifies that a person commits voluntary manslaughter if he or she negligently causes the death of another person, other than an accomplice,[231] while committing or attempting to commit one of the enumerated felonies. This form of voluntary manslaughter is identical to the felony murder version of second degree murder,[232] although the presence of mitigating circumstances is a defense to this form of murder. The statute specifies that a culpable mental state of "negligently" applies, a term defined at RCC § 22E-206 that here means that the actor should have been aware of a substantial risk that death would result from his or her conduct, and the risk is of such a nature and degree, that, considering the nature and purpose of the person's conduct and the circumstances known to the person, the person's failure to perceive that risk is clearly blameworthy.[233] The negligently culpable mental state does not, however, apply to the enumerated felonies in subparagraphs (a)(2)(A)-(G), which have their own culpable mental state requirements which must be proven. 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.[234] There also must be "some causal connection between the homicide and the underlying felony."[235] The death must have been caused by an act "in furtherance" of the underlying felony.[236] The revised statute codifies this case law by requiring that the death be "in the course of and in furtherance of committing, or attempting to commit" an enumerated offense.[237]

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[229] For example, consider a person who is habitually abused by her husband, who drives at extremely high speeds under threat of further abuse (insufficient to afford a duress defense) from her husband if she slows down. If that person then causes a fatal car crash, her emotional state and external coercion from her husband may weigh against finding that she acted with extreme indifference to human life.

[230] RCC § 22E-206 specifies that "When the law requires recklessness as to a result element or circumstance element, the requirement is also satisfied by proof of intent, knowledge, or purpose." Moreover, absent any applicable defense, any time a person purposely or knowingly causes the death of another ,that person manifests extreme indifference to human life.

[231] For example, if in the course of an armed robbery, the accused accidentally fires his gun, striking and killing his accomplice who was acting as a lookout, there would be no felony murder liability.

[232] *See* Commentary to RCC § 22E-1101.

[233] RCC 22E-206(e).

[234] *Head v. United States*, 451 A.2d 615, 625 (D.C. 1982).

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

[236] 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.

[237] Causing death of another is in furtherance of the predicate felony if it facilitated commission or attempted commission of the felony, or avoiding apprehension or detection of the felony. *E.g.*, *Craig v. State*, 14 S.W.3d 893, 899 (Ark. 2000) ("appellant should not have been charged with first-degree felony murder because he did not kill Jake McKinnon in the course of and in furtherance of committing or attempting to avoid apprehension for an

Subsection (b) specifies that a person commits involuntary manslaughter if he or she recklessly causes the death of another. The culpable mental state of recklessness, a term defined at RCC § 22E-206, requires that the accused was consciously aware of a substantial risk of causing death, and that the risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, its disregard is clearly blameworthy.[238]

Subsection (c) specifies rules for imputing a conscious disregard of the risk required to prove that the person acted with extreme indifference to human life. Under the principles of liability governing intoxication under RCC § 22E-209, when an offense requires recklessness as to a result or circumstance, that culpable mental state may be imputed even if the person lacked actual awareness of a substantial risk due to his or her self-induced intoxication.[239] However, as discussed above, extreme indifference to human life in paragraph (a)(1) of the RCC murder statute requires that the person consciously disregarded an *extreme* risk of death or serious bodily injury, a greater degree of risk than is required for recklessness alone. While RCC § 22E-209 does not authorize fact finders to impute awareness of an extreme risk, this subsection specifies that a person shall be deemed to have been aware of an extreme risk required to prove that the person acted with extreme indifference to human life when the person was unaware of that risk due to self-induced intoxication, but would have been aware of the risk had the person been sober. The terms "intoxication" and "self-induced intoxication" have the meanings specified in RCC § 22E-209.[240]

Even when a person's conscious disregard of an extreme risk of death or serious bodily injury is imputed under this subsection, in some instances the person may still not have acted with extreme indifference to human life. It is possible, though unlikely, that a person's self-induced intoxication is non-culpable, and weighs against finding that the person acted with extreme indifference to human life.[241] In these cases, although the awareness of risk may be

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independent felony"); *Lovette v. State*, 636 So. 2d 1304, 1307 (Fla. 1994) ("These killings lessened the immediate detection of the robbery and apprehension of the perpetrators and, thus, furthered that robbery.").

[238] *See* Commentary to RCC § 22E-206.

[239] Imputation of recklessness under RCC § 22E-209 also requires that the person was negligent as to the result or circumstance.

[240] For further discussion of these terms, see Commentary to RCC § 22E-209.

[241] This is perhaps clearest where a person's self-induced intoxication is pathological—i.e., "grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible." Model Penal Code § 2.08(5)(c). The following hypothetical is illustrative. X consumes a single alcoholic beverage at an office holiday party, and immediately thereafter departs to the metro. While waiting for the train, X begins to experience an extremely high level of intoxication—unbeknownst to X, the drink has interacted with an allergy medication she is taking, thereby producing a level of intoxication ten times greater than what X normally experiences from that amount of alcohol. As a result, X has a difficult time standing straight, and ends up stumbling in another train-goer, V, who X fatally knocks onto the tracks just as the train is approaching. If X is subsequently charged with voluntary manslaughter on these facts, her self-induced state of intoxication—when viewed in light of the surrounding circumstances— may weigh against finding that she manifested extreme indifference to human life. It may be true that X, but for her intoxicated state, would have been more careful/aware of V's proximity. Nevertheless, X is only liable for voluntary manslaughter under the RCC if X's conduct manifested an extreme indifference to human life.

It is also possible, under narrow circumstances, for a person's self-induced intoxication to negate his or her blameworthiness even when it is not pathological. This is reflected in the situation of X, who consumes an extremely large amount of alcohol by herself on the second level of her two-story home. Soon thereafter, X's sister, V, makes an unannounced visit to X's home, lets herself in, and then announces that she's going to walk up to the second story to have a conversation with X. A few moments later, X stumbles into V at the top of the stairs, unaware of V's proximity, thereby causing V to fall to her death. If X is charged with voluntary manslaughter, under current

imputed, the person could still be acquitted of voluntary manslaughter. However, finding that the person did not act with extreme indifference to human life does not preclude finding that the person acted recklessly as required for involuntary manslaughter[242], provided that his or her conduct was clearly blameworthy.

Subsection (d) establishes the penalties for voluntary and involuntary manslaughter. Paragraph (d)(1) specifies that voluntary manslaughter is a [Class X offense… RESERVED]. Paragraph (d)(2) specifies that involuntary manslaughter is a [Class X offense… RESERVED].

Paragraph (d)(3) provides enhanced penalties for both voluntary and involuntary manslaughter. If the government proves the presence of at least one aggravating factor listed under paragraph (d)(3), the penalty classification for voluntary and involuntary manslaughter may be increased in severity by one penalty class. These penalty enhancements may apply in addition to any penalty enhancements authorized by RCC Chapter 8.

Subparagraph (d)(3)(A) specifies that recklessness as to whether the decedent is a protected person is an aggravating circumstance. Recklessness is defined at RCC § 22E-206, and requires that the accused was aware of a substantial risk that the decedent was a protected person, and that the risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, its disregard is clearly blameworthy. The term "protected person" is defined in RCC § 22E-701.[243]

Subparagraph (d)(3)(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, or district official is an aggravating circumstance. This aggravating circumstance requires that the accused acted with "purpose" a term defined at RCC § 22E-206, which means that the actor must consciously desire to harm that person because of his or her status as a law

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law evidence of her voluntary intoxication could *not* be presented to negate the culpable mental state. *Wheeler v. United States, 832 A.2d 1271, 1273 (D.C. 2003) (quoting Bishop v. United States, 71 App.D.C. 132, 107 F.2d 297 (D.C. Cir. 1939)).* For example, the government's affirmative case might focus on the fact that an ordinary, reasonable (presumably sober) person in X's position would have possessed the subjective awareness required to establish extreme indifference to human life—whereas X might have difficulty persuading the factfinder that she lacked this subjective awareness without being able to point to her voluntarily intoxicated state. *See, e.g.*,Larry Alexander, *The Supreme Court, Dr. Jekyll, and the Due Process of Proof*, 1996 Sup. Ct. Rev. 191, 200 (1996) (arguing that such an approach, in effect, creates a permissive, but unrebuttable presumption of *mens rea* in situations of self-induced intoxication); Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 Cal. L. Rev.943, 955 (1999) (arguing that "retain[ing] a *mens rea* requirement in the definition of the crime, but keep[ing] the defendant from introducing evidence to rebut its presence would, in effect, "rid[] the law of a culpability requirement").

[242] RCC § 22E-1102.

[243] RCC § 22E-701 "Protected person" means a person who is:

(A) Under 18 years of age old, and when, in fact, the defendant actor is at least 18 years of age or older old and at least 2 4 years older than the other person complainant;

(B) 65 years old or older, when, in fact, the actor is under the age of 65 years and at least 10 years younger than the complainant;

(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; or

(G)A District official, while in the course of official duties.

enforcement officer, public safety employee, or District official.[244] Harm may include, but does not require bodily injury. Harm should be construed more broadly to include causing an array of adverse outcomes.[245] "Law enforcement officer," "public safety employee," and "District official" are all defined terms in RCC § 22E-701. Per RCC § 22E-205, the object of the phrase "with the purpose" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. Here, it is not necessary to prove that the complainant who was harmed was a law enforcement officer, public safety employee, or District official, only that the actor believed to a practical certainty that the complainant that he or she would harm a person of such a status.

Subsection (e) provides an affirmative defense to prosecution under paragraph (a)(2). RCC § 22E-201 specifies the burden of proof and production for all affirmative defenses in the RCC. Under RCC § 22E-201, the actor bears the burden of proving the elements of the defense by a preponderance of the evidence. The affirmative defense under subsection (e) includes two components. First, the defense requires that the actor does not commit the lethal act. This element may be satisfied when someone other than the actor, either a fellow participant in a predicate felony, the person who is the target of the predicate felony, or a third party, commits the lethal act.[246] Second, the defense requires one of two additional elements described in paragraphs (e)(1) and (e)(2). Paragraph (e)(1) requires that the actor believes that no participant in the felony intends to cause death or serious bodily injury. This element may be satisfied when the actor is an accomplice and believes that the principal does not intend to cause death or serious bodily injury, or if the actor commits the predicate offense alone and the actor does not intend to cause death or serious bodily injury. "Intent" is a defined term that here requires that the actor believes that no participant in the predicate felony consciously desires or is practically certain that he or she will cause death or serious bodily injury in the course of the felony. This element may be satisfied even if the actor believes that a participant in the predicate felony intends to engage in conduct that creates a *risk* of causing death or serious injury.[247] Although the actor must genuinely hold this belief, the belief need not be objectively reasonable.[248] Alternatively, paragraph (e)(2) requires that the actor made reasonable efforts to prevent another participant in the predicate felony from causing death or serious bodily injury. This element of

[244] 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.

[245] For example, if a person fires several shots above a police officer's head with the purpose of frightening the officer, and accidentally hits and kills the officer, the aggravating factor under (c)(3)(B) may apply, even if the person did not have the purpose of causing bodily injury.

[246] For example, if in the course of a robbery of a store, the clerk fires a shot in self defense and hits and kills a bystander, this element of the defense would be satisfied.

[247] For example, if a getaway driver for a robbery knows that the robber intends to brandish a gun to threaten a store clerk, but believes that the robber will only frighten but not harm the clerk, the defense would apply even if the robber kills the clerk. This element of the defense is satisfied even though brandishing a gun creates a risk of death or serious bodily injury.

[248] Requiring that the belief be reasonable would extend felony murder liability to actors who were merely *negligent* as to whether an accomplice or another person intended to cause death or serious bodily injury. When a person does not actually cause the death of another, mere negligence is an insufficient degree of culpability to warrant felony murder liability. Other homicide charges may be brought for a negligent killing.

the defense may be satisfied even if the actor believed a co-felon intended to cause death or serious bodily injury.[249]

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

Relation to Current District Law. *The revised manslaughter statute changes current law in six main ways, three of which track changes in the RCC murder statutes.*[250]

First, the revised involuntary manslaughter offense 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. However, 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,"[251] which requires that the offense creates "an inherent danger of physical injury[.]"[252] The DCCA has further required that the offense be committed "in a way which is dangerous under the particular circumstances of the case,"[253] meaning "the manner of its commission entails a reasonably foreseeable risk of appreciable injury."[254] In practice, this form of involuntary manslaughter in the current D.C. Code is called "misdemeanor manslaughter." By contrast, under the revised 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 § 22E-206, and requires that the accused consciously disregarded a substantial risk of death, and that the risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, its disregard is clearly blameworthy. 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 offense between negligent and depraved heart killings.

Second, the revised involuntary manslaughter offense eliminates the "criminal negligence" type of involuntary manslaughter liability. The current District manslaughter statute, D.C. Code §22-2105, does not distinguish degrees of manslaughter or otherwise specify the

[249] For example, A and B kidnap C and hold him for ransom. When C's family refuses to pay the ransom, A decides to kill C. B does not want C to be killed, and alerts the police and physically attempts to prevent B from harming C. If B still manages to kill C, the defense would apply to A, even though he was aware that B intended to kill C.

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

[251] *Walker*, 380 A.2d at 1391.

[252] *Comber*, 584 A.2d at 50.

[253] *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.

[254] *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.

elements of the offense, including the culpable mental state required. However, 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."[255] 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.'"[256] 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.[257] By contrast, the revised manslaughter statute requires that the accused consciously disregarded a substantial, though not necessarily extreme, risk of death. In addition, the risk must be of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, its disregard is clearly blameworthy. However, it is not required that the accused acted with extreme indifference to human life. Negligently causing the death of another continues to be criminalized as negligent homicide, per RCC § 22E-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.

Third, applying the general culpability principles for self-induced intoxication in RCC § 22E-209 allows a defendant to claim that due to intoxication, he or she did not form the awareness of risk required to act "recklessly, with extreme indifference to human life." However, subsection (c) allows a fact finder to impute awareness of the risk required to prove that the defendant acted with extreme indifference to human life, when the lack of awareness was due to self-induced intoxication. Although self-induced intoxication is generally culpable, and weighs in favor of finding that the person acted with extreme indifference to human life, it is possible, however unlikely, that self-induced intoxication reduces the blameworthiness, and negates finding that the person acted with extreme indifference to human life.[258]

Although the current manslaughter statute is silent as to the effect of voluntary intoxication, the DCCA has held that voluntary intoxication "is not a defense to voluntary manslaughter."[259] By contrast, although subsection (c) allows for imputation of the awareness of risk, in some rare cases, a defendant's self-induced intoxication may still negate finding that he or she acted with extreme indifference to human life, as required for voluntary manslaughter. This change improves the proportionality of the revised offense.

Fourth, the revised manslaughter statute includes multiple penalty enhancements based on the status of the decedent. The current District manslaughter statute, D.C. Code § 22-2105, does not itself provide for any enhanced penalties. However, various separate statutes in the current D.C. Code authorize enhanced penalties for manslaughter based on the victim's status, as a minor,[260] as an elderly adult[261], as a specified transportation worker,[262] or as a citizen patrol

[255] *Smith v. United States*, 686 A.2d 537, 545 (D.C. 1996).
[256] *Comber*, 584 A.2d at 49 (quoting *Dixon v. United States*, 419 F.2d 288, 293 (D.C. Cir. 1969)).
[257] *Id.* at 48-49.
[258] *Infra*, at 241.
[259] *Davidson v. United States*, 137 A.3d 973, 975 (D.C. 2016).
[260] 22-3611 (enhancement for specified crimes committed against minors).
[261] D.C. Code §§ 22-3601 (enhancement for specified crimes committed against senior citizens);

member.[263] A separate protection of District public officials offense also criminalizes harming a District official, or family member, while official is engaged in official duties, or on account of those duties.[264] By contrast, the RCC manslaughter offense incorporates penalty enhancements based on the status of the decedent. If a person commits voluntary or involuntary manslaughter, and was either reckless as to the victim being a "protected person," or had purpose to harm the victim because of the victim's status as a public safety employee or District official, the penalty classification for either offense may be increased by one penalty class. The term "protected person" is defined under RCC § 22E-701,[265] and differs in scope in various respects from current law.[266] For example, a victim's status as a member of a "citizen patrol" no longer is sufficient for an enhanced manslaughter penalty. Because the various types of victim-specific enhancements applicable to manslaughter are all included in the penalty enhancement provision, 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 determinants of penalties rather than stacked enhancements. Incorporating these various enhancements, and the offense for harming a District employee or official, into a single penalty enhancement provision also reduces unnecessary overlap and improves the clarity of the code.

Fifth, through the definition of "protected person," the revised manslaughter statute provides heightened penalties 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,[267] or had purpose to harm the decedent because of the decedent'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 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

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[262] 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).

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

[264] 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.

[265] RCC § 22E-701 "Protected person" means a person who is:

(A) Under 18 years of age old, and when, in fact, the defendant actor is at least 18 years of age or older old and at least 2 4 years older than the other person complainant;

(B) 65 years old or older, when, in fact, the actor is under the age of 65 years and at least 10 years younger than the complainant;

(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; or

(G)A District official, while in the course of official duties.

[266] *See* Commentary to RCC § 22E-1101 (describing differences in the relative ages of victims and perpetrators under the RCC as compared to current District penalty enhancements).

[267] The term "protected person" includes law enforcement officers and public safety employees engaged in the course of official duties. RCC § 22E-701.

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.

Sixth, the revised manslaughter statute does not provide enhanced penalties for committing manslaughter while armed with a dangerous weapon. Under current law, manslaughter is subject to heightened penalties if the accused committed the offense "while armed" or "having readily available" a dangerous weapon.[268] In contrast, under the revised statute, committing manslaughter while armed does not increase the severity of penalties. This change improves the proportionality of the revised code, as manslaughter while armed does not inflict greater harm than unarmed manslaughter, and therefore does not warrant heightened penalty.

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

First, the revised manslaughter statute specifically includes felony murder as a form of voluntary manslaughter. 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. Moreover, 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.*"[269] 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, but does not further clarify whether felony murder malice is included within the voluntary manslaughter offense.[270] 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.[271] The RCC resolves this ambiguity by defining voluntary manslaughter to include felony murder. In doing so, the manslaughter statute also incorporates all changes to felony murder included in the revised second degree murder statute.

Second, the revised 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.[272] Under current law felony murder does not require that the killing be "in furtherance" of the predicate 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."[273] However, while there is no "in furtherance" requirement under current law,[274] the

[268] D.C. Code § 22-4502.
[269] *Comber*, 584 A.2d at 37 (emphasis added).
[270] 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.
[271] *West v. United States*, 499 A.2d 860, 864 (D.C. 1985).
[272] *See* Commentary to RCC § 22E-1101.
[273] *Butler v. United States*, 614 A.2d 875, 887 (D.C. 1992).

DCCA has held that "[m]ere temporal and locational coincidence"[275] 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*."[276] By contrast, the revised manslaughter 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.[277] 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.[278] This change to the revised statute also maintains the revised manslaughter offense as a lesser-included offense of the revised murder offenses.

Third, the revised 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.[279] The current felony murder predicates include: (1) all conduct constituting "robbery," currently an ungraded offense; (2) first degree child cruelty; (3) any "felony involving a controlled substance;"[280] (4) mayhem; and (5) "any housebreaking while armed with or using a dangerous weapon," although it is unclear which specific crimes constitute such "housebreaking."[281] By

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[274] 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).

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

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

[277] Courts in other states have disagreed about the meaning of "in furtherance" language that is common 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" 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."). The RCC tracks the former approach, requiring the death to have advanced or facilitated the commission of the underlying crime.

[278] 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.

[279] *See* Commentary to RCC § 22E-1101.

[280] D.C. Code §22-2101.

[281] 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*

contrast, the revised manslaughter statute changes current law by clarifying or limiting these predicate crimes to match liability as described in the revised second degree murder statute.[282] This change to the 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 manslaughter as a lesser-included offense of murder offenses.

Three other changes to felony murder liability provided in the revised second degree murder offense 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; 3) codifying an affirmative defense when the actor did not commit the lethal 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.[283] To the extent that these revisions change the scope of felony murder, they also change the scope of voluntary 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 manslaughter as a lesser-included offense of murder offenses.

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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. However, the DCCA has 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).

[282] *See*, Commentary to RCC § 22E-1101 for a detailed description of the RCC felony murder predicates as compared to current District law.

[283] *See*, Commentary to RCC § 22E-1101.

RCC § 22E-1103. Negligent Homicide.

(a) *Offense.* A person commits 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 RCC § 22E-206; and the term "person" has the meaning specified in RCC § 22E-701.

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 person. The section specifies a culpable mental state of "negligence" a term defined in RCC § 22E-206 to mean that the accused should have been aware of a substantial risk of death, and that the risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, its disregard is clearly blameworthy.[284]

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.*

First, the revised negligent homicide offense requires that the accused acted with criminal negligence, as defined under RCC § 22E-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[.]"[285] The D.C. Court of Appeals (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."[286] This standard is borrowed directly from civil tort cases.[287] Although the DCCA does not always clearly define the test,[288]

[284] See Commentary to RCC § 22E-206.
[285] 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.").
[286] *Butts v. United States*, 822 A.2d 407, 416 (D.C. 2003).
[287] *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

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).[289]

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,"[290] negligence under the RCC requires that the risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, its disregard is clearly blameworthy.[291] The RCC's definition of negligence also requires that the accused created a "substantial" risk, whereas tort negligence has no substantial risk requirement.[292] 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.[293]

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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").

[288] 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.").

[289] *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 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).

[290] *Butts*, 822 A.2d at 416.

[291] Commentary to RCC § 22E-206.

[292] RCC § 22E-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.

[293] 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

Second, the revised negligent homicide offense is not limited to deaths caused by operation of a motor 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[.]"[294] 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 circumstances in which the actor should have been aware of the risk."[295] 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.'"[296] 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.[297] 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.

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must be some level of mental culpability on the part of the defendant. However, this principle does not preclude a civil negligence standard.").

[294] D.C. Code § 50-2203.01.

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

[296] *Comber v. United States*, 584 A.2d 26, 49 (quoting *Dixon v. United States*, 419 F.2d 288, 293 (D.C. Cir. 1969)).

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