RECKLESS ENDANGERMENT
FIRST DEGREE
(D Felony)
(Depraved Indifference)
PENAL LAW 120.25
(Committed on or after Sept. 1, 1967)
(Revised December 12, 2006 [1] and June 5, 2012 [2])

The _____ count is Reckless Endangerment in the First Degree.

Under our law, a person is guilty of Reckless Endangerment in the First Degree when, under circumstances evincing a depraved indifference to human life, that person recklessly engages in conduct which creates a grave risk of death to another person.

Some of the terms used in this definition have their own special meaning in our law. I will now give you the meaning of the following terms: "recklessly engages in conduct which creates a grave risk of death to another person" and "depraved indifference to human life."

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[1] This charge was revised in 2006 to accord with the Court of Appeals holdings in *People v Feingold,* 7 NY3d 288 (2006) (overruling *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 seven], and to expand footnote 11.

A person RECKLESSLY ENGAGES IN CONDUCT WHICH CREATES A GRAVE RISK OF DEATH TO ANOTHER PERSON when he or she:

> engages in conduct which creates a grave and unjustifiable risk that another person's death will occur,
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> 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.[3]

Reckless conduct that results in a grave risk of death, however, is not enough to constitute this crime. And that is true no matter how grave or substantial the risk of death was. [4] To constitute this crime, the evidence must also show that the defendant acted under circumstances evincing a depraved indifference to human life.

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.[5] 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

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[2] *See* Penal Law § 15.05(3); *People v Boutin*, 75 NY2d 692, 696 (1990). *See also Hafeez*, 100 NY2d at 259; *People v Sanchez*, 98 NY2d 373 (2002) overruled on other grounds by *Feingold*.

[4] "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).

[5] "We say today explicitly ...: depraved indifference to human life is a culpable mental state" *(Feingold*, 7 NY3d at 294).

or she means to cause grievous harm, but because he or she simply does not care whether or not grievous harm will result.[6] 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.[7] 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, and devoid of regard for the life or lives of others. [8]

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[6] "...'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'" (*Feingold* at 296, quoting *Suarez*, 6 N.Y.3d at 214).

[7] *People v Lewie,* 17 NY3d at 359, *supra*.

[8] "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" (*Suarez,* 6 N.Y.3d at 214 quoting *People v Russell,* 91 NY2d 280, 287 (1998)).

This definition also applies "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 ...." (*Suarez,* 6 N.Y.3d 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 definition of "depraved indifference to human life" may also 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].

[*Add, if appropriate*:

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 potentially fatal course of conduct against a particularly vulnerable victim.][9]

[*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 is unaware of the risk solely by reason of his or her voluntary intoxication.[10] 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.[11]]

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[9] "[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).

[10] Penal Law § 15.05(3).

[11] 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 negatived 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

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, both of the following two elements:

1. That on or about _*(date)*_, in the county of _*(county)*_, the defendant, _*(defendant's name)*_, recklessly engaged in conduct which created a grave risk of death to another person; and

2. That the defendant did so under circumstances evincing a depraved indifference to human life.

Therefore, if you find that the People have proven beyond a reasonable doubt both of those elements, you must find the defendant guilty of the crime of Reckless Endangerment in the First Degree as charged in the _____ count.

On the other hand, if you find that the People have not proven beyond a reasonable doubt either one or both of those elements, you must find the defendant not guilty of the crime of Reckless Endangerment in the First Degree as charged in the _ ____ count.

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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).