



Report #75 - Resisting Arrest

(First Draft)

SUBMITTED FOR PUBLIC COMMENT
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Report #75—Resisting Arrest (First Draft)

This Report contains draft revisions to certain District criminal statutes. These draft revisions are part of the D.C. Criminal Code Reform Commission’s (CCRC) efforts to issue recommendations for comprehensive reform of District criminal statutes.

Written comments on the revisions in this report are welcome from government agencies, criminal justice stakeholders, and the public. Comments should be submitted via email to ccrc@dc.gov with the subject line “Comments on Report #75.” The Commission will review all written comments that are timely received. The deadline for the written comments on this Report #75—*Resisting Arrest*, is March 1, 2022 (four weeks from the date of issue). Written comments received after March 1, 2022 may not be reviewed or considered in the agency’s next draft (if another draft is deemed necessary) or final recommendations.

This Report has two main parts: (1) draft statutory text for inclusion in the Revised Criminal Code Act of 2021 (RCCA) the bill submitted to the Council by the CCRC on October 1, 2021; and (2) commentary on the draft statutory text.

The Report’s commentary explains the meaning of each provision, considers whether existing District law would be changed by the provision (and if so, why this change is being recommended) and may address the provision’s relationship to code reforms in other jurisdictions, as well as recommendations by the American Law Institute and other experts.

Appendices to this report are:

- Appendix A – Black Letter Text of Draft Revised Statutes. (No commentary.)
- Appendix B – Redlined Text Comparing Draft Revised Statutes with Current D.C. Code Statutes. (No commentary.)
- Appendix C – Special Conforming Amendments.

A copy of this document and other work by the CCRC is available on the agency website at www.ccrc.dc.gov.

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Draft RCCA Text and Commentary

Corresponding D.C. Code statutes in {}

§ 22A-4404.

Resisting Arrest. {D.C. Code § 22-405.01}

§ 22A-4404. Resisting arrest.

- (a) *Offense.* An actor commits resisting arrest when the actor:
- (1) With the purpose of preventing the actor or another person from being placed in official custody;
 - (2) Knowingly:
 - (A) Uses physical force against a law enforcement officer; or
 - (B) Engages in conduct other than speech or passive resistance that either:
 - (i) Creates a substantial risk of causing significant bodily injury to a law enforcement officer; or
 - (ii) Requires substantial physical force by a law enforcement officer to overcome the actor's resistance; and
 - (3) The actor is reckless as to the fact that:
 - (A) A law enforcement officer who has authority to make an arrest verbally communicated to the person under arrest that the person was under arrest;
 - (B) The communication would cause a reasonable person in the actor's circumstances to believe that the actor or another person was under arrest; and
 - (C) The actor was given a reasonable opportunity to:
 - (I) Submit to arrest; or
 - (II) Cease or refrain from using force or engaging in conduct interfering with the arrest of another person.
- (b) *Affirmative Defense:* It is an affirmative defense to liability under this section offense that the actor reasonably believes:
- (1) The actor or another person is in imminent danger of significant bodily injury; and
 - (2) The conduct constituting the offense:
 - (A) Will protect against such bodily injury; and
 - (B) Is necessary in degree.
- (c) *Unit of Prosecution.* Where conduct is of a continuing nature, the unit of prosecution is based on the arrest regardless of the number of law enforcement officers involved in the arrest.
- (d) *Penalty.* Resisting arrest is a Class C misdemeanor.

Explanatory Note. This section establishes the resisting arrest offense for the proposed Revised Criminal Code Act (RCCA). The revised resisting arrest offense prohibits efforts to resist formal arrest or interfere with the formal arrest of another person. The offense includes lower-level conduct not otherwise criminalized as an assault that causes bodily injury, an offensive physical contact, or a criminal threat. The revised resisting arrest offenses replaces the resisting arrest statute in current D.C. Code § 22-405.01.

Subsection (a) specifies the prohibited conduct for resisting arrest. Paragraph (a)(1) provides that the actor must act “with the purpose” of preventing the actor or another person

from being placed in official custody. Per RCCA § 22A-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, that means it is not necessary for the government to prove that the actor actually prevented the placement of the actor or another person into official custody. It is sufficient that the government proves it was the conscious desire of the actor to prevent the placement of the actor or another person in official custody by the actor’s proscribed conduct. “Official custody” is a defined term that means “full submission after an arrest or substantial physical restraint after arrest.”¹

Paragraph (a)(2) specifies that the culpable mental state for the conduct elements in subparagraphs (a)(2)(A)-(B) is knowingly. “Knowingly” is a defined term.² Per the rule of interpretation in RCCA § 22A-207, “knowingly” applies to each circumstance and result element specified in subparagraphs (a)(2)(A)-(B).

Subparagraphs (a)(2)(A)-(B) specify three alternative forms of proscribed conduct. Subparagraph (a)(1)(A) proscribes knowingly using physical force against a law enforcement officer. “Knowingly” applied here means that the actor must be aware or believe that they are using physical force against a person and that the actor must believe or be practically certain that the person is a law enforcement officer. The physical force required here need not cause bodily injury. Physical force includes shoves or grasps that do not cause physical pain, physical injury, illness, or impairment of physical condition. However, incidental touching or jostling is insufficient to satisfy this element. “Law enforcement officer” is a defined term.³

Subparagraph (a)(2)(B) proscribes knowingly engaging in conduct other than speech or passive resistance that results in the elements specified in sub-subparagraphs (a)(2)(B)(i)-(ii). Sub-subparagraph (a)(2)(B)(i) specifies that prohibited conduct includes conduct that creates a substantial risk of causing significant bodily injury to a law enforcement officer. “Significant bodily injury” and “law enforcement officer” are both defined terms.⁴ “Significant bodily injury” is an injury that, “to prevent long-term physical damage or to abate severe pain, requires hospitalization or immediate medical treatment beyond what a layperson can personally administer” or one of several enumerated injuries.⁵ Pursuant to this sub-subparagraph, the government must prove that the actor’s conduct

¹ “Official custody” is defined in RCCA § 22A-101.

² “Knowingly” is defined in RCCA § 22A-206.

³ “Law enforcement officer” is defined in RCCA § 22A-101 and includes: (A) An officer or member of the Metropolitan Police Department of the District of Columbia, or of any other police force operating in the District of Columbia; (B) An investigative officer or agent of the United States; (C) An on-duty, civilian employee of the Metropolitan Police Department; (D) An on-duty, licensed special police officer; (E) An on-duty, licensed campus police officer; (F) An on-duty employee of the Department of Corrections or Department of Youth Rehabilitation Services; or (G) An on-duty employee of the Court Services and Offender Supervision Agency, Pretrial Services Agency, or Family Court Social Services Division.

⁴ “Significant bodily injury” and “law enforcement officer” are defined in RCCA § 22A-101.

⁵ The RCCA definition of “significant bodily injury” includes the following enumerated injuries: “a fracture of a bone; a laceration that is at least one inch in length and at least one quarter inch in depth; a burn of at least second degree severity; a temporary loss of consciousness; a traumatic brain injury; and a contusion or other bodily injury to the neck or head caused by strangulation or suffocation.” RCCA §22A-101.

created a substantial risk of significant bodily injury to a person who was a law enforcement officer. It is not sufficient for the government to prove that there was some possibility that the actor's conduct could have caused significant bodily injury to a law enforcement officer. Rather, the evidence must establish a substantial risk of the injury. Further, the government must establish that the actor was aware or believed it practically certain that the risk they create is a risk of causing significant bodily injury. Finally, the government must show that the actor believed or was practically certain that the person the actor put at risk was a law enforcement officer.

Sub-subparagraph (a)(2)(B)(ii) specifies as a third alternative that prohibited conduct includes conduct that requires substantial physical force by a law enforcement officer to overcome the actor's resistance. "Law enforcement officer" is a defined term in RCCA § 22A-101. Pursuant to this sub-subparagraph, the government must prove that the actor's conduct required substantial physical force to overcome. It is not sufficient for the government to establish that some force is required. The "knowingly" mental state applied to this sub-subparagraph means that the actor must be aware or practically certain that their conduct would require a law enforcement officer to use substantial physical force to overcome the actor's resistance.

Subparagraph (a)(3) requires that the actor have a "reckless" culpable mental state as to three circumstance elements specified in sub-subparagraphs (a)(3)(A)-(C). "Reckless" is a defined term in RCCA § 22A-206 that requires both that the actor consciously disregard a substantial risk that the circumstance exists and that the risk be of such a nature and degree that, considering the nature of and motivation for the actor's conduct and the circumstances the actor is aware of, its disregard is a gross deviation from the ordinary standard of conduct.

Sub-subparagraph (a)(3)(A) specifies as the first required circumstance element that a law enforcement officer who has authority to make arrests has verbally communicated to the person under arrest that the person was under arrest. The sub-subparagraph does not require that a law enforcement officer verbally communicate directly to the actor that a third party is under arrest.⁶ "Law enforcement officer" has the meaning specified RCCA § 22A-101 but in this paragraph is also modified by the phrase "who has authority to make an arrest." The RCCA definition of a "law enforcement officer" includes persons that do not have the authority to place a person under arrest. However, pursuant to the modifying phrase here, the verbal communication by a law enforcement officer that the person is under arrest must come from a law enforcement officer actually empowered to make an arrest. The "reckless" mental state applied here means that the actor must consciously disregard a substantial risk that a law enforcement

⁶ For example, if an actor comes upon a scene where a uniformed officer is grappling with a third person to place the third person under arrest, it is not required that the officer verbally communicate with the actor that the person is under arrest. In such an instance, the actor could be found guilty of resisting arrest even if they were not present when the verbal communication took place if the actor disregarded a substantial risk that the third person was under arrest and the risk was of such a nature and degree that, considering the nature of and motivation for the person's conduct and the circumstances the person is aware of, the person's conscious disregard of that risk was a gross deviation from the standard of conduct that a reasonable individual would follow in the person's situation.

officer with the power to arrest communicated to the actor that the actor or another person was under arrest and that the risk is of such a nature and degree that, considering the nature of and motivation for the actor's conduct and the circumstances the actor is aware of, its disregard is a gross deviation from the ordinary standard of conduct.

Sub-subparagraph (a)(3)(B) specifies that the verbal communication required in (a)(3)(A) be one that would cause a reasonable person in the actor's circumstances to believe that the actor or another person was under arrest. The "reckless" mental state applied here means that the actor must consciously disregard a substantial risk that the communication would cause a reasonable person in the actor's circumstances to believe that the actor or another person was under arrest and that the risk is of such a nature and degree that, considering the nature of and motivation for the actor's conduct and the circumstances the actor is aware of, its disregard is a gross deviation from the ordinary standard of conduct.

Sub-subparagraph (a)(3)(C) specifies that the actor have been given a reasonable opportunity to submit to the arrest if the actor is the person under arrest or a reasonable opportunity to cease or refrain from using force or engaging in conduct that interferes with the arrest of another person in the case where the actor is interfering with the arrest of another person. The "reckless" mental state applied here means that the actor must consciously disregard a substantial risk they were given a reasonable opportunity to submit to arrest or cease or refrain from the conduct that interferes with the arrest of another person and that the risk is of such a nature and degree that, considering the nature of and motivation for the actor's conduct and the circumstances the actor is aware of, its disregard is a gross deviation from the ordinary standard of conduct. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.⁷

Section (b) provides an affirmative defense to liability under this section if the actor reasonably believes the elements in (b)(1) and (b)(2) to be true. RCCA § 22A-201 specifies the burden of proof and production for all affirmative defenses in the RCCA. Under RCCA § 22A-201, the actor bears the burden of proving the elements of the defense by a preponderance of the evidence.

Paragraph (b)(1) specifies that the actor must reasonably believe that the actor or another person is in imminent danger of significant bodily injury. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.⁸ The word "imminent" should be construed to mean ready to take place or dangerously near. It should not be construed to have the same meaning as "immediate" or

⁷ See e.g., Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "...these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. ... The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

⁸ See footnote 7 *supra*.

to require that the bodily injury will occur at a specific moment in time. “Significant bodily injury” is a defined term that means an injury that, “to prevent long-term physical damage or to abate severe pain, requires hospitalization or immediate medical treatment beyond what a layperson can personally administer” or one of several enumerated injuries.⁹ The actor’s belief that the harm will occur may be mistaken, but it must be objectively reasonable.

Paragraph (b)(2) and subparagraphs (b)(2)(A) and (b)(2)(B) specify that the actor must also reasonably believe that their conduct which constitutes the offense of resisting arrest will protect against significant bodily injury and is necessary in degree. Conduct is not necessary in degree if the harm can be avoided by a reasonable “legal alternative available to the defendants that does not involve violation of the law.”¹⁰ The actor’s belief that conduct will protect against bodily injury and is necessary in degree may be mistaken, but it must be objectively reasonable considering the circumstances.

Section (c) specifies that the unit of prosecution is based on the arrest regardless of the number of law enforcement officers involved in the arrest. This means that an actor who resists multiple officers attempting to place the actor or another person under arrest is liable under this section for a single count of resisting arrest and cannot be held liable for multiple counts of resisting arrest based on the number of officers involved in the arrest.¹¹

Section (d) specifies the penalty classification for resisting arrest. [See RCCA §§ 22A-603 and 22A-604 for the imprisonment terms and fines for each penalty class.]

Relation to Current District Law. *The revised resisting arrest statute changes current District law in five main ways.*

First, the revised resisting arrest statute specifies various conduct that constitutes an act of resisting arrest instead of relying on the ambiguous term “resists.” Current D.C. Code § 22-405.01 punishes a person who “resists an arrest” by a law enforcement officer but does not specify what conduct actually constitutes resisting arrest. The current resisting arrest statute was created in 2016¹² and has yet to be interpreted by the DCCA. However, resisting arrest was previously proscribed in D.C. Code § 22-405 (2001 ed.) which punished resisting arrest as assault on a police officer.¹³ Prior D.C. Code §22-405 similarly did not specify which conduct constituted resistance and the DCCA was repeatedly called upon to address what level of resistance was prohibited by statute.¹⁴ In doing so, the DCCA

⁹ The RCCA definition of “significant bodily injury” includes the following enumerated injuries: “a fracture of a bone; a laceration that is at least one inch in length and at least one quarter inch in depth; a burn of at least second degree severity; a temporary loss of consciousness; a traumatic brain injury; and a contusion or other bodily injury to the neck or head caused by strangulation or suffocation.” RCCA §22A-101.

¹⁰ See Commentary to RCCA § 22A-401, Lesser Harm.

¹¹ This differs from other offenses committed against multiple officers in the course of arrest. For example, if an actor assaults two officers in the course of a single arrest, the actor could be charged with two separate counts of assault as that is an offense against the individual person.

¹² See “Neighborhood Engagement Achieves Results Act of 2016”, 63 D.C. Reg. 10570 (June 30, 2016).

¹³ Prior § 22-405 read in relevant part: “[w]hoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with a law enforcement officer on account of, or while that law enforcement officer is engaged in the performance of his or her official duties.”

¹⁴ See e.g., *Coghill v. United States*, 982 A.2d 802 (D.C. 2009); *Dolson v. United States*, 948 A.2d 1193, 1202 (D.C. 2008).

was forced to strike a balance between the “statutory purpose and constitutional concerns.”¹⁵ In contrast, the revised resisting arrest statute eliminates the ambiguous term “resists” from the offense elements. The revised statute instead requires actual physical force *against* a law enforcement officer or conduct, other than speech or mere passive resistance, that either creates a substantial risk of causing significant bodily injury to a law enforcement officer or requires substantial physical force by a law enforcement officer to overcome. This change may improve the constitutionality of the statute regarding penalizing speech and improves the clarity of the revised statutes.

Second, the revised statute changes the scope of the statute by applying the revised definition of “law enforcement officer” and requiring that the officer have the authority to make an arrest. Current D.C. Code § 22-405.01(a) specifies that the term “law enforcement officer” shall have the same meaning as provided in § 22-405(a).¹⁶ This definition includes members of a fire department operating in the District of Columbia and investigators or code inspectors employed by the government of the District of Columbia who are not included in the RCCA revised definition of “law enforcement officer.”¹⁷ The current D.C. Code definition also includes civilian employees of MPD. In contrast, the revised statute uses the RCCA definition of “law enforcement officer,” which does include firefighters, etc., and requires the communication indicating that the actor or another person is under arrest be made by a law enforcement officer *with authority to make arrest*.¹⁸ These changes clarify District law by distinguishing persons who are regularly involved with criminal law enforcement from others who are not, and creating one broad, consistent definition as to who constitutes a “law enforcement officer” throughout the criminal code. The requirement that the law enforcement officer communicating to the person that they are under arrest have actual arrest authority ensures that an actor has clear reason to understand that they are being taken into custody. This change improves the clarity, consistency, and proportionality of the revised statutes.

¹⁵ In *In re C.L.D.*, 739 A.2d 353, 357 (D.C.1999), the DCCA cited constitutional concerns and held that “mere passive resistance or avoidance” did not violate D.C. Code §22-405. In several later cases, the DCCA was called up on to determine what constituted active resistance and what was mere passive resistance.

¹⁶ “[T]he term “law enforcement officer” means any officer or member of any police force operating and authorized to act in the District of Columbia, including any reserve officer or designated civilian employee of the Metropolitan Police Department, any licensed special police officer, any officer or member of any fire department operating in the District of Columbia, any officer or employee of any penal or correctional institution of the District of Columbia, any officer or employee of the government of the District of Columbia charged with the supervision of juveniles being confined pursuant to law in any facility of the District of Columbia regardless of whether such institution or facility is located within the District, any investigator or code inspector employed by the government of the District of Columbia, or any officer or employee of the Department of Youth Rehabilitation Services, Court Services and Offender Supervision Agency, the Social Services Division of the Superior Court, or Pretrial Services Agency charged with intake, assessment, or community supervision.” D.C. Code § 22-405(a).

¹⁷ Such persons are now encompassed by the RCCA definition of “public safety employee.” *See* RCCA § 22A-101.

¹⁸ The RCCA definition of “law enforcement officer” includes persons who may not be empowered to place a person under arrest including employees of the Court Services and Offender Supervision Agency, Pretrial Services Agency, and Family Court Services Division.

Third, the revised statute is limited to arrests and does not provide liability for an actor who prevents a law enforcement officer from merely detaining another person. Current D.C. Code § 22-405.01(a) applies to actors who resist their own arrest and actors who intentionally prevent a law enforcement officer either from making an arrest of another person or detaining another person. Broad resisting arrest statutes have historically subjected persons to arrest where no other crime has occurred. The statutes have been used to generate probable cause or “cover” for police use of force in cases where there is no evidence of criminal activity.¹⁹ The NEAR Act revisions to the assault on a police officer statute and creation of the resisting arrest offense were themselves prompted in part by a WAMU investigation into arrests in the District that found that “[n]early two-thirds of those arrested for assaulting an officer weren’t charged with any other crime, raising questions about whether police had legal justification to stop the person.”²⁰ Although current D.C. Code § 22-405.01(a) already reduces the risk of misuse of this statute by not imposing liability on actors who resist detention based on less than probable cause, the statute does still apply to actors who interfere with the detention (versus arrest) of another person. In contrast, the revised resisting arrest statute imposes the same requirement of an actual arrest in cases involving both actors under arrest and actors interfering with the arrest of another. Limiting the charge to resistance or interference with an actual arrest reduces the potential for abuse of the charge. Liability remains under an array of other revised statutes (e.g. assault or offensive physical contact) should a person prevent a law enforcement officer’s detention of another.²¹ This change improves the proportionality of the revised statutes.

Fourth, the revised statute provides an affirmative defense in circumstances where the actor reasonably believes that the actor or another person is in imminent danger of significant bodily injury. Current D.C. Code §22-405.01 applies to conduct that is “without justifiable and excusable cause” and specifies that the fact that an arrest is unlawful does not constitute justifiable or excusable cause to resist or interfere.²² The statute provides no other explanation of “justifiable or excusable cause.” The current resisting arrest statute

¹⁹ Alexandra Natapoff, *A Stop Is Just a Stop: Terry's Formalism*, 15 OHIO ST. J. CRIM. L. 113, 120 (2017) (explaining “. . . police have the ability to generate probable cause *sua sponte* during a stop and therefore can affirmatively convert stops into arrests in legally substantive ways. Perhaps the most powerful way is through the assertion that the stopped person has engaged in offenses such as disorderly conduct, resisting arrest, and similar behaviors colloquially referred to as ‘contempt of cop’”); *see also id.* (noting “[t]here is abundant evidence that police overuse disorderly conduct and similar statutes to arrest people who ‘disrespect’ them or express disagreement with their actions” and citing a 2008 investigation in Seattle which found “[t]he number of black men who faced stand-alone obstructing charges during the six-year period reviewed is equal to nearly 2 percent of Seattle’s black male population”) (internal citations omitted); Scott Holmes, *Resisting Arrest and Racism - the Crime of “Disrespect”*, 85 UMKC L. REV. 625, 630 (2017)(noting “[t]he prevalence of resisting arrest charges is a red flag and indicator of police misconduct within police departments”).

²⁰ Committee on the Judiciary, Report on Bill 21-0360, “Neighborhood Engagement Achieves Results Act of 2016,” January 27, 2016 at 10-11.

²¹ Note also that the revised resisting arrest statute places no limits on police authority to arrest or detain people pursuant to law.

²² D.C. Code § 22-405.01(c) (“It is neither justifiable nor excusable cause for a person to use force to resist an arrest when such an arrest is made by an individual he or she has reason to believe is a law enforcement officer, whether or not such arrest is lawful.”).

was created in 2016²³ and has yet to be interpreted by the DCCA. However, resisting arrest was previously proscribed in D.C. Code § 22-405 (2001 ed.) which punished resisting arrest as assault on a police officer.²⁴ In interpreting prior D.C. Code § 22-405, the DCCA held that a person may not use self-defense against a police officer acting within their official duties unless the officer engages in excessive force.²⁵ Similarly, the RCCA codification of the defense of self or another person defense also precludes use of the defense when the “actor is reckless as to the fact that they are protecting themselves or another from *lawful* conduct.”²⁶ In contrast, the revised resisting arrest statute provides an affirmative defense specific to the resisting arrest charge for situations where the actor reasonably believes that the actor or another person is in danger of significant bodily injury. This defense is a limited defense that focuses on the actor’s fear of significant bodily injury and permits only conduct the actor reasonably believes will protect against the feared significant bodily injury and is necessary in degree. The lawfulness of arrest or the reasonableness of the force used by an officer does not limit the use of the defense. For example, if a law enforcement officer utilized a chokehold in the course of making an arrest, the actor could lawfully use force that is necessary in degree to prevent suffocation or other injury, irrespective of the lawfulness of arrest or the officer’s use of force. Focusing on the actor’s fear of imminent injury and conduct to prevent injury rather than whether an officer’s force is “excessive” or “reasonably necessary” ensures that an actor is not punished for reasonable conduct intended to protect against injury merely because an officer, given the extraordinary power to use force, did not use legally excessive force.²⁷ This change improves the clarity and proportionality of the revised statutes.

Fifth, the revised resisting arrest statute specifies several circumstance elements that an actor must be reckless to before criminal liability is imposed. Current D.C. Code § 22-405.01 does not establish any circumstance elements requiring that an actor is given a reasonable opportunity to submit to arrest or refrain from conduct regarding from the arrest of another. In contrast, the revised resisting arrest statute imposes three circumstance elements that must be satisfied before the law imposes criminal liability on an actor for resisting arrest or interfering with the arrest of another. First, the revised statute requires that a law enforcement officer with authority to make an arrest actually communicate to the actor that the actor or another person is under arrest. Second, the revised statute requires

²³ See “Neighborhood Engagement Achieves Results Act of 2016”, 63 D.C. Reg. 10570 (June 30, 2016).

²⁴ Prior § 22-405 read in relevant part: “[w]hoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with a law enforcement officer on account of, or while that law enforcement officer is engaged in the performance of his or her official duties.”

²⁵ *Coleman v. United States*, 194 A.3d 915, 918–19 (D.C. 2018) (“It is well-settled in this jurisdiction that the use of self-defense is unavailable against a police officer unless ‘excessive force [is used] in carrying out official duties.’”) (citing *Cheek v. United States*, 103 A.3d 1019, 1022 (D.C. 2014)). The legislative history of the NEAR Act indicates that the Council intended that this doctrine, often referred to as the *Speed* doctrine, be applied to the current statute. See Committee on the Judiciary, Committee Markup and Addendum to Report on Bill 21-0360, “Neighborhood Engagement Achieves Results Act of 2016,” May 16, 2016 at 4 (citing *Speed v. United States* 562 A.2d 124, 128 (D.C. 1989).

²⁶ See RCCA § 22A-403(b)(3).

²⁷ The codification of an affirmative defense irrespective of the lawfulness of the force used impacts only liability for the offense of resisting arrest and does not change the exception contained in the in RCCA § 22A-403(b) or any law regarding police use of force.

that the communication be one that would actually cause the actor or another person to believe that a person was under arrest. And third, the revised statute requires that the actor be given a reasonable opportunity to submit to arrest or cease or refrain from interfering in an arrest. For all of these elements, the RCCA imposes a reckless mental state that requires the actor consciously disregard a substantial risk as to the element. The addition of these circumstance elements ensures that actors are given an opportunity to understand that an arrest is occurring and to conform their conduct but does not change the rule that the actual lawfulness of arrest does not impact liability. Arrests can happen suddenly and without warning²⁸ in the midst of circumstances that are confusing and unnerving to the person arrested or witnessing the arrest. Persons who are placed under arrest or witness someone placed under arrest without a clear understanding of what is happening to them or any opportunity to process are more likely to act reflexively to resist. The addition of the communication requirement and the requirement of a reasonable opportunity to submit to arrest or cease or refrain from interference ensures that persons are not held liable for conduct short of assault based on shock or reflex if no law enforcement officer has communicated to them that they are under arrest and given them an opportunity to respond.²⁹ These changes improve the proportionality of the revised statutes.

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

First, the revised resisting arrest statute specifies that the unit of prosecution is based on the arrest. Current D.C. Code § 22-405.01 does not specify whether a person can be charged with multiple counts of resisting a single arrest based on the number of officers involved in the arrest rather than the arrest. The current resisting arrest statute was created with the passage of the Neighborhood Engagement Achieves Results Act (NEAR ACT) of 2016 and has yet to be interpreted by the DCCA. However, resisting arrest was previously punished as assault on a police officer under the prior version of D.C. Code § 22-405. The DCCA previously held that a person could be convicted of assault on a police officer for acts against each officer³⁰ but has not ruled as to whether resisting arrest by itself can be committed against multiple officers now that the offense has been delinked from assault on a police officer. In contrast, the revised resisting arrest statute treats resisting arrest as an offense against the public rather than against individual officers and provides that resisting a single arrest by multiple officers may only be punished as a single count of resisting arrest. This change ensures that conduct that does not rise to the level of an assault

²⁸ In many instances, there are multiple officers involved in placing a person under arrest and the actor's attention may not be on the officers who make initial contact with the actor. For example, an actor may be talking to a police officer when one or multiple other officers approach and grab the unsuspecting actor with intent to place the actor in official custody.

²⁹ The RCCA's requirement that these circumstances be met to establish liability for resisting arrest in no way impacts liability for other conduct such as assault and places no limits police authority to detain people pursuant to law.

³⁰ *Bowles v. United States*, 113 A.3d 577, 580 (D.C. 2015) (stating "when the evidence shows that separate acts of assault, resistance or interference occurred with respect to distinct officers, separate APO offenses have occurred").

against another person³¹ will not be punished more severely based solely on the number of officers involved. This change improves the proportionality of the revised statutes.

Second, the revised resisting arrest statute requires a “purposeful” mental state with respect to resisting arrest or interfering with the arrest of another. Current D.C. Code § 22-405.01 specifies that a person must act “intentionally” to resist or prevent an arrest. Neither the current statute nor case law defines the term “intentionally.”³² To resolve this ambiguity, the revised resisting arrest statute requires that an actor act “with the purpose” of preventing the actor or another person from being placed in official custody. Specifying a purposeful mental state provides clarity as to the culpable mental states required for the offense and ensures that a person is not held liable for resisting arrest unless they acted with the purpose of resisting arrest. These changes improve the clarity and proportionality of the revised statutes.

Third, the revised resisting arrest statute specifies a “knowingly” mental state for the actor’s conduct against a law enforcement officer. Current D.C. Code § 22-405.01 specifies that a person must act “intentionally” to resist a person the actor “has reason to believe is a law enforcement officer.” The statute does not further explain the phrase “reason to believe”. The current resisting arrest statute was created in 2016³³ and has yet to be interpreted by the DCCA. However, resisting arrest was previously proscribed in D.C. Code § 22-405 (2001 ed.) which punished resisting arrest as assault on a police officer.³⁴ Although prior D.C. Code § 22-405 did not specify a mental state with respect to the complainant’s status as a law enforcement officer, DCCA case law held that the statute required proof that an actor knew or should have known that the person they resisted was a law enforcement officer.³⁵ It is not clear whether the “reason to believe” standard in current D.C. Code § 22-405.01 is equivalent to the “knew or should have known” standard articulated by the DCCA for the old resisting statute, whether the language refers to something like a subjective but possibly mistaken belief in the manner that similar language has been construed in another offense,³⁶ or whether it requires lesser proof and operates as

³¹ The unit of prosecution for the revised resisting arrest offense does not affect the unit of prosecution for assault charges that may be brought for injuring a law enforcement officer.

³² The current resisting arrest statute was created with the passage of the Neighborhood Engagement Achieves Results Act (NEAR ACT) of 2016 and has yet to be interpreted by the DCCA. However, resisting arrest was previously proscribed in D.C. §22-405 (2001 ed.) which punished “[w]hoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with a law enforcement officer on account of, or while that law enforcement officer is engaged in the performance of his or her official duties.” In interpreting that statute, which does not use the term “intentionally,” the DCCA held that assault on a police officer was a general intent crime and that the government was not required to prove an actor acted with the purpose of resisting arrest. *See In re J.S.*, 19 A.3d 328, 334 (D.C. 2011).

³³ *See* “Neighborhood Engagement Achieves Results Act of 2016”, 63 D.C. Reg. 10570 (June 30, 2016).

³⁴ Prior § 22-405 read in relevant part: “[w]hoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with a law enforcement officer on account of, or while that law enforcement officer is engaged in the performance of his or her official duties.”

³⁵ *See Fletcher v. United States*, 335 A.2d 248, 251 (D.C. 1975).

³⁶ *Owens v. United States*, 90 A.3d 1118, 1123 (D.C. 2014) (construing the receiving stolen property statute, D.C. Code § 22-3232, reference to “knowing or having reason to believe that the property was stolen” and noting that jury instructions “improperly focused on what a reasonable person would have believed without emphasizing the jury’s duty to determine appellant’s subjective knowledge”).

a negligence standard.³⁷ To resolve this ambiguity, the revised resisting arrest statute specifies a “knowing” mental state with respect to whether the actor knew the person they used physical force against, risked causing significant injury to, or caused to use substantial force against the actor was a law enforcement officer. This change improves the clarity and proportionality of District law.

Fourth, the revised resisting arrest statute explicitly excludes conduct amounting to speech or mere passive resistance from liability. Current D.C. Code § 22-405.01 does not explicitly state that an actor’s conduct must go beyond speech or mere passive resistance before liability can be imposed. Similarly, the former assault on a police officer statute, prior D.C. Code § 22-405, did not specify that speech and passive resistance were outside the scope of the statute. Nonetheless, DCCA case law interpreting former D.C. Code § 22-405 held that mere passive resistance does not constitute resisting arrest under that statute. The DCCA’s interpretation was meant to strike a balance between “statutory purpose and constitutional concerns.”³⁸ Resolving the ambiguity of the current statute, the revised resisting arrest statute codifies the DCCA interpretation that requires an actor’s conduct go beyond speech and mere passive resistance. This change ensures that constitutional concerns are addressed, is consistent with prior DCCA case law, and improves the clarity of the revised statutes.

³⁷ With respect to the similar phrase “knowing or having reason to believe” in the District’s current receiving stolen property offense, D.C. Code § 22-3232, the DCCA held that the culpable mental state still required a subjective awareness by the defendant as to the offense element. *See Owens v. United States*, 90 A.3d 1118, 1123 (D.C. 2014) (noting that jury instructions “improperly focused on what a reasonable person would have believed without emphasizing the jury’s duty to determine appellant’s subjective knowledge”). However, the import of that interpretation is unclear as that statute uses the term “knowing” and the current resisting arrest statute does not.

³⁸ In *In re C.L.D.*, 739 A.2d 353, 357 (D.C.1999), the DCCA cited constitutional concerns and held that “mere passive resistance or avoidance” did not violate D.C. Code §22-405. In several later cases, the DCCA was called up on to determine what constituted active resistance and what was mere passive resistance. *See e.g., Coghill v. United States*, 982 A.2d 802 (D.C. 2009); *Dolson v. United States*, 948 A.2d 1193, 1202 (D.C. 2008).

Appendix A – Black Letter Text of Draft Revised Statutes

§ 22A-4404. Resisting arrest.

- (a) *Offense.* An actor commits resisting arrest when the actor:
- (1) With the purpose of preventing the actor or another person from being placed in official custody;
 - (2) Knowingly:
 - (A) Uses physical force against a law enforcement officer; or
 - (B) Engages in conduct other than speech or passive resistance that either:
 - (i) Creates a substantial risk of causing significant bodily injury to a law enforcement officer; or
 - (ii) Requires substantial physical force by a law enforcement officer to overcome the actor's resistance; and
 - (3) The actor is reckless as to the fact that:
 - (A) A law enforcement officer who has authority to make an arrest verbally communicated to the person under arrest that person was under arrest;
 - (B) The communication would cause a reasonable person in the actor's circumstances to believe that the actor or another person was under arrest; and
 - (C) The actor was given a reasonable opportunity to:
 - (I) Submit to arrest; or
 - (II) Cease or refrain from using force or engaging in conduct interfering with the arrest of another person.
- (b) *Affirmative Defense:* It is an affirmative defense to liability under this section offense that the actor reasonably believes:
- (1) The actor or another person is in imminent danger of significant bodily injury; and
 - (2) The conduct constituting the offense:
 - (A) Will protect against such bodily injury; and
 - (B) Is necessary in degree.
- (c) *Unit of Prosecution.* Where conduct is of a continuing nature, the unit of prosecution is based on the arrest regardless of the number of law enforcement officers involved in the arrest.
- (d) *Penalty.* Resisting arrest is a Class C misdemeanor.

Appendix B – Redlined Text
Comparing Draft Revised Statutes with Current D.C. Code Statutes

§ 22A-4404. Resisting arrest.

- (a) *Offense.* An actor commits resisting arrest when the actor:
- (1) With the purpose of preventing the actor or another person from being placed in official custody;
 - (2) Knowingly:
 - (A) Uses physical force against a law enforcement officer; or
 - (B) Engages in conduct other than speech or passive resistance that either:
 - (i) Creates a substantial risk of causing significant bodily injury to a law enforcement officer; or
 - (ii) Requires substantial physical force by a law enforcement officer to overcome the actor’s resistance; and
 - (3) The actor is reckless as to the fact that:
 - (A) A law enforcement officer who has authority to make an arrest verbally communicated to the person under arrest that person was under arrest;
 - (B) The communication would cause a reasonable person in the actor’s circumstances to believe that the actor or another person was under arrest; and
 - (C) The actor was given a reasonable opportunity to:
 - (I) Submit to arrest; or
 - (II) Cease or refrain from using force or engaging in conduct interfering with the arrest of another person.
- (b) *Affirmative Defense:* It is an affirmative defense to liability under this section offense that the actor reasonably believes:
- (1) The actor or another person is in imminent danger of significant bodily injury; and
 - (2) The conduct constituting the offense:
 - (A) Will protect against such bodily injury; and
 - (B) Is necessary in degree.
- (c) *Unit of Prosecution.* Where conduct is of a continuing nature, the unit of prosecution is based on the arrest regardless of the number of law enforcement officers involved in the arrest.
- (d) *Penalty.* Resisting arrest is a Class C misdemeanor.

~~(a) For the purposes of this section, the term “law enforcement officer” shall have the same meaning as provided in § 22-405(a).~~

~~(b) Whoever without justifiable and excusable cause intentionally resists an arrest by an individual who he or she has reason to believe is a law enforcement officer or prevents that individual from making or attempting to make an arrest of or detain another person shall~~

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~~be guilty of a misdemeanor and, upon conviction, shall be imprisoned not more than 6 months or fined not more than the amount set forth in § 22-3571.01, or both.~~

~~(c) It is neither justifiable nor excusable cause for a person to use force to resist an arrest when such an arrest is made by an individual he or she has reason to believe is a law enforcement officer, whether or not such arrest is lawful.~~

Appendix C – Special Conforming Amendments

In addition to conforming amendments necessary to update citations to statutes in this Report, the CCRC at this time recommends the following special conforming amendments be made:

- Update revised D.C. Code § 16-705(a)(1) to include the revised resisting arrest statute in the list of offenses requiring a jury trial in the first three years after enactment of the RCCA.