INSTRUCTIONS TO TRAINERS
CONCERNING LAW OF SELF-DEFENSE

Trainers shall provide the following materials to all persons obtaining firearms safety training for the purpose of applying for a concealed carry pistol license from the District:

> The Criminal Jury Instructions for the District of Columbia (Redbook)[1] concerning self-defense (attached below).

These instructions and materials do not constitute the rendering of legal advice by the Metropolitan Police Department to any applicant or trainer. These instructions and materials are provided for the sole purpose of assisting the trainer in instructing an applicant on the law of self-defense.

Trainers shall provide a discussion of the law of self-defense in general, and highlight and provide detailed discussions and training on the following portions of the Redbook instructions:

You are entitled to claim self-defense:

> (1) if you actually believe you are in imminent danger of bodily harm; and
> (2) if you have reasonable grounds for that belief.

You may use the amount of force which, at the time of the incident, you actually and reasonably believe is necessary to protect yourself (or a third person) from imminent bodily harm. This may extend to the use of deadly force if you actually and reasonably believe you are in imminent danger of death or serious bodily harm from which you can save yourself only by using deadly force against your assailant.

Even if the other person is the aggressor and you are justified in using force in self-defense, you may not use any greater force than you actually and reasonably believe is necessary under the circumstances to prevent the harm you reasonably believe is intended or to save your life or avoid serious bodily harm.

[1] The "Redbook instructions are neither the law nor necessarily a correct statement thereof." *Edelen v. U.S.* 560 A.2d 527, 529 (D.C. 1989). They are, however, the considered judgment of a committee composed of judges, prosecutors and defense attorneys as to the current state of the law in the District.

Under the case law of the District of Columbia, the District is neither a "right to stand and kill" nor a "duty to retreat to the wall before killing" jurisdiction. The District case law has established a "middle ground."[2]

You should take reasonable steps, such as stepping back or walking away, to avoid the necessity of taking a human life, so long as those steps are consistent with your own safety. However, you do not have to retreat or consider retreating when you actually and reasonably believe that you are in danger of death or serious bodily harm and that deadly force is necessary to repel that danger.

If you are the aggressor, you cannot rely upon self-defense to justify the use of force. Similarly, if you deliberately put yourself in a position where you have reason to believe that your presence will provoke trouble, you cannot claim self-defense. Finally, mere words are insufficient to justify the use of force.

If you are the initial aggressor or provoke a conflict, but you then withdraw from it in good faith and communicate that withdrawal by words or actions, you may then use reasonable force to save yourself from imminent bodily harm, including deadly force to save yourself from death or serious bodily injury.

You cannot claim self-defense to justify an assault on a police officer – even if a stop or arrest later turns out to be unlawful -- unless the officer uses more force than appears to be reasonably necessary. Then, you may use only the amount of force that is reasonably necessary for your protection.

You may use reasonable non-deadly force to protect your home or business if you reasonably believe that your property is in imminent danger of an unlawful trespass and such force is necessary to avoid the danger. Similarly, if a person has unlawfully trespassed on your property, you may use reasonable non-deadly force to eject them.

Generally, you may not use deadly force to protect your property. However, if you reasonably believe that an intruder is entering your home or business with the intent to commit a felony (such as murder, rape, robbery or burglary) or seriously harm any of its occupants, you may use deadly force.

[2] *Gillis v. U.S.*, 400 A.2d 311, 313 (D.C. 1979).

Note that case law in the District does not explicitly extend to businesses the principle of defense of property, but appears to have recognized it implicitly. Other jurisdictions that recognize defense of a home also recognize defense of a business.

You may not claim defense of property where the police have lawfully entered your property to investigate a crime.

You also may use non-deadly force to protect your personal property from theft or damage when you reasonably believe that it is immediate danger and the use of force is necessary to avoid its theft or damage. You also may use non-deadly force to repossess property that has been taken if you do so immediately after the property has been taken and in hot pursuit of the thief. Otherwise you may not use force to repossess your property.

1-IX Criminal Jury Instructions for DC Instruction 9.500

- **Criminal Jury Instructions for the District of Columbia**
- **VI. Defenses**
- **IX. Defenses**
- **E. Self-Defense, Defense of Others, Defense of Property, Claim of Right**

Instruction 9.500 SELF-DEFENSE—GENERAL CONSIDERATIONS

Every person has the right to use a reasonable amount of force in self-defense if (1) s/he actually believes s/he is in imminent danger of bodily harm and if (2) s/he has reasonable grounds for that belief. The question is not whether looking back on the incident you believe that the use of force was necessary. The question is whether [name of defendant], under the circumstances as they appeared to him/her at the time of the incident, actually believed s/he was in imminent danger of bodily harm, and could reasonably hold that belief.

[Insert other relevant self-defense instructions.]

Self-defense is a defense to the charges of [insert all charges to which self-defense applies]. [Name of defendant] is not required to prove that s/he acted in self-defense. Where evidence of self-defense is present, the government must prove beyond a reasonable doubt that [name of defendant] did not act in self-defense. If the government has failed to do so, you must find [name of defendant] not guilty.

Comment:

The 2008 release inserted the sentence that requires the court to specify the counts to which self-defense applies. *See* *Jones v. U.S.*, 893 A.2d 564, 568 (D.C. 2006) ("In such circumstances, there is no good reason for a trial court not to identify each of the charges to which self-defense applies, especially when asked to do so …"). The Fifth Edition added the bracketed cross-reference to other relevant self-defense instructions.

Where evidence of self-defense is present, the jury should be instructed as to the defendant's right of self-defense. *See, e.g.*, *Hernandez v. U.S.*, 853 A.2d 202 (D.C. 2004) (holding failure to give self-defense instruction where some evidence supported it, however weak, was reversible error); *Guillard v. U.S.*, 596 A.2d 60 (D.C. 1991) ("Trial court should give self-defense instruction if there is any evidentiary basis in record to support it."). A self-defense instruction should be given even though a defendant asserts a different or contradictory defense as long as self-defense is reasonably raised by the evidence. *Guillard*, 596 A.2d at 62 ("A defendant's decision, however, to establish different or even contradictory defenses does not jeopardize the availability of a self-defense jury instruction as long as self-defense is reasonably raised by the evidence.") (quotations omitted). *See also* *Adams v. U.S.*, 558 A.2d 348, 349–50 (D.C. 1989) ("[M]ere inconsistency between defenses does not constitute a proper basis for the denial of a defense instruction."). However, the jury should not be instructed on self-defense where there is no evidence to support the theory of this defense. *See, e.g.*, *Jones v. U.S.*, 516 A.2d 929 (D.C. 1987) (finding that instruction on self-defense where no evidence supported theory of this defense would have "indulged and even encouraged speculations as to bizarre reconstruction of the uncontested facts.") (quotations omitted); *Gezmu v. U.S.*, 375 A.2d 520 (D.C. 1977) (rejecting defendant's request for self-defense instruction as there was no evidence of imminent danger and therefore no evidence of self-defense); *U.S. v. Crowder*, 543 F.2d 312 (D.C. Cir. 1976) (en banc) (finding trial court correctly refused to give instruction when defendant's own testimony negated possibility of self-defense). *See also* *Hurt v. U.S.*, 337 A.2d 215 (D.C. 1975) (finding that trial court properly refused to give defendant's requested instruction that self-defense is a defense to carrying a dangerous weapon where defendant carried pistol in public for a period of time before actual danger arose). *See generally* *Bynum v. U.S.*, 408 F.2d 1207 (D.C. Cir. 1968) and *Kelly v. U.S.*, 361 F.2d 61, 62 (D.C. Cir. 1966) (placing burden on government to disprove self-defense beyond a reasonable doubt); Model Penal Code §§ 3.04, 3.05, 3.11 (2001).

Cross references: No. 4.202, Homicide—First Degree Premeditated Murder and Second Degree Murder, and Voluntary Manslaughter (Self-Defense and Heat of Passion Caused by Adequate Provocation); No. 4.211, Homicide—Second Degree Murder and Voluntary Manslaughter (Self-

Defense and Heat of Passion Caused by Adequate Provocation); Nos. 9.500–9.505, Self-Defense—related instructions.

Criminal Jury Instructions for DC

Instruction 9.501 SELF-DEFENSE—AMOUNT OF FORCE PERMISSIBLE

A. NONDEADLY FORCE

A person may use a reasonable amount of force in self-defense. A person may use an amount of force which, at the time of the incident, s/he actually and reasonably believes is necessary to protect himself/herself from imminent bodily harm.

B. DEADLY FORCE

A person may use a reasonable amount of force in self-defense, including, in some circumstances, deadly force. "Deadly force" is force that is likely to cause death or serious bodily harm. A person may use deadly force in self-defense if s/he actually and reasonably believes at the time of the incident that s/he is in imminent danger of death or serious bodily harm from which s/he can save himself/herself only by using deadly force against his/her assailant.

C. EXCESSIVE FORCE (TO BE USED WITH EITHER DEADLY OR NONDEADLY FORCE)

Even if the other person is the aggressor and [name of defendant] is justified in using force in self-defense, s/he may not use any greater force than s/he actually and reasonably believes to be necessary under the circumstances [to prevent the harm s/he reasonably believes is intended] [to save his/her life or avoid serious bodily harm].

In deciding whether [name of defendant] used excessive force in defending himself/herself, you may consider all the circumstances under which s/he acted. A person acting in the heat of passion caused by an assault does not necessarily lose his/her claim of self-defense by using greater force than would seem necessary to a calm mind. In the heat of passion, a person may actually and reasonably believe something that seems unreasonable to a calm mind.

Comment:

Where evidence of excessive force is present, Part C of the instruction should be given, preceded by Part A or Part B, depending upon whether the defendant is charged with an offense involving the exercise of nondeadly force (A) or deadly force (B). *See generally* *Sacrini v. U.S.*, 38 App. D.C. 371 (1912) (holding whether defendant's actions are reasonable depends upon whether the circumstances known to the accused would cause a reasonably prudent person, situated as the defendant, to believe s/he is being or about to be attacked); *Kinard v. U.S.*, 96 F.2d 522 (D.C. Cir. 1938) and *McPhaul v. U.S.*, 452 A.2d 371 (D.C. 1982) (holding that defendant's belief must be both

reasonable and bona fide to find self-defense); *Perry v. U.S.*, 422 F.2d 697 (D.C. Cir. 1969) and *Inge v. U.S.*, 356 F.2d 345 (D.C. Cir. 1966) (finding whether excessive force was used is determined by all the circumstances of the particular case); *Brown v. U.S.*, 256 U.S. 335 (1921) (finding that claim of self-defense is not necessarily defeated because defendant, acting in heat of passion brought on by the assault, used more force than would have appeared reasonable to a calmer mind; if one reasonably believes s/he is in immediate danger of grievous bodily harm, deadly force may be used in defending her/himself); *U.S. v. Peterson*, 483 F.2d 1222 (D.C. Cir. 1973) (defining deadly force as force capable of inflicting death or serious bodily harm).

Cross references: Nos. 9.500–9.505, Self-defense—related instructions.

Instruction 9.502 SELF-DEFENSE—AMOUNT OF FORCE PERMISSIBLE WHERE APPEARANCES ARE FALSE

A. NONDEADLY FORCE

If [name of defendant] actually and reasonably believes it is necessary to use force to prevent imminent bodily harm to himself/herself, s/he may use a reasonable amount of force even though afterwards it turns out that the appearances were false.

B. DEADLY FORCE

If [name of defendant] actually and reasonably believes that s/he is in imminent danger of death or serious bodily harm and that deadly force is necessary to repel such danger, s/he may use deadly force in self-defense. S/he may do so even though afterwards it turns out that the appearances were false because either [name of defendant] was not actually in imminent danger or deadly force was not necessary.

Comment:

This instruction should be given when there is evidence that the appearances on which the defendant claims prompted actions in self-defense were false. *See* *Fersner v. U.S.*, 482 A.2d 387, 391 (D.C. 1984) (quoting the instruction and noting "Indeed, the [defendant's] personal perceptions are so significant that they may justify the use of reasonable, including deadly, force in self-defense …"). *See also* *Jackson v. U.S.*, 645 A.2d 1099, 1102 (D.C. 1994) (instruction should have been given in case where evidence that complainant pulled out a black object that may not have been a gun but that defendant could have mistaken for one). *Cf.* *Alcindore v. U.S.*, 818 A.2d 152, 157 (D.C. 2003). Part A of the instruction is to be given where the defendant is charged with an offense involving the exercise of non-deadly force. Part B should be given where the defendant is charged with homicide, or an assault with intent or attempt to exercise deadly force. *See* Perkins, *Criminal Law*, pp. 993–96 (1969 ed.). This instruction may also be given where there is controverted evidence of danger to the defendant. *Sloan v. U.S.*, 527 A.2d 1277 (D.C. 1987). *See generally* *U.S. v. Peterson*, 483 F.2d 1222 (D.C. Cir. 1973) (summarizing at length the defense of self-defense).

Cross references: Nos. 9.500–9.505, Self-Defense—related instructions.

-IX Criminal Jury Instructions for DC Instruction 9.502

Instruction 9.502 SELF-DEFENSE—AMOUNT OF FORCE PERMISSIBLE WHERE APPEARANCES ARE FALSE

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If [name of defendant] actually and reasonably believes that s/he is in imminent danger of death or serious bodily harm and that deadly force is necessary to repel such danger, s/he may use deadly force in self-defense. S/he may do so even though afterwards it turns out that the appearances were false because either [name of defendant] was not actually in imminent danger or deadly force was not necessary.

Comment:

This instruction should be given when there is evidence that the appearances on which the defendant claims prompted actions in self-defense were false. *See* *Fersner v. U.S.*, 482 A.2d 387, 391 (D.C. 1984) (quoting the instruction and noting "Indeed, the [defendant's] personal perceptions are so significant that they may justify the use of reasonable, including deadly, force in self-defense …"). *See also* *Jackson v. U.S.*, 645 A.2d 1099, 1102 (D.C. 1994) (instruction should have been given in case where evidence that complainant pulled out a black object that may not have been a gun but that defendant could have mistaken for one). *Cf.* *Alcindore v. U.S.*, 818 A.2d 152, 157 (D.C. 2003). Part A of the instruction is to be given where the defendant is charged with an offense involving the exercise of non-deadly force. Part B should be given where the defendant is charged with homicide, or an assault with intent or attempt to exercise deadly force. *See* Perkins, *Criminal Law*, pp. 993–96 (1969 ed.). This instruction may also be given where there is controverted evidence of danger to the defendant. *Sloan v. U.S.*, 527 A.2d 1277 (D.C. 1987). *See generally* *U.S. v. Peterson*, 483 F.2d 1222 (D.C. Cir. 1973) (summarizing at length the defense of self-defense).

Cross references: Nos. 9.500–9.505, Self-Defense—related instructions.

1-IX Criminal Jury Instructions for DC Instruction 9.503

Instruction 9.503 SELF-DEFENSE—NO DUTY TO RETREAT BEFORE USING DEADLY FORCE

The law does not require a person to retreat or consider retreating when s/he actually and reasonably believes that s/he is in danger of death or serious bodily harm and that deadly force is necessary to repel that danger. But the law does say that a person should take reasonable steps, such as stepping back or walking away, to avoid the necessity of taking a human life, so long as those steps are consistent with the person's own safety. In deciding whether [name of defendant] acted reasonably, you should therefore consider whether s/he could have taken those steps, consistent with his/her own safety.

Comment:

This instruction represents the "middle ground" between "the right to stand and kill, and the duty to retreat to the wall before killing," *Gillis v. U.S.*, 400 A.2d 311, 313 (D.C. 1979), and may be given "when there is a truly relevant question as to whether a defendant could have safely retreated." *Broadie v. U.S.*, 925 A.2d 605, 621 (D.C. 2007) (internal quotation omitted).

This instruction should be given in any case in which the jury could reasonably find that the defendant used deadly force. For a definition of deadly force, see Instruction No. 5.13. *See generally Alcindore v. U.S.*, 818 A.2d 152 (D.C. 2003) (recognizing that under D.C. law, "the actor's 'subjective perceptions are the prime determinant of the right to use force—and the degree of force required—in self-defense, subject only to the constraints that those perceptions be reasonable under the circumstances.' " (citing *Fersner v. U.S.*, 482 A.2d 387, 391–92 (D.C. 1984)); *Laney*, *supra* (suggesting no duty to retreat if defendant is "assailed in a place where he has a right to be, unless by so doing an affray can be clearly avoided[,]" even to the point of taking life if necessary); *Marshall v. U.S.*, 45 App. D.C. 373 (1916) ("The right of a defendant when in imminent danger to take life does not depend upon whether there was an opportunity to escape."); *Grant v. U.S.*, 734 A.2d 174 (D.C. 1999) (finding that it was proper for prosecution to inquire on cross-examination as to why defendant did not continue flight or retreat, once it had started); *U.S. v. Bush*, 416 F.2d 823 (D.C. Cir. 1969) (jury could not find that accused had exceeded the bounds of lawful self-defense when he backed into a wall and the assailant kept coming at him); Perkins, *Criminal Law*, pp. 993–96 (1969

ed.); Model Penal Code § 3.11 (2001); 2 Devitt & Blackmar, *Federal Jury Practice and Instructions*, § 41.21, 234–35 (3d ed. 1977) (citing previous version of this instruction at p. 234).

Where defendant is in his own home or on his own property, it may be necessary for the court to draft an additional instruction to incorporate the "castle doctrine." *See generally* *Smith v. U.S.*, 686 A.2d 537 (D.C. 1996) (declining to decide whether the "castle doctrine" applies when one is attacked in his home, through no fault of his own, by an invitee whose invitation has been withdrawn; failure to so instruct not plain error; jury may consider a failure to retreat, together with all other circumstances, in determining if there was a case of true self-defense); *Cooper v. U.S.*, 512 A.2d 1002 (D.C. 1986) (holding that the "castle doctrine" does not apply in the circumstance of an attack from a co-occupant in one's own home).

The court may also wish to modify the instruction that the jury should consider whether the defendant could have retreated without compromising the safety of any other person in a case where the defendant claims to have acted in reasonable belief that another person is in danger of death or serious bodily harm. *Cf.* *Broadie*, 925 A.2d at 621.

Cross references: Nos. 9.500–9.505, Self-defense—related instructions.

Instruction 9.504 SELF-DEFENSE—WHERE DEFENDANT MIGHT HAVE BEEN THE AGGRESSOR

A. MERE WORDS NOT PROVOCATION

If you find that [name of defendant] [was the aggressor] [or] [provoked the conflict upon himself/herself], s/he cannot rely upon the right of self-defense to justify his/her use of force. [One who deliberately puts himself/herself in a position where s/he has reason to believe that his/her presence will provoke trouble cannot claim self-defense.] Mere words without more by [name of defendant], however, do not constitute [aggression] [or] [provocation].

B. NONDEADLY FORCE WHERE DEFENDANT WITHDRAWS

If you find that [name of defendant] [was the aggressor] [or] [provoked the assault upon himself/herself], s/he cannot rely upon the right of self-defense to justify the use of force. However, if one who [is the aggressor] [or] [provokes a conflict] later withdraws from it in good faith, and communicates that withdrawal by words or actions, s/he may use reasonable force to save himself/herself from imminent bodily harm.

C. DEADLY FORCE WHERE DEFENDANT WITHDRAWS

If you find that [name of defendant] [was the aggressor] [or] [provoked the assault upon himself/herself], s/he cannot invoke the right of self-defense to justify his/her use of force. However, if one who [is the aggressor] [or] [provokes a conflict] later withdraws from it in good faith, and communicates that withdrawal by words or actions, s/he may use deadly force to save himself/herself from imminent danger of death or serious bodily harm.

Comment:

Where some evidence is introduced that the defendant might have been the attacker or provoked the assault by the complainant/decedent, Part A of this instruction should be given, and Part B or Part C should follow, depending on whether the defendant is charged with an offense involving the exercise of nondeadly force (B) or deadly force (C). *See* *U.S. v. Grover*, 485 F.2d 1039,1041–42 (D.C. Cir. 1973) (finding that trial court's refusal to give instruction was within its discretion where no evidence proffered showing defendant's good faith effort to retreat); *U.S. v. Peterson*, 483 F.2d 1222, 1231 (D.C. Cir. 1973) (reaffirming principle that self-defense is available as defense to aggressor only if he communicates to his adversary his intent to withdraw and makes a good faith attempt to do so); *Rowe v. U.S.*, 370 F.2d 240, 241 (D.C. Cir. 1966) ("Self-defense may not be

claimed by one who deliberately places himself in a position where he has reason to believe his presence would provoke trouble."); *Harris v. U.S.*, 364 F.2d 701 (D.C. Cir. 1966) ("One cannot provoke fight and then rely on claim of self-defense when such provocation results in counterattack unless he has previously withdrawn from fray and communicated such withdrawal."); *Laney v. U.S.*, 294 F. 412, 414 (D.C. Cir. 1923) (finding that charging on the law of self-defense not warranted where defendant voluntarily re-entered the fray after escaping to safety); Perkins, *Criminal Law*, pp. 1129–33 (1982).

The Committee has bracketed language referring to an aggressor and one who provokes the assault to indicate that aggression and provocation are distinct legal theories under D.C. law and there will be times when it is not appropriate to instruct on both. *See* *Rorie v. U.S.*, 882 A.2d 763, 771 (D.C. 2005) (discussing charge "relating to the defendant as 'the aggressor' or the defendant as the person who 'provoked the conflict upon himself,' "); *Swann v. U.S.*, 648 A.2d 928, 930 n. 7 (D.C.1994) ("a defendant cannot claim self-defense if 'the defendant was the aggressor, or if s/he provoked the conflict upon himself/herself.' "). *Compare, e.g.*, *Sams v. U.S.*, 721 A.2d 945, 953 (D.C. 1998) (discussing provocation doctrine), *with* *U.S. v. Peterson*, 483 F.2d 1222 (D.C. Cir. 1973) (holding that "an affirmative unlawful act reasonably calculated to produce an affray foreboding injurious or fatal consequences is an aggression which, unless renounced, nullifies the right of homicidal self-defense"); *cf.* *Kleinbart v. U.S.*, 426 A.2d 343, 357 (D.C. 1981) (equating "aggressor" and "attacker"), *mandate recalled on other grounds*, 553 A.2d 1236 (1989). As to the availability of self-defense to a person who is the aggressor or who deliberately puts himself or herself in a position where he or she has reason to believe his or her presence will provoke trouble, *see* *Sams v. U.S.*, 721 A.2d 945, 953 (D.C. 1998) (finding that case law from *Laney* to *Howard v. U.S.*, 656 A.2d 1106, 1111 (D.C. 1995), makes clear that self-defense is not available to a defendant who deliberately puts himself in a position where he has reason to believe that his presence will provoke trouble, even if his purpose in putting himself in that position was benign); *Howard v. U.S.*, 656 A.2d 1106 (D.C. 1995) (holding that trial court did not err in refusing to instruct jury on self-defense where evidence showed that defendants had deliberately placed themselves in a position where they have reason to believe that their presence would provoke trouble); *Martin v. U.S.*, 452 A.2d 360, 363 (D.C. 1982) (holding that self-defense could not be invoked unless jury found that defendant's first slap of victim was an exercise of reasonable discipline, not aggression); *Mitchell v. U.S.*, 399 A.2d 866, 869 (D.C. 1979) (finding against defendant's claim of self-defense where defendant followed victim into the street, placing himself in a position reasonably calculated to provoke trouble); *Nowlin v. U.S.*, 382 A.2d 9, 14 n. 7 (D.C. 1978) ("[A]ppellant had no legitimate claim to the defense of self-defense, since he had voluntarily placed himself in a position which he could reasonably expect would result

in violence."); *U.S. v. Taylor*, 510 F.2d 1283, 1287 (D.C. Cir. 1975) (finding that defendant could not claim self-defense, since his pursuit of a third party created deceased's pursuit of him as an officer of the law). *See also* *Bedney v. U.S.*, 471 A.2d 1022, 1023–24 (D.C. 1984) (approving trial court's use of instruction 5.17(D)). *But see* *Rorie v. U.S.*, 882 A.2d 763 (D.C. 2005) (holding that there was inadequate evidentiary basis for giving aggressor or provocation instruction).

The fact that a defendant may have been an aggressor at an earlier point in time does not by itself rule out a defense of self-defense. *Rorie*, 882 A.2d at 772 ("Thus, the fact that a defendant may have been an aggressor or a provocateur at an earlier point in time, does not by itself rule out a defense of self-defense."); *Grover*, 485 F.2d at 1043. If there is evidence of a "disengagement" due to the passage of time, and "[t]he effect of the disengagement of the parties and the passage of … time … restore[s] them to the status quo ante." *Id.* At that point, "any disability on [the defendant] because of his prior aggression [is] lifted, and he [is] able to defend himself against any subsequent attack." *Id.* *See also* *Rorie v. U.S.*, 882 A.2d 763 (D.C. 2005) (holding court's *sua sponte* giving of Instruction 5.16 constituted reversible error when evidence did not justify giving the "first aggressor" or provocation instruction).

As to the availability of the defense to the aggressor who effectively disengages in good faith from an altercation and communicates that intent to withdraw to his or her opponent, see generally *Peterson*, 483 F.2d at 1231; *Harris*, 364 F.2d at 702; *Parker v. U.S.*, 158 F.2d 185, 186 (D.C. Cir. 1946) (finding that trial court properly instructed about aggressor's right to claim self-defense if he withdrew in good faith); *Rowe v. U.S.*, 164 U.S. 546 (1896) (holding that the right to self-defense is restored to the aggressor if he withdraws in good faith from further contest).

Cross references: Nos. 9.500–9.505, Self-Defense—related instructions.

Instruction 9.505 SELF-DEFENSE—PAST VIOLENCE BY COMPLAINANT OR DECEDENT

A. DEFENDANT WAS AWARE [Applicable in D.C. Superior Court and U.S. District Court]

1. Complainant's or Decedent's Specific Acts of Violence

You have heard evidence about past acts of violence by [name of complainant] [name of decedent] and that [name of defendant] knew about those past acts. You may consider such evidence as bearing on the reasonableness of [name of defendant]'s fear for his/her own safety.

2. Complainant's or Decedent's Reputation

You have heard evidence that [name of complainant] [name of decedent] had a general reputation for violence and that [name of defendant] knew about that reputation. You may consider such evidence as bearing on the reasonableness of [name of defendant]'s fear for his/her own safety.

B. DECEDENT'S CHARACTER FOR VIOLENCE REGARDLESS OF DEFENDANT'S AWARENESS [Applicable *Only* in Homicide Cases in D.C. Superior Court]

1. Decedent's Specific Acts of Violence

You have heard evidence about past acts of violence by [name of decedent]. You may consider such evidence in evaluating the likelihood that [name of decedent] was the aggressor.

2 Decedent's Reputation for Violence

You have heard evidence about [name of decedent]'s general reputation for violence. You may consider such evidence in evaluating the likelihood that [name of decedent] was the aggressor.

C. COMPLAINANT/DECEDENT'S CHARACTER FOR VIOLENCE REGARDLESS OF DEFENDANT'S AWARENESS [Applicable in U.S. District Court—*Not* Limited to Homicide Cases]

You have heard evidence about [name of complainant/decedent]'s character for violence. You may consider such evidence in evaluating the likelihood that [name of complainant or decedent] was the aggressor.

D. THREATS BY THE COMPLAINANT/DECEDENT AGAINST THE DEFENDANT [Applicable in D.C. Superior Court and U.S. District Court]

You have heard evidence that, prior to the alleged [insert offense charged], [name of complainant] [name of decedent] made a threat or threats against [name of defendant]. [Even if you find that [name of defendant] was unaware of the prior threats at the time of the alleged [insert offense charged]], you may consider such evidence as bearing on the likelihood that [name of complainant] [name of decedent] was the aggressor.

[You have also heard evidence that, at the time of the alleged [insert offense charged] [name of defendant] knew of the threat or threats against him/her. If you find that [name of defendant] knew of these prior threats by [name of complainant] [name of decedent], then you may also consider them as bearing on the reasonableness of [name of defendant]'s fear for his/her own safety.]

E. EVIDENCE OF PEACEFUL CHARACTER OF COMPLAINANT/DECEDENT [Applicable in D.C. Superior Court and U.S. District Court]

You have heard evidence about the peaceful character of [name of complainant] [name of decedent]. You may consider such evidence only as bearing on the likelihood that [name of complainant] [name of decedent] threatened [name of defendant] with imminent bodily harm, that is, on the issue of who was the aggressor. [If you find that [name of defendant] knew of [name of complainant/decedent]'s peaceful character, you may also consider such evidence as bearing on the reasonableness of [name of defendant]'s fear for his/her own safety.]

Comment:

Section A reflects the law in both Superior Court and the U.S. District Court. If the defendant is aware of either specific acts of violence or the alleged victim's reputation in the community for violence, the jury may consider that evidence in evaluating the reasonableness of the defendant's apprehension of imminent bodily harm. *See, e.g.*, *Hart v. U.S.*, 863 A.2d 866, 870 (D.C. 2004) ("Evidence of the defendant's knowledge of the victim's reputation for violence is … admissible, because 'it tends to support the contention that the accused acted from an honest and reasonable apprehension of imminent bodily harm because of the information imparted to him about the complainant.' " (citing *King v. U.S.*, 177 A.2d 912, 913 (D.C. 1962)); *Harris v. U.S.*, 618 A.2d 140, 143 (D.C. 1982) ("There is no dispute that to support a self-defense claim, the accused may show prior acts of violence committed by the victim about which the accused knew … . Such evidence is relevant to the reasonableness of the accused's fear of the victim." (citing *In re G.*, 427 A.2d 440, 443 (D.C. 1981)); *U.S. v. Burks*, 470 F.2d 432, 434–35 (D.C. Cir. 1972) ("[E]vidence of the deceased's violent character, including evidence of specific violent acts, is admissible where a claim of self-defense is raised. Such evidence is relevant on the issue of who was the aggressor and,

where there is evidence that the defendant knew of the deceased's character, on the issue of whether or not the defendant reasonably feared he was in danger of imminent great bodily injury."); *see also* *Johns v. U.S.*, 434 A.2d 463, 468–69 and n.8 (D.C. 1981) (holding that defendant's right to introduce evidence of deceased's violent character for claim of self-defense does not allow government to introduce similar character evidence against defendant, unless defendant opened up the issue of his own good character for rebuttal); *Cooper v. U.S.*, 353 A.2d 696, 700 n.8 (D.C. 1975) (holding that both general reputation evidence as well as evidence of specific prior acts of violence which were known to defendant may be used to support claim of self-defense); *U.S. v. Agurs*, 510 F.2d 1249, 1254 (D.C. Cir. 1975) (holding that prosecutor has duty to disclose exculpatory evidence of victim's proclivity toward violence to defendant claiming self-defense), *rev'd on other grounds*, 427 U.S. 97 (1976). If evidence is introduced that the defendant is aware of both specific acts and reputation, then the court should combine subparts 1 and 2 and reword the instructions accordingly.

The provisions of Fed. R. Evid. 404(a) govern in criminal cases prosecuted in federal district court. *See* *U.S. v. Harris*, 491 F.3d 440, 447 (D.C. Cir. 2007) ("while a criminal defendant can put character in issue, the evidence can concern only a 'pertinent trait of character,' Fed. R. Evid. 404(a)(1), and even then may be excluded if 'its probative value is substantially out-weighed by the danger of unfair prejudice,' Fed. R. Evid. 403").

Effective December 1, 2011, Fed. R. Evid. Rule 404(a) provides:

- (a)Character Evidence.
  - (1)Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.
  - (2)Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:
    - (A)a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;
    - (B)subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:
      - (i)offer evidence to rebut it; and
      - (ii)offer evidence of the defendant's same trait; and

- (C)in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

- (3)Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

As explained in the Advisory Committee Notes, the 2000 Amendment to Rule 404(a)(1) was intended "to provide that when the accused attacks the character of an alleged victim under subdivision (a)(2) of this Rule, the door is opened to an attack on the same character trait of the accused." Moreover, the 2006 Amendment to Rule 404(a)(2) "clarifies that evidence otherwise admissible under Rule 404(a)(2) may nonetheless be excluded in a criminal case involving sexual misconduct. In such a case, the admissibility of evidence of the victim's sexual behavior and predisposition is governed by the more stringent provisions of Rule 412."

Section B applies in D.C. Superior Court and reflects the rule in this jurisdiction that, only in homicide cases, may prior violent acts of the victim or the victim's reputation for violence be introduced to prove that the victim was the first aggressor. *Hart v. U.S.*, 863 A.2d 866, 871 (D.C. 2004) ("The trial court correctly ruled to exclude evidence of the victim's reputation for violence to prove she was the first aggressor, since this was not a homicide case. That ruling extended to evidence of prior specific acts of violence."); *Harris v. U.S.*, 618 A.2d 140, 144 (D.C. 1982) ("Thus, the holding in *Akers* [*U.S. v. Akers*, 374 A.2d 874, 877 (D.C. 1977)] limiting the use of evidence of specific prior acts of violence by the victim on the first aggressor issue to homicide cases is not dicta, and we are bound to follow it."). The parties may also be able to introduce evidence of a character witness's personal opinion. *See Rogers v. U.S.*, 566 A.2d 69 (D.C. 1989) (en banc).

Section C reflects the law in federal court, which permits an accused to introduce "[e]vidence of a pertinent trait of character of the alleged victim of the crime." Fed. R. Evid. 404(a)(2). Under Fed. R. Evid. 405(a), the proper method for proving character in these circumstances is by reputation or personal opinion testimony—not specific instances of conduct.

Section D comports with the ruling in *McBride v. U.S.*, 441 A.2d 644, 653 (D.C. 1982) ("*Akers*, therefore, did not address the intermediate question presented here: whether a complainant's uncommunicated threats against a defendant are admissible in a nonhomicide case to show—not the victim's general propensity to violence, based on acts against third persons—but the victim's specific intentions toward the defendant. … We conclude that if the evidence establishes the required foundation … there is no policy barrier against evidence of uncommunicated threats that

illuminate the victim's state of mind toward the defendant, either in homicide or nonhomicide cases."); *see also* Fed. R. Evid. 404(b).

Section E should be used where the prosecution introduces evidence of the complainant's/decedent's peaceful character to rebut defense evidence of the complainant/decedent's violent character. In *Rawls v. U.S.*, 539 A.2d 1087 (D.C. 1988), the Court of Appeals held that once the defendant raised self-defense and placed the decedent's character in issue, the prosecution was entitled to introduce evidence of the non-combative nature of the decedent to prove both who was the aggressor and whether the defendant was in reasonable fear of imminent great bodily injury where the witness had a long-standing relationship with the parties and had observed them on an almost daily basis. *Id.* at 1089. *See also* *Carter v. U.S.*, 475 A.2d 1118, 1121 (D.C. 1984) (By raising self-defense in homicide trial, defendant was asserting that decedent had been the initial aggressor in the fatal conflict; therefore, evidence of decedent's peaceable or violent character was admissible as relevant on issue of who was initial aggressor). The court in *Rawls* did not address the language of any instruction. The Committee offers this instruction for the purpose of clarifying for the jury the limited purpose for which such character evidence may be used in the event the court admits such evidence under the *Rawls* rationale. *See also* Fed. R. Evid. 404(a)(2).

See also *Hawkins v. U.S.*, 461 A.2d 1025, 1033–34 (D.C. 1983) (holding that evidence of decedent's assaults upon wife was too removed in time and confined in special context of marital relationship to be relevant in case where defendant murdered a fellow motorist, and was properly excluded); *Hurt v. U.S.*, 337 A.2d 215 (D.C. 1975) (striking testimony of defendant's witness was proper where witness's evidence of deceased's violent character was cumulative, vague, and uncertain); *King v. U.S.*, 177 A.2d 912 (D.C. 1962) (holding that defendant's testimony that he had heard of prior belligerent acts of victim—even without personal observation—admissible on issue of defendant's state of mind in assault case).

Cross references: Nos. 9.500–9.505, Self-Defense—related instructions.

1-IX Criminal Jury Instructions for DC Instruction 9.510

Instruction 9.510 DEFENSE OF A THIRD PERSON

Every person has the right to use a reasonable amount of force in defense of another person if (1) s/he actually believes that the other person is in imminent danger of bodily harm and if (2) s/he has reasonable grounds for that belief. The question is not whether looking back on the incident you believe that the use of force was necessary. The question is whether [name of defendant], under the circumstances as they appeared to him/her at the time of the incident, actually believed that the person s/he was seeking to defend was in imminent danger of bodily harm, and could reasonably hold that belief. Defense of another person may be a defense to the charge(s) of [insert all charges to which defense applies].

[A person may use a reasonable amount of force in defense of another person, including, in some circumstances, deadly force. “Deadly force” is force which is likely to cause death or serious bodily harm. A person may use deadly force in defense of another person if s/he actually believes at the time of the incident that person is in imminent danger of death or serious bodily harm from which s/he can save that person only by using deadly force against the assailant, and if his/her belief is reasonable.]

[Even if [name of defendant] was justified in using force in defense of another person, s/he would not be entitled to use any greater force than s/he had reasonable grounds to believe and actually did believe to be necessary under the circumstances to save the other person’s life or avert serious bodily harm.]

[In deciding whether [name of defendant] used excessive force in defending another person you may consider all the circumstances under which s/he acted. A person acting in the heat of passion caused by an assault does not necessarily lose his/her claim of defense of a third person by using greater force than would seem necessary to a calm mind. In the heat of passion, a person may actually and reasonably believe something that seems unreasonable to a calm mind.]

[Name of defendant] is not required to prove that s/he acted in the defense of another person. If evidence of defense of another person is present, the government must prove beyond a reasonable doubt that [name of defendant] did not act in the defense of another person. On the other hand, if the government has proved beyond a reasonable doubt that [name of defendant] did not act in defense of another person, along with each other element of the offense, then you must find him/her guilty of the offense of [insert name of offense(s)].

Comment:

The first and fifth paragraphs of this instruction conform with the language of Instruction 5.12, Self Defense, General Considerations. The second, third, and fourth paragraphs are in brackets for use when deadly force and/or excessive force are involved and were based on the decision of the District of Columbia Court of Appeals in *Fersner v. U.S.*, 482 A.2d 387, 392–93 (D.C. 1984).

"[W]hen it comes to determining whether—and to what degree—force is reasonably necessary to defend a third person under attack, the focus ultimately must be on the intervenor's, not the victim's, reasonable perceptions of the situation." *Fersner*, 482 A.2d at 392. *See also* *Lee v. U.S.*, 61 A.3d 655, 660 (D.C. 2013) ("the focus of the inquiry is on the defendant's reasonable perceptions of the situation, not those of the third party" (quotations omitted)); *Jones v. U.S.*, 555 A.2d 1024, 1027–28 (D.C. 1989) (finding defendant entitled to defense of third person instruction in assault on police officer prosecution where some evidence supported defendant's perception that force was necessary to protect a stranger who appeared to be victim of street robbery); *Graves v. U.S.*, 554 A.2d 1145, 1147–49 (D.C. 1989) (finding defendant entitled to defense of third person instruction based on defendant's perception that his wife was in imminent danger of bodily harm).

1-IX Criminal Jury Instructions for DC Instruction 9.520

Copy Citation

- **Criminal Jury Instructions for the District of Columbia**
- **VI. Defenses**
- **IX. Defenses**
- **E. Self-Defense, Defense of Others, Defense of Property, Claim of Right**

Instruction 9.520 DEFENSE OF PROPERTY

A. DEFENSE OF REAL PROPERTY

A person is justified in using reasonable force to protect his/her property from trespass when s/he reasonably believes that his/her property is in immediate danger of an unlawful trespass and that the use of such force is necessary to avoid the danger. Similarly, if a person reasonably believes that someone has unlawfully trespassed on his/her property, s/he may use reasonable, nondeadly force to secure the property.

Generally, a person may not use deadly force to protect his/her property. However, a person may use deadly force to protect his/her home or business if s/he has a reasonable belief that an intruder is entering his/her home or business with the intent to commit a felony or to do serious bodily harm to any of the occupants.

[Name of defendant] is not required to prove that s/he acted in defense of his/her property. If evidence of defense of property is present, the government must prove beyond a reasonable doubt that [name of defendant] did not act in defense of his/her property.

B. DEFENSE OF PERSONAL PROPERTY

A person is justified in using reasonable force to protect his/her property from [theft] [or] [insert other misuse] when s/he reasonably believes that his/her property is in immediate danger of an unlawful taking or misuse and that the use of such force is necessary to avoid the danger. Similarly, if a person reasonably believes that someone has unlawfully taken his/her property, s/he may use reasonable, nondeadly force to repossess the property. But s/he must act immediately after the taking has occurred, or in hot pursuit of the person who has taken the property. If time has elapsed, a person may not use force in repossessing the property.

[Name of defendant] is not required to prove that s/he acted in defense of his/her property. If evidence of defense of property is present, the government must prove beyond a reasonable doubt that [name of defendant] did not act in defense of his/her property.

Comment:

The Committee has broken this instruction up into two parts, one for real property and one for personal property. Although the titles of the two sections refer to "real" and "personal" property, for ease of understanding by a lay jury the body of the instructions refer solely to "property."

For real property, the instruction should be given where the defendant properly asserts a defense of the use of nondeadly, reasonable force in protection of his or her real property, or deadly force based upon a reasonable belief that an intruder is entering his or her home or business with the intent to commit a felony or to do serious bodily harm to the occupants. *See* *Shehyn v. U.S.*, 256 A.2d 404, 406 (D.C. 1969) ("It is well settled that a person may use as much force as is reasonably necessary to eject a trespasser from his property, and that if he uses more force than necessary, he is guilty of assault. This is true regardless of any actual or threatened injury to the property by the trespasser, although this would be a factor in determining the reasonableness of the force used.") (footnote omitted); *see generally* LaFave, *Substantive Criminal Law* § 10.6, vol. 2 (2003) ("One is justified in using reasonable force to protect his [or her] property from trespass or theft, when he [or she] reasonably believes that his [or her] property is in immediate danger of such an unlawful interference and that the use of such force is necessary to avoid that danger.") (quoted in *Gatlin v. U.S.*, 833 A.2d 995, 1008–09 (D.C. 2003)). There does not appear to be any controlling legal authority in the District of Columbia explicitly extending defense of property to a business. However, it appears that in every jurisdiction where defense of home is recognized, defense of business is likewise. Further, those cases recognize that there is no duty to retreat in one's home or place of business. "Indeed, the prevailing rule throughout the country among those jurisdictions which, like Florida, have adopted a general duty to retreat doctrine is that a defendant is under no duty to retreat prior to using deadly force in self-defense when violently attacked in his home or business premises, which includes *inter alia* his place of employment while lawfully engaged in his occupation." *Redondo v. State*, 380 So.2d 1107, 1110 (Fla. 3d D.C.A. 1980) (*Accord* *People v. Johnson*, 75 Mich. App. 337, 254 N.W.2d 667 (Mich. Ct. App. 1977)); *State v. Pearson*, 215 S.E.2d 598 (N.C. 1975); *Commonwealth v. Johnston*, 263 A.2d 376, 380 (Pa. 1970). *But see* *Commonwealth v. Gagne*, 326 N.E.2d 907 (Mass. 1975).

For the defense of personal property, the instruction is not available where deadly force has been used, but should be given where there is evidence that the defendant used nondeadly, reasonable force to defend his or her property. *See* *Gatlin*, 833 A.2d at 1009–11 (recognizing defense of personal property defense, but affirming trial court verdict that evidence was sufficient to disprove defense of property beyond a reasonable doubt). The previous version of this instruction was quoted approvingly by the *Gatlin* court, which noted that the instruction comported with similar instructions codified in most states. *Id*. at 1008. The *Gatlin* court did limit the extent of this defense by holding that "where … the police have entered the common, public areas of a school building without excessive force to investigate a criminal complaint, school personnel who have been charged with assault of one of those police officers within the school, are not entitled to the defense of property defense." *Id*. at 1009. The *Gatlin* court further held that "a school employee … who has been charged with assault of a newspaper photographer within the school may not rely on the defense of property defense where the employee is able to seek the assistance of police officers who are on the scene to protect the integrity of the school building." *Id*. at 1009–10. In *Doby v. U.S.*, 550 A.2d 919 (D.C. 1988), the Court of Appeals expressly refused to decide whether a claim of defense of property is available to a charge of possession of a prohibited weapon. *Id*. at 919; *see also id*. (holding that instruction was properly denied where evidence showed that defendant was using pistol not to repossess stolen property but "merely to vindicate a principle").

The Committee inserted in brackets "insert other misuse" in the instruction addressing for personal property because there are forms of "trespass" that would apply to personal property—such as destruction, defacement of property, other interference with possessory rights that do not amount to theft. Also, in the case of a vehicle, "trespass" would include the unauthorized entering or remaining. *See* Black's Law Dictionary (6th Ed. 1990) at 1502–03.

Instruction 4.114 ASSAULT ON A POLICE OFFICER

D.C. Official Code § 22-405 (2001)

The elements of the offense of assault on a police officer, each of which the government must prove beyond a reasonable doubt, are that:

- 1.[Name of complainant] was [insert statutory law enforcement position];
- 2.[Name of defendant] assaulted, resisted, intimidated, or interfered with [name of complainant];
- 3.[Name of defendant] did so voluntarily, on purpose, and not by mistake or accident;
- 4.[Name of defendant] did so while [name of complainant] was engaged in the performance of his/her official duties; [and]
- 5.At the time [name of defendant] did so, s/he knew or had reason to believe that [name of complainant] was [insert statutory law enforcement position][.][; and]
- [6.[[] caused significant bodily injury to [.]]

  [[Name of defendant] committed a violent act that created a grave risk of causing significant bodily injury to [name of complainant.]]

[For this offense, "significant bodily injury" means an injury that requires hospitalization or immediate medical treatment in order to preserve the health and well-being of the individual. "Medical treatment" is not merely a diagnosis, and must be aimed at preventing long-term physical damage and other potentially permanent injuries, or abating severe pain. "Treatment" is not medical if applied to lesser, short-term hurts. Remedies such as ice packs, bandages, and self-administered over-the-counter medications do not qualify as "medical treatment," whether or not they are administered by a medical professional. Medical treatment is not required unless the individual would suffer additional harm by failing to receive professional diagnosis and treatment. The fact that an individual who was injured did or did not seek immediate medical attention, was or was not transported by ambulance to a hospital, or did or did not receive treatment at a hospital is not determinative of whether hospitalization or immediate medical treatment was required. Instead, you must consider the nature of the alleged injury itself and the practical need in the ordinary course of events for hospitalization or prompt medical treatment in determining whether significant bodily injury occurred here.]

[Speech or mere passive resistance or avoidance of the officer is not enough to constitute "resisting" or "interfering." "Resisting" or "interfering" requires active confrontation, obstruction, or action directed against the officer that precluded the officer from carrying out his/her official duties.]

[If you find that the government has proven these [five] [six] elements beyond a reasonable doubt, then you must consider whether the defendant acted without justification or excuse. This involves special rules that I will now explain to you.

A police officer may stop or detain someone for a legitimate police purpose. And the officer may use the amount of force that appears reasonably necessary to make or maintain the stop. This is the amount of force that an ordinarily careful and intelligent person in the officer's position would think necessary.

If the officer uses only the force that appears reasonably necessary, the person stopped may not interfere with the officer, even if the stop later turns out to have been unlawful. If s/he does interfere, s/he acts without justification or excuse.

If the officer uses more force than appears reasonably necessary, the person stopped may defend against the excessive force, using only the amount of force that appears reasonably necessary for his/her protection. If that person uses more force than is reasonably necessary for protection, s/he acts without justification or excuse.

The government must prove beyond a reasonable doubt that the defendant acted without justification or excuse.]

Comment:

The 2014 release added the definition of "resisting" or "interference" applied in *Ruffin v. U.S.*, 76 A.3d 845, 850 (D.C. 2013). *See also* *Coghill v. U.S.*, 982 A.2d 802 (D.C. 2009); *Dolson v. U.S.*, 948 A.2d 1193 (D.C. 2008); *In re C.L.D.*, 739 A.2d 353 (D.C. 1999).

The 2013 release added the definition of "significant bodily injury," which is the same as the definition in No. 4.102 Assault With Significant Injury. *See* *Fadero v. U.S.*, 59 A.3d 1239 (D.C. 2013) (holding that the definition of "significant bodily injury" is the same for D.C. Official Code § 22-404(a)(2) and D.C. Official Code § 22-405(c)). The definition tracks the statute as well as the Court of Appeals decisions in *In re R.S.*, 6 A.3d 854 (D.C. 2010), *Quintanilla v. U.S.*, 62 A.3d 1261 (D.C. 2013), and *Nero v. U.S.*, 73 A.3d 153 (D.C. 2013).

The 2011 release substituted the bracketed language in elements 1 and 5, leaving it for the court to fill in the appropriate position. The 2007 release added in element 6 the new offense of an assault on a police officer causing significant bodily injury created by § 208 of the Omnibus Public Safety Act of 2006. That Act also reduced the penalty for simple assault on a police officer to 180 days. *See* D.C. Code § 22-404. The Omnibus Public Safety Act of 2006 went into effect on July 19, 2006, as the Omnibus Public Safety Emergency Amendment Act of 2006. It remained in effect under various Emergency Acts (Act 16-490, Act 17-10 and Act 17-25). The law was **not** in effect for the following two periods—from October 17, 2006, at midnight until October 18, 2006, at 5:00 p.m. and from April 16, 2007, at midnight until April 19, 2007, at 5 p.m. The permanent law went into effect on April 24, 2007.

The paragraphs of the instruction relating to whether the defendant acted with justification or excuse are bracketed because the absence of justifiable or excusable cause is not an element of the offense which the government must prove in every case, but rather must be warranted by evidence of excessive force. *See* *Jones v. U.S.*, 512 A.2d 253, 259 n.8 (D.C. 1986); *see also* *Nelson v. U.S.*, 580 A.2d 114, 117 (D.C. 1990).

The paragraphs relating to justification or excuse are in accordance with several explicit directives from the court in *Speed v. U.S.*, 562 A.2d 124 (D.C. 1989). Thus, a defendant's right to forcibly resist the police is limited not only when an arrest is being made, but also during any "stop or detainment for a legitimate police purpose." *Id.* at 129. If the self-defense instruction is warranted, it must explicitly state that the government must prove beyond a reasonable doubt that the defendant assaulted the officer without justifiable and excusable cause. *Id.* And if the government fails to prove that the victim was a police officer, or that the defendant knew or had reason to believe it, or that the officer was engaged in official police duties or was assaulted on account of official police duties, then the special principles of justifiable and excusable cause do not apply, and the jury is to be instructed on the general right of self-defense. *Id.* at 129–30. *See also* *Robinson v. U.S.*, 649 A.2d 584, 587 (D.C. 1994) (citing this instruction with approval and noting: "Where a defendant is charged with the felony offense of assault on a police officer, a limited right of self-defense arises when the defendant presents evidence that the officer has used excessive force in carrying out his duties … Under this exception, if the defendant responded to the officer's excessive force with force that was 'reasonably necessary under the circumstances for self protection,' then the defendant acted with justifiable and excusable cause.").

Speed set out an instruction on justifiable or excusable cause. 562 A.2d at 129–30. The Committee modified that instruction to shorten it and, it is hoped, make it more easily understandable, without, however, altering the substance.

A definition of assault is not included in this instruction. The court should give the definition of attempted-battery assault, or intent-to-frighten assault, or both, wherever the facts show a simple assault and a police officer is the victim. However, the Committee believed that defining the term was not legally required in every case charging assault on a police officer, since in some cases the conduct in question falls short of simple assault. *See, e.g., Jones v. U.S.*, 385 F.2d 296, 298 (D.C. Cir. 1967).

The bracketed statement that "[t]he mere use of threatening words alone, while it does not constitute an assault, may constitute intimidation" was deleted in the 1993 edition. *See In re E.D.P.*, 573 A.2d 1307, 1309 (D.C. 1990) (statute constitutional when construed to apply only to physical conduct and not to speech); *City of Houston v. Hill*, 482 U.S. 451, 465–67 (1987) (statute criminalizing mere words that interfere with an officer held unconstitutional).

The portions of D.C. Official Code § 22-405 (2001), concerning police officers and firemen apply exclusively to the District of Columbia. The extraterritorial application of the language in the statute dealing with assaults on employees of correctional institutions has not been directly decided by the District of Columbia Court of Appeals. *Cf. Jackson v. U.S.*, 441 A.2d 1000, 1003–04 (D.C. 1982) (explicitly reserving question of whether extraterritorial application of statute to D.C. correctional officers in facilities located in other jurisdictions would comport with Article III and the Sixth Amendment of the Constitution); *U.S. v. Perez*, 488 F.2d 1057, 1058 (4th Cir. 1974) (holding that the U.S. District Court in Virginia had jurisdiction to try an assault on a District of Columbia correctional officer under this D.C. statute because the section is applicable outside the District of Columbia). *Compare In re W.*, 391 A.2d 1385, 1390 (D.C. 1978) (juvenile proceedings are not criminal prosecutions for purposes of the U.S. Constitution, so D.C. Code § 22-405 could be given extraterritorial effect).

D.C. Official Code § 22-405 (2001), applies to both attempted and completed acts of assault. *U.S. v. Caviness*, 192 A.2d 288, 289 (D.C. 1963). Because the actions of assaulting, resisting, opposing, impeding, intimidating or interfering are stated in the disjunctive in the statute, a finding that the defendant committed any single act will support a conviction. *Johnson v. U.S.*, 298 A.2d 516, 519 (D.C. 1972). The assault contemplated by the statute is a simple assault. *Id.* at 518. Non-violent

obstruction of a police officer in the performance of his duties is also proscribed by the statute. *Jones*, 385 F.2d at 298 n.2; *see* *Andersen v. U.S.*, 132 A.2d 155, 157 (D.C. 1957).

See *Holt v. U.S.*, 675 A.2d 474, 483–84 (D.C. 1996) (concluding that this instruction adequately conveyed the defendant's defense that he abandoned his assault after discovering that the complainant was a police officer); *Jones v. U.S.*, 555 A.2d 1024, 1026–27 (D.C. 1989) (defendant entitled to instruction on defense of third person, where there is some evidence he did not know the officers were police officers); *McDonald v. U.S.*, 496 A.2d 274, 276 (D.C. 1985) (Metro Transit Police Officer is within the statute); *Lassiter v. D.C.*, 447 A.2d 456, 459 (D.C. 1982) (illegality of arrest is no defense to charge of assaulting police officer); *In re G.*, 427 A.2d 440, 444 (D.C. 1981) (fact that defendant had opportunity to view officer's gun and police clothing sufficient to establish that defendant knew or should have known complainant was police officer); *Petway v. U.S.*, 420 A.2d 1211, 1212–13 (D.C. 1980) (per curiam) (error not to instruct jury on lesser included offense of assault when there was disputed testimony as to whether defendant knew complainant was police officer); *Brown v. U.S.*, 274 A.2d 683, 684 (D.C. 1971) (D.C. Code § 22-405 (2001) abrogates the common law rule affording a right to resist an unlawful arrest); *U.S. v. Lewis*, 435 F.2d 417, 419–20, 140 U.S. App. D.C. 345 (1970) (where defendant fired a gun at two police officers, act constituted but one assault); *Pino v. U.S.*, 370 F.2d 247, 248, 125 U.S. App. D.C. 225 n.1 (1966) (assault on a police officer is a general intent crime).

Lesser included offense: No. 4.100, Assault.

Cross references: No. 3.100, Defendant's State of Mind—Note; No. 3.101, Proof of State of Mind; No. 4.100, Assault; No. 4.101, Assault with a Dangerous Weapon; No. 4.102, Assault with Significant Injury; No. 4.103, Aggravated Assault.