

MURDER IN THE SECOND DEGREE
(Depraved Indifference Murder of Child)
Penal Law § 125.25(4)
(Committed on or after Nov. 1, 1990)
(Revised December 12, 2006 ¹ and June 5, 2012 ²)

The (specify) count is Murder in the Second Degree.

Under our law, a person is guilty of Murder in the Second Degree when, under circumstances evincing a depraved indifference to human life and being eighteen (18) years old or more, he or she recklessly engages in conduct which creates a grave risk of serious physical injury or death to a person less than eleven (11) years old and thereby causes the death of such person.

The following terms used in that definition have a special meaning: ³

SERIOUS PHYSICAL INJURY means impairment of a person's physical condition which creates a substantial risk of death, or which causes death, or serious and protracted

¹ The 2006 revision was for the purpose of incorporating the holdings of *People v Feingold*, 7 NY3d 288 (2006) which overruled *People v Register*, 60 NY2d 270 (1983) by holding that "depraved indifference to human life is a culpable mental state," and the cases decided with *Feingold*: *People v Mancini*, 7 NY3d 767 (2006) (leaving a victim to die is not depraved indifference murder); and *People v Swinton*, 7 NY3d 776 (2006) (the conviction for depraved indifference assault was modified to assault in the third degree because the evidence was insufficient to conclude that the parents of the victim acted with depraved indifference by feeding the child food which resulted in the child's severe malnutrition). See also *People v Suarez*, 6 NY3d 202 (2005); *People v Payne*, 3 NY3d 266 (2004); *People v Gonzalez*, 1 NY3d 464 (2004); *People v Hafeez*, 100 NY2d 253 (2003).

² The 2012 revision was for the purpose of adding language from *People v Lewie*, 17 NY3d 348 (2011), on the meaning of depravity [see text to footnote ten], and to expand footnote 16.

³ If causation, "death," or "person" is in issue, see Additional Charges at the end of the charges for this article.

disfigurement, or protracted impairment of health or protracted loss or impairment of the function of any bodily organ.⁴

A person RECKLESSLY ENGAGES IN CONDUCT WHICH CREATES A GRAVE RISK OF SERIOUS PHYSICAL INJURY OR DEATH TO A PERSON when he or she:

engages in conduct which creates a grave and unjustifiable risk that serious physical injury or death of a person will occur,

and when he or she is aware of and consciously disregards that risk,

and when that grave and unjustifiable risk is of such nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.⁵

Reckless conduct that results in death, however, is not enough to constitute this crime. And that is true no matter how grave or substantial the risk of death was.⁶ To constitute this crime, the evidence must show that the defendant acted under

⁴ See Penal Law § 10.00(10).

⁵ See Penal Law § 15.05(3); *People v. Boutin*, 75 NY2d 692, 696 (1990). See also *People v Sanchez*, 98 NY2d 373 (2002) *overruled on other grounds*; *Feingold* and *Hafeez*; (Both *Sanchez* and *Hafeez* emphasize that depraved indifference murder has a heightened degree of recklessness compared to the degree of recklessness necessary to constitute reckless manslaughter. Depraved indifference murder requires a recklessness which creates a “grave” risk of death, and reckless manslaughter requires a recklessness which creates a “substantial” risk of death. If both crimes are charged to the jury, the difference in the degrees of recklessness should be explained as set forth in the CJI2d charge: “Depraved Murder + Reckless Manslaughter Explained”).

⁶ “Reckless homicide cannot be elevated into depraved indifference murder merely because the actions of the defendant created a risk of death, however grave or substantial that risk may have been” (*Suarez*, 6 NY3d at 213).

circumstances evincing a depraved indifference to human life. The fact that taking the life of another can itself, in a sense, be considered a "depraved" act does not, however, turn every killing into depraved indifference murder.⁷

DEPRAVED INDIFFERENCE TO HUMAN LIFE refers to a person's state of mind in recklessly engaging in conduct which creates a grave risk of death.⁸ A person has a depraved indifference to human life when that person has an utter disregard for the value of human life – a willingness to act, not because he or she means to cause grievous harm [to the person who is injured], but because he or she simply does not care whether or not grievous harm will result.⁹ In other words, a person who is depravedly indifferent is not just willing to take a grossly unreasonable risk to human life - - that person does not care how the risk turns out.¹⁰ Depraved indifference to human life reflects a wicked, evil or inhuman state of mind, as manifested by brutal, heinous and despicable acts. It is evinced by conduct that is wanton, deficient in a moral sense of concern, devoid of regard for the life or lives of others,¹¹ and so blameworthy as to justify the

⁷ "That taking the life of another can itself, in a sense, be considered a 'depraved' act does not, however, turn every killing into depraved indifference murder as proscribed by the Penal Law" (Id at 208).

⁸ "We say today explicitly what the Court in Suarez stopped short of saying: depraved indifference to human life is a culpable mental state" (*Feingold*, 7 NY3d at 294).

⁹ "We therefore make clear that depraved indifference is best understood as an utter disregard for the value of human life– a willingness to act not because one intends harm, but because one simply doesn't care whether grievous harm results or not" (*Suarez*, 6 NY3d at 214).

¹⁰ *People v Lewie*, 17 NY3d at 359, *supra*.

¹¹ For the court's information, the remaining portion of the sentence exists only for the crimes of depraved indifference murder. It does not appear in the other depraved indifference crimes, such as assault and reckless endangerment, where death does not result.

same criminal liability that the law imposes on a person who intentionally kills.¹²

*[Add if appropriate:]*¹³

A person acts with a depraved indifference to human life when, having a conscious objective not to kill but to harm, he or she engages in torture or a brutal, prolonged and ultimately fatal course of conduct against a particularly vulnerable victim.]¹⁴

[Add if appropriate:]

A person recklessly engages in conduct which creates a grave risk of death to another when he or she creates the risk but

¹² “Reflecting wickedness, evil or inhumanity, as manifested by brutal, heinous and despicable acts, depraved indifference is embodied in conduct that is ‘so wanton, so deficient in a moral sense of concern, so devoid of regard of the life or lives of others, and so blameworthy’ as to render the actor as culpable as one whose conscious objective is to kill” (id, quoting *People v. Russell*, 91 N.Y.2d 280, 287 [1998]).

¹³ This charge is applicable to cases involving circumstances in which a defendant has abandoned a victim, as enunciated by the Court of Appeals in *Suarez*: “When the defendant intends neither to seriously injure, nor to kill, but nevertheless abandons a helpless and vulnerable victim in circumstances where the victim is highly likely to die, the defendant’s utter callousness to the victim’s moral plight –arising from a situation created by the defendant– properly establishes depraved indifference murder”(id at 212). “[I]rrespective of what the actor does or does not do after inflicting the fatal injury, depraved indifference murder is not made out unless the core statutory requirement of depraved indifference murder is established” (id at 210). Accordingly, this charge may be used in what the Court of Appeals has termed to be “classic abandonment of a helpless victim” cases (id at 212; See e.g. *People v Mills*, 1 NY3d 269 (2003) [pushing a young child into water and walking away]; *People v Kibbe*, 35 NY2d 407 (1974) [pushing an intoxicated person from a car onto a dark and snowy road]; *But see People v Mancini*, 7 NY3d 767 (2006)[assaulting a person and then leaving him does not necessarily constitute a depraved indifference to human life].

¹³ “[A]lthough we have reversed depraved indifference murder convictions in most cases involving isolated attacks, we have held that the crime is nevertheless established when a defendant– acting with a conscious objective not to kill but to harm– engages in torture or a brutal, prolonged and ultimately fatal course of conduct against a particularly vulnerable victim” (*Suarez*, 6 NY3d at 212).

is unaware of the risk solely by reason of his or her voluntary intoxication.¹⁵ However, in determining whether the defendant acted with depraved indifference to human life, you may consider whether the defendant's mind was affected by intoxicants to such a degree that he was incapable of forming the mental state of depraved indifference to human life.^{16]}

It is not a defense to this charge that the actor did not know that the deceased was less than eleven (11) years old, or that the actor believed that such deceased was eleven (11) years old or more on the date of the crime.¹⁷

¹⁵ Penal Law § 15.05(3).

¹⁶ Penal Law § 15.25 provides that "Intoxication is not, as such, a defense to a criminal charge; but in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged." In *Register*, the Court of Appeals held that "depraved indifference to human life" was not a culpable mental state, that "it is not an element in the traditional sense but rather a definition of the factual setting in which the risk creating conduct must occur – objective circumstances which are not subject to being negated by evidence of defendant's intoxication." *Feingold* overruled *Register*, and held that "depraved indifference to human life is a culpable mental state" (7 NY3d at 294). Thereafter, in *People v Coon*, 34 AD3d 869 (3d Dept 2006), the Third Department noted that the defendant's level of intoxication by his voluntary use of crack cocaine made him "incapable of possessing the culpable mental state necessary to prove depraved indifference." Similarly, in *People v Wimes*, 49 AD3d 1286, 1287 (4th Dept 2008), the Fourth Department noted that "[t]here was no mention of intoxication during the plea allocution, despite the fact that intoxication could have negated the element of depraved indifference in the crime to which defendant pleaded guilty." The Second Department, however, has declined to hold that voluntary intoxication may negate the culpable mental state of depraved indifference to human life (see *People v Heidgen*, 87 AD3d 1016, 1025-1026 (2d Dept 2011), *lv granted* 17 NY3d 957 [2012]. See also *People v Wells*, 53 AD3d 181 (1st Dept 2008), and compare with *People v Valencia*, 14 NY3d 927 (2010).

¹⁷ See Penal Law §15.20(3).

In order for you to find the defendant guilty of this crime, the People are required to prove, from all the evidence in the case, beyond a reasonable doubt, each of the following four elements:

1. That on or about (date), in the county of (county), the defendant, (defendant's name), caused the death of a person less than eleven (11) years old, namely, (specify);
2. That the defendant did so by recklessly engaging in conduct which created a grave risk of serious physical injury or death to (specify);
3. That the defendant engaged in such conduct under circumstances evincing a depraved indifference to human life; and
4. That, at such time, the defendant was eighteen (18) years old or more.

If you find the People have proven beyond a reasonable doubt each of those elements, you must find the defendant guilty of this crime.

If you find the People have not proven beyond a reasonable doubt any one or more of those elements, you must find the defendant not guilty of this crime.