Report #72 -
Obstruction of Justice Offenses

(Second Draft)

SUBMITTED FOR PUBLIC COMMENT
February 1, 2022

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

This 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 #72." The Commission will review all written comments that are timely received. The deadline for the written comments on this Report #72—*Obstruction of Justice Offenses*, is March 1, 2022 (four weeks from the date of issue). Written comments repeating or relating to comments already addressed by the CCRC in this draft and 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 – Penalties for Revised Obstruction of Justice & RCCA Obstruction of Justice Related Offenses.
- Appendix D – Disposition of Comments on Report #72 – Obstruction of Justice Offenses (First Draft)

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

Report #72 – Obstruction of Justice Offenses

Draft RCCA Text and Commentary

Corresponding D.C. Code statutes in {}

RCCA § 22A-101. Generally Applicable Definitions.

"Court of the District of Columbia" means the Superior Court of the District of Columbia or the District of Columbia Court of Appeals.

Explanatory Note. The RCCA definition of "Court of the District of Columbia" replaces the definition of "Court of the District of Columbia" in D.C. Code § 22-721(1), applicable to the provisions of Chapter 33, Offenses Involving Obstruction of Governmental Operations. The RCCA definition of Court of the District of Columbia is used in the definitions of "Official Proceeding" and "Court Official" which are used in multiple offenses in Chapter 33.

Relation to Current District Law. The RCCA definition of Court of the District of Columbia is identical to the statutory definition under current law.[1]

"Court Official" means any of the following persons acting within their professional role in connection to an official proceeding:

(A) Judicial officer;

(B) A lawyer or a person employed by or working with the lawyer;

(C) An employee of any Court of the District of Columbia;

(D) An employee of the Court Services and Offender Supervision Agency, Pretrial Services Agency, or Family Court Social Services Division; or

(E) An independent contractor or employee of an independent contractor hired by any Court of the District of Columbia.

Explanatory Note. The RCCA definition of "court official" replaces the current term "officer" used in D.C. Code § 22-722, applicable to the provisions in Chapter 33, Offenses Involving Obstruction of Governmental Operations. The RCCA definition of "court official" is used in the revised offenses of tampering with a juror or court officer and retaliation against a witness, informant, juror, or court official. The definition includes specified participants in the judicial process when they are acting within their professional roles in connection to an official proceeding.

Relation to Current District Law. The RCCA definition of Court of the District of Columbia is a new definition that specifies which participants are court officers under the statute.

The current D.C. Code § 22-722 obstruction of justice statute in the District uses the term "officer" in multiple provisions, but does not clearly define the term. Additionally, D.C. Code § 22-722(a)(3) specifies certain actions—e.g., arresting another person or causing a probation revocation proceeding to be instituted—that would necessarily be taken by certain court officials but does not name the court officials and contains potential gaps in liability.[2] The RCCA addresses this ambiguity and incongruence in the statute by defining

[1] D.C. Code §22-721(1).

[2] For example, both pretrial services officers and probation officers could arguably be considered "officers" under §§22-722(a)(2) and (a)(5). Section 722(a)(3)(1) seems to clearly apply to probation officers as it makes

the term "court official" and specifying which provisions apply to "court officials." Under the new definition, the term "court official" encompasses judicial officers, lawyers and persons employed by or working with a lawyer, employees of any Court in the District of Columbia, employees of the Court Services and Offender Supervision Agency, Pretrial Services Agency, or Family Court Social Services Division, and any independent contractor or employee of an independent contractor hired by any Court in the District of Columbia when those person are acting within their professional role in connection to an official proceeding. This clarifies both which participants in a judicial proceeding are considered court officials and when persons employed in positions in connection to court proceedings are considered court officials in relation to a particular proceeding. This change improves the overall clarity and consistency of the statute.

"Criminal Investigation" means an investigation of a violation of any criminal law in effect in the District of Columbia.

Explanatory Note. The RCCA definition of "criminal investigation" replaces the current definition of "criminal investigation" used in D.C. Code § 22-721(3), applicable to the provisions in Chapter 33, Offenses Involving Obstruction of Governmental Operations. The RCCA definition of "criminal investigation" is used in the revised offenses of obstruction of justice,[3] tampering with a witness or informant,[4] and tampering with a juror or court official.[5]

Relation to Current District Law. The RCCA definition of "criminal investigation" is identical to the current definition in D.C. Code § 22-721(3) with one exception. The RCCA definition substitutes the phrase "criminal law" for "criminal statute." This change reduces a possible gap in liability for criminal offenses that are not codified in statute such as municipal regulations.

"Juror" means a petit juror, grand juror, or any person summoned to the Superior Court of the District of Columbia for the purpose of serving on a jury.

Explanatory Note. The RCCA definition of "juror" is a new definition applicable to the provisions in Chapter 33, Offenses Involving Obstruction of Governmental Operations. The RCCA definition of "juror" is used in the revised offenses of tampering

---

it an offense to harass another person with intent to hinder, delay, prevent, or dissuade the person from "causing a criminal prosecution or a parole or probation revocation proceeding to be sought or instituted, or assisting in a prosecution or other official proceeding." The language seemingly omits, however, pretrial services officers who might file a pretrial violation report requesting that an actor's pretrial release be revoked in favor of detention pending trial. It is possible that acts intended to cause a pretrial services officer to delay or withhold sending a violation report to a judicial officer is covered by the catch-all provision of the current statute. It might also be possible to conjure an interpretation where the conduct qualifies as intending to cause an officer to withhold truthful testimony, records, or documents from an official proceeding. Whether these interpretations are correct, however, is unclear.

[3] RCCA § 22A-4301.

[4] RCCA § 22A-4302.

[5] RCCA § 22A-4303.

with a juror or court official[6] and retaliation against a witness, informant, juror, or court official.[7]

Relation to Current District Law. The RCCA definition of "juror" is a new definition that specifies all petit jurors, grand jurors, and persons summoned for jury duty by the Superior Court of the District are considered jurors under the revised code. The current obstruction of justice statute, D.C. Code § 22-722, expressly applies to jurors but does not specify that the term encompasses petit jurors, grand jurors, or persons summoned for jury duty. At the same time, D.C. Code § 11-1902, which establishes requirements for a jury selection system defines "juror" as "(A) any individual summoned to Superior Court for the purpose of serving on a jury; (B) any individual who is on call and available to report to Court to serve on a jury upon request; and (C) any individual whose service on a jury is temporarily deferred." The DCCA does not appear to have applied this definition to the obstruction of justice statute and application of this definition would be confusing in the context of the obstruction of justice statute. In contrast, the RCCA adds a new definition of "juror" that encompasses petit, grand jurors, and persons summoned for jury duty by a Court of the District of Columbia. This simplified definition is appropriate for Title 22A and comprehensively covers all relevant persons the statute provisions protecting jurors aim to cover. This change improves the clarity of the revised statutes.

"Official Proceeding" means:

(A) Any trial, hearing, grand jury proceeding, or other proceeding in a court of the District of Columbia; or

(B) Any hearing, official investigation, or other proceeding conducted by the Council of the District of Columbia or an agency or department of the District of Columbia government, excluding criminal investigations.

Explanatory Note. The RCCA definition of "official proceeding" replaces the current definition of "official proceeding" used in D.C. Code § 22-721(4), applicable to the provisions in Chapter 33, Offenses Involving Obstruction of Governmental Operations. The RCCA definition of "official proceeding" is used in the revised offenses of obstruction of justice,[8] tampering with evidence,[9] tampering with a witness or informant,[10] tampering with a juror or court official, and retaliation against a witness, informant, juror, or court official.[11]

Relation to Current District Law. The RCCA definition of "official proceeding" is substantially similar to the current definition. However, the RCCA changes current law in one important way.

The revised definition specifically excludes criminal investigations from the definition of "official proceeding." Current District law provides statutory definitions for the terms "criminal investigation" and "official proceeding" in D.C. Code § 22-721. The

[6] RCCA § 22A-4303.
[7] RCCA § 22A-4304.
[8] RCCA § 22A-4301.
[9] RCCA § 22A-4305.
[10] RCCA § 22A-4302.
[11] RCCA § 22A-4303.

definition of "official proceeding" includes the word "investigations" which the DCCA recently held to include criminal investigations in the tampering with physical evidence statute.[12] At the same time, however, DCCA precedent holds that obstructing a police investigation does not constitute obstruction of the "due administration of justice in an official proceeding" in D.C. Code § 22-722(a)(6).[13] In doing so, the DCCA reasoned "because the statute already includes a police investigation within the definition of 'criminal investigation,' we need not stretch the meaning of 'official proceeding' to reach the very same circumstances."[14] In contrast, the RCCA codifies definitions for both terms but expressly excludes criminal investigations from the definition of official proceeding. This change eliminates overlap and ensures that statutory provisions are applied to "criminal investigations" or "official proceedings" only when expressly stated. This change improves the clarity of the statute.

[12] *Mason v. United States*, 170 A.3d 182, 191 (D.C. 2017); *Taylor v. United States*, No. 19-CF-1209, slip op. at 18 (January 27, 2022).
[13] *Wynn v. United States*, 48 A.3d 181, 191 (D.C. 2012).
[14] *Wynn v. United States*, 48 A.3d 181, 190 (D.C. 2012).

RCCA § 22A-4301. Obstruction of Justice.

(a) *First Degree*. An actor commits first degree obstruction of justice when the actor:
  (1) Knowing that an official proceeding or criminal investigation has been initiated for any crime that is, in fact, a predicate felony;
  (2) With the purpose of obstructing or impeding the criminal investigation or the proper functioning and integrity of the official proceeding;
  (3) In fact, commits any criminal offense under District of Columbia law.

(b) *Second Degree*. An actor commits second degree obstruction of justice when the actor:
  (1) Knowing that an official proceeding or criminal investigation has been initiated for any crime;
  (2) With the purpose of obstructing or impeding the criminal investigation or the proper functioning and integrity of the official proceeding;
  (3) In fact, commits any criminal offense under District of Columbia law.

(c) *Penalties*.
  (1) First degree obstruction of justice is a Class 9 felony.
  (2) Second degree obstruction of justice is a Class A misdemeanor.
  (3) Merger.
    (A) A conviction for obstruction of justice shall not merge with a conviction for any offense specified in paragraphs (a)(3) or (b)(3) of this section when arising from the same act or course of conduct except as provided in subparagraph (c)(3)(B) of this paragraph.
    (B) A conviction for obstruction of justice shall merge with a conviction for any other offense under chapters 31, 32, 33, or 34 of this title arising from the same course of conduct. The sentencing court shall follow the procedures specified in subsections (b) and (c) of § 22A-214.

(d) *Definitions*.
  (1) In this section, the term "predicate felony" means:
    (A) Any Class 1, 2, 3, 4, 5, 6, or 7 crime under this title that requires as an element a bodily injury, sexual act, sexual contact, confinement or death; or
    (B) A criminal attempt, solicitation, or conspiracy to commit any Class 1, 2, 3, 4, 5, 6, or 7 crime under this title that requires as an element a bodily injury, sexual act, sexual contact, confinement or death.

Explanatory Note. *The revised obstruction of justice offense punishes any criminal offense performed with the purpose of obstructing or impeding a criminal investigation or the proper functioning of an official proceeding that has been initiated or is likely to be initiated. The penalty gradations are based on the seriousness of the offense underlying the criminal investigation or official proceeding. The revised obstruction of justice offense is divided into two degrees, one felony and one misdemeanor, and convictions merge with*

other offenses in Chapters 31, 32, 33, and 34. A conviction for obstruction of justice shall not merge with a conviction for an offense underlying the obstruction of justice conviction. The revised obstruction of justice offense, in conjunction with other revised statutes in the chapter, replaces the "catch-all" provision of the current obstruction of justice statute.[15]

Subsection (a) specifies the conduct prohibited as first degree obstruction of justice. Paragraph (a)(1) requires a mental state of "knowing" as defined in RCCA § 22A-206 with respect to whether an official proceeding or criminal investigation has been initiated for any crime and imposes strict liability with regard to whether that crime is a predicate felony. Under RCCA § 22A-206(b)(2), the term "knowing" requires that the actor be practically certain that the circumstance exists when applied to a circumstance element. Thus, this paragraph requires proof that the actor be "practically certain" that an official proceeding or criminal investigation has been initiated for some crime. The paragraph also specifies that the government must prove that the crime is, in fact, a "predicate felony". The phrase "in fact" in subparagraph (a)(1) indicates there is no culpable mental state requirement for the requirement that the crime is a "predicate felony". Applied here, this means the government need not prove that the actor knew the criminal investigation or official proceeding was initiated for a predicate felony, only that the actor knew an official proceeding or criminal investigation was initiated for any crime.

The terms "official proceeding" and "criminal investigation" are defined terms in RCCA § 22A-101. The term "predicate felony" is defined for this section only to include any Class 1, 2, 3, 4, 5, 6, and 7 crime that requires as an element a bodily injury, sexual act, sexual contact, confinement, or death as well as any criminal attempt, solicitation, or conspiracy to commit a Class 1, 2, 3, 4, 5, 6, or 7 crime where an element of the offense includes a bodily injury, sexual act, sexual contact, confinement, or death. Because this definition includes all felonies that require as an element a bodily injury, sexual act, sexual contact, confinement, or death, the term predicate felony is broader than the term "crime of violence" in RCCA § 22A-101. At the same time, the statute does not encompass felonies that do not require a criminal bodily, injury, sexual act, sexual contact, confinement, or death unless the felony was an inchoate offense of attempt, solicitation, or conspiracy where one of the required elements was a bodily injury, sexual act, sexual contact, confinement, or death. The terms "bodily injury", "sexual act", and "sexual contact" are defined terms in RCCA §22A-101.

Paragraph (a)(2) specifies a culpable mental state of purposely as defined in RCCA § 22A-206(a) for the conduct of obstructing or impeding. The paragraph requires that the actor consciously desire to obstruct or impede the criminal investigation or the proper functioning of the official proceeding that the actor knows has been initiated by commission of a criminal offense under District law. 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.

[15] The remaining enumerated acts in the current obstruction of justice statute are addressed in four other RCCA statutes: RCCA § 22A-4302, tampering with a witness or informant; RCCA § 22A-4303, tampering with a juror or court official; RCCA § 22A-4305, tampering with physical evidence, and RCCA § 22A-4304, retaliation against a witness, informant, juror, or court official.

Here it is not necessary that the conduct did or could have obstructed or impeded the criminal investigation or proper functioning of the official proceeding. Rather, proof that the actor consciously desired to obstruct or impede the criminal investigation or proper functioning of an official proceeding is sufficient. Critically, an actor only commits the offense of obstruction of justice if the actor commits a criminal offense with the specific purpose obstructing or impeding the criminal investigation or official proceeding. It is not sufficient for the government to establish that an actor committed a criminal offense that accidentally or knowingly obstructed or impeded, or that could have obstructed or impeded, a criminal investigation or the proper functioning of an official proceeding.[16] Similarly, it is not a defense to the revised obstruction of justice offense that the actor's conduct did not or could not have obstructed or impeded the official proceeding or criminal investigation. The relevant issue is the actor's purpose.[17] The terms "official proceeding" and "criminal investigation" are defined terms in RCCA § 22A-101.

Paragraph (a)(3) states that the prohibited conduct is any conduct that, in fact, constitutes a criminal offense under District of Columbia law. This requires that the government prove that the actor committed a criminal offense under District law. Although the government is required to prove each element of the criminal offense, there is no requirement that the underlying act be separately charged. "In fact," a defined term in RCCA § 22A-207, is used to indicate that there is no culpable mental state requirement as to a given element, here whether the accused committed one of the specified offenses. The use of "in fact" does not change the culpable mental states required in the specified offenses.

Subsection (b) states the elements for second degree obstruction of justice. The sole difference between first and second degree obstruction of justice is that first degree obstruction of justice requires that the government prove an official proceeding or criminal investigation has been initiated for a predicate felony whereas second degree applies to official proceedings or criminal investigations initiated for any crime. This difference is accomplished by the removal of the phrase "that is in fact, a predicate felony" in paragraph (b)(1). The statutory text for second degree obstruction of justice is otherwise identical to the statutory text of first degree obstruction of justice.

---

[16] *E.g.*, An actor, aware of the fact that the actor's family member is facing trial, assaults a person unaware of the fact that the person is a witness against the actor's family in the trial. The witness, who is aware of the connection between the actor and the family member, subsequently commits perjury in the trial involving the actor's family member because the witness fears further violence from the actor. The actor has committed a criminal act, an assault, that impacted the proper functioning of an official proceeding. Because the actor did not have the purpose of obstructing the trial involving the actor's family member when the actor assaulted the witness, however, the actor is not guilty of the offense of obstruction of justice.

[17] Although impossibility is not a defense with respect to whether the actor's conduct could have obstructed the official proceeding or criminal investigation in question, the government must still establish that the actor knew there was an official proceeding or criminal investigation pending or likely to be initiated pursuant to paragraphs (a)(1) and (b)(1). If the actor's conduct is too attenuated from actual proceedings because the actor's purpose was to obstruct or impede an official proceeding or criminal investigation that has not been initiated and is not reasonably foreseeable, impossibility is a defense. The revised obstruction of justice offense covers acts that have a relationship in time, causation, or logic with a particular criminal investigation or official proceeding.

Subsection (c) establishes the penalties for first and second degree obstruction of justice. [*See* RCCA §§ 22A-603 and 22A-604 for the imprisonment terms and fines for each penalty class.] In addition, subparagraph (c)(3)(A) states that a conviction for obstruction of justice shall not merge with any offense in paragraphs (a)(3) or (b)(3) arising from the same course of conduct except as provided in subparagraph (c)(3)(B). Subparagraph (c)(3)(B) states that a conviction for obstruction of justice shall merge with a conviction for any other offenses under chapters 31, 32, 33, or 34 of title 22. These chapters include the offenses of bribery, impersonation of an official, perjury, false swearing, tampering with a witness or informant, tampering with evidence, escape, and other related offenses. Thus, if a person commits obstruction of justice by tampering with a witness or informant, the tampering with a witness or informant conviction would merge with the obstruction of justice conviction pursuant to the RCCA's rules of priority in RCCA § 22A-214. Obstruction of justice merges with other offenses in chapters 31, 32, 33, or 34 regardless of whether they otherwise merge under § 22A-214.[18]

Subsection (d) defines the term "predicate felony" for this section only.

Relation to Current District Law. *The revised obstruction of justice statute changes District law in five main ways.*

First, the RCCA obstruction of justice offense does not address specific forms of harming or intimidating persons performing particular roles in the justice system and, instead, provides liability for such conduct in other revised statutes. Current D.C. Code § 22-722(a) contains six paragraphs each enumerating multiple forms of obstruction of justice, all subject to the same 3-30 year penalty.[19] In contrast, the revised obstruction of

[18] *E.g.*, if an actor was convicted of first degree obstruction of justice, first degree tampering with a witness or informant, and first degree assault for committing an assault against a person with the purpose of causing that person to testify falsely in a trial, the conviction for the underlying assault would not merge with the convictions for obstruction of justice or first degree tampering with a witness or informant per subparagraph (c)(3)(A). Per subparagraph (c)(3)(B), however, the convictions for obstruction of justice and tampering with a witness or informant would merge if arising out of the same course of conduct. Subparagraph (c)(3)(B) ensures that, if the obstruction of justice conviction is established by proof of commission of tampering with a witness rather than proof of the offense underlying the tampering charge, the obstruction of justice and tampering charges will merge. Pursuant to the RCCA § 22 E214, obstruction of justice would merge into the first degree tampering with a witness conviction in this scenario because first degree tampering with a witness or informant is a Class 7 felony and has a higher authorized maximum penalty than first degree obstruction of justice which is a Class 9 felony.

[19] D.C. Code § 22-722(a)(1) currently punishes a person who endeavors to influence, intimidate, or impede a juror in the discharge of the juror's official duties through force, threats, intimidation or corrupt persuasion. D.C. Code § 22-722(a)(2) currently punishes a person who endeavors to influence, intimidate, or impede a witness or official through intimidation, force, threats, or corrupt persuasion with the intent to: (a) influence, delay, or prevent the truthful testimony of the person in an official proceeding; (b) cause or induce the person to withhold truthful testimony or a record, document, or other object from an official proceeding; (c) evade a legal process that summons the person to appear as a witness or produce a document in an official proceeding; or (d) cause or induce the person to be absent from a legal official proceeding to which the person has been summoned by legal process. D.C. Code § 22-722(a)(3) currently punishes harassing another person with the intent to hinder, delay, prevent, or dissuade the person from: (a) attending or testifying truthfully in an official proceeding; (b) reporting to a law enforcement officer the commission of, or any information concerning, a criminal offense; (c) arresting or seeking the arrest of another person in connection with the

justice offense eliminates these specific enumerations within the obstruction of justice statute in favor of a single catch-all provision that punishes any criminal offense done with the purpose of obstructing or impeding a criminal investigation or the proper functioning and integrity of an official proceeding. To cover more specific conduct addressed in the current D.C. Code provisions, the RCCA creates new offenses of tampering with a juror or court official, tampering with a witness or informant, and retaliation against a witness, informant, juror, or court official.[20] Although the RCCA obstruction of justice statute overlaps with the more serious conduct in the revised tampering with a witness or informant and tampering with a juror or court officer statutes, the maximum authorized penalty for those offenses generally is higher than the maximum authorized penalty for the revised obstruction of justice offense. The revised obstruction of justice offense carries a lower maximum penalty than the new tampering statutes because the revised obstruction of justice statute accounts only for harm to a criminal investigation or the proper functioning of an official proceeding. This change improves the organization and proportionality of the revised statutes.

Second, the revised obstruction of justice offense has two grades based on the nature of the underlying offense. Currently, the D.C. Code § 22-722 obstruction of justice offense is not graded and the statutory penalty range is 3 to 30 years for all forms of covered conduct.[21] In contrast, the revised statute creates two grades within the obstruction of justice statute based on the seriousness of the official proceeding or investigation. Where the subject of the official proceeding or criminal investigation targeted is a predicate felony, the offense of obstruction justice is a Class 9 felony. In cases involving

---

commission of a criminal offense; or (d) causing a criminal prosecution or a parole or probation revocation proceeding to be sought or instituted, or assisting in a prosecution or other official proceeding. D.C. Code §§ 22-722(a)(4)-(5) currently punishes anyone who injures or threatens to injure any person or his or her property on account of the person or any other person (1) giving to a criminal investigator in the course of any criminal investigation information related to a violation of any criminal statute in effect in the District of Columbia or (2) performing his official duty as a juror, witness, or officer in any court in the District of Columbia. D.C. Code § 22-722(a)(6) is a catch-all provision that punishes anyone who "corruptly, or by threats of force, any way obstructs or impedes or endeavors to obstruct or impede the due administration of justice in any official proceeding." D.C. Code § 22-722(b) provides the penalty for obstruction of justice.

[20] Changes in District law specific to these new offenses are discussed in the commentary for those offenses. Because the revised obstruction of justice offense covers any criminal act done with the purpose of obstructing or impeding an official proceeding or criminal investigation when the actor has knowledge that the official proceeding or criminal investigation has been or is likely to be initiated, the conduct now encompassed in other statutes could still fall under the obstruction of justice statute. For example, if an actor commits the offense of tampering with a witness or informant, they will have necessarily committed the offense of obstruction of justice in the second degree and possibly in the first degree. Pursuant to (c)(3), convictions for each offense would merge and which conviction remained under RCCA § 22A-214(c) would be dependent on the respective degrees of each conviction. Obstruction of justice is classified as a Class 9 or Class B misdemeanor. Tampering with a witness or informant is classified as a Class 7, 9, or A crime. Thus, either obstruction of justice or tampering with a witness or informant could have the highest authorized maximum period of incarceration depending on the degree of each offense.

[21] For example, an actor who murdered a witness is guilty of the same offense as an actor who tries to bribe a witness to evade a subpoena even though the harm to the witness is miniscule in comparison. Similarly, an actor who endeavors to obstruct an investigation into a homicide is guilty of the same offense as an actor who endeavors to obstruct an investigation into shoplifting where the societal interest in prosecution in greatly reduced.

misdemeanors or felonies where a bodily injury, sexual act, sexual contact, confinement, or death is not an element of the offense, obstruction of justice is a Class A misdemeanor. Although the obstruction of justice offense punishes conduct directed at an official proceeding or criminal investigation to protect the integrity of those proceedings, this grading scheme recognizes that the community interest in prosecution for more serious offenses involving a bodily injury, sexual act, sexual contact, confinement or death, remains greater than the interest in prosecution for lesser offenses, even if the impact on the integrity of proceedings is the same. This change improves the proportionality of the revised statutes.

Third, the revised obstruction of justice offense requires a person to commit some type of separately-defined criminal offense in connection with the obstructing or impeding conduct. Current D.C. Code § 22-722(a)(6) states the conduct element as "corruptly, or by threats of force, any way obstructs or impedes or endeavors to obstruct or impede…." The statute does not define the term "corruptly" and efforts to define the term have not cleared up confusion.[22] DCCA case law has repeatedly sought to address the meaning of the term, following similar Supreme Court jurisprudence, and interpreted the word to mean something akin to an "intent to undermine the integrity of the pending investigation."[23] In contrast, the revised statute eliminates the ambiguous term "corruptly" and requires some predicate criminal offense for there to be obstruction of justice liability. The requirement of a criminal offense promotes uniformity in application, guards against the criminalization of protected speech, and also ensures that there is fair notice of what conduct is prohibited.

---

[22] *See United States v. Poindexter*, 951 F.2d 369, 378 (D.C. Cir. 1991) ("We must acknowledge that, on its face, the word "corruptly" is vague; that is, in the absence of some narrowing gloss, people must "guess at its meaning and differ as to its application."); Daniel A. Shtob, *Corruption of A Term: The Problematic Nature of 18 U.S.C. S1512(c), the New Federal Obstruction of Justice Provision*, 57 VAND. L. REV. 1429, 1441–42 (2004) ("The use of "corruptly" as a scienter requirement within the obstruction of justice statutes has elicited judicial struggle and made application and enforcement of its provisions unduly difficult. Unable to rely on clear precedent, multiple circuits have referenced dictionary definitions, antiquated legislative histories, and nuances in linguistic analysis to define the term.").

[23] *Hawkins v. United States*, 119 A.3d 687, 101 (D.C. 2015) ("This court recently discussed the definition of "corruptly" in *Brown v. United States,* 89 A.3d 98 (D.C.2014), where we noted that in *Arthur Andersen LLP v. United States,* 544 U.S. 696, 125 S.Ct. 2129, 161 L.Ed.2d 1008 (2005), the Supreme Court "analyzed the term 'corruptly'" in the federal obstruction-of-justice statute by "distilling its connotations into the word 'wrongdoing.'" *Brown,* 89 A.3d at 104; *see Arthur Andersen,* 544 U.S. at 705, 125 S.Ct. 2129 (suggesting that the word "corruptly" is normally associated with "wrongful, immoral, depraved, or evil" acts); *see also Riley v. United States,* 647 A.2d 1165, 1169 n.11 (D.C.1994) (citing to the Black's Law Dictionary definition of "corruptly" as "a wrongful design to acquire some pecuniary or other advantage") (citing Black's Law Dictionary 345 (6th ed.1990)). In another recent case, *Smith v. United States,* 68 A.3d 729, 742 (D.C.2013), we implicitly equated "corruptly" with "intent to undermine the integrity of the pending investigation" when listing the elements of obstruction under subsection (a)(6). That language is similar to the definition employed by several federal appellate courts—that to act "corruptly" means to act "knowingly and dishonestly, with the specific intent to subvert or undermine the due administration of justice." *See, e.g., United States v. Kay,* 513 F.3d 432, 454 (5th Cir.2007); *United States v. Gordon,* 710 F.3d 1124, 1151 (10th Cir.2013) (defining "corruptly" as "with an improper purpose and to engage in conduct knowingly and dishonestly with the specific intent to subvert, impede or obstruct the" proceeding) (quoting *United States v. Friske,* 640 F.3d 1288, 1291 (11th Cir.2011)). The language in *Smith* also mirrors the jury instruction provided in this case—'with the intent to undermine the integrity of the proceeding.'"); *see also United States v. Brady*, 168 F.3d 574, 578 (1st Cir. 1999) ("There is no hope in one opinion of providing a definitive gloss on the word 'corruptly'; neither would it be wise to try.").

The breadth of the criminal code, which includes non-violent offenses such as contempt, solicitation of perjury, bribery, blackmail, as well as inchoate and accomplice liability is sufficient to provide liability for attempts to obstruct justice. This change improves the clarity and consistency of the revised statutes.

Fourth, the revised code expressly applies the obstruction of justice statutes to "criminal investigations." Under current D.C. Code § 22-721, the term "official proceeding" "means any trial, hearing, investigation, or other proceeding in a court of the District of Columbia or conducted by the Council of the District of Columbia or an agency or department of the District of Columbia government, or a grand jury proceeding" and the term "criminal investigation" "means an investigation of a violation of any criminal statute in effect in the District of Columbia." Even though "criminal investigation" is defined separately from "official proceeding," the DCCA has determined that the definition of an official proceeding does, in fact, include police investigations.[24] At the same time, however, DCCA precedent holds that obstructing a police investigation does not constitute obstruction of justice under the catchall provision of D.C. Code § 22-722(a)(6) because police investigations are not considered to be within the scope of the "due administration of justice" clause.[25] In contrast, the RCCA codifies definitions of both "official proceeding" and "criminal investigation" but explicitly excludes criminal investigations from the definition of "official proceeding." The revised obstruction of justice statute applies to criminal investigations only when the term "criminal investigation" is expressly stated.[26] This change reduces unnecessary overlap and improves the clarity and consistency of the revised statutes.

Fifth, the revised statute explicitly states that convictions for obstruction of justice merge with convictions for offenses found in chapters 31, 32, 33, or 34 arising from the same course of conduct. The current D.C. Code does not include a general merger provision, and the DCCA has held that offenses merge only if the elements of one offense are necessarily included in the elements of the other offense.[27] Application of this test, sometimes called the *Blockburger*[28] rule, to the obstruction of justice statute been inconsistent and has resulted in persons receiving multiple convictions for obstruction of

[24] *See Mason v. United States,* 170 A.3d 182, 191 (D.C. 2017) (holding that "official proceeding" under D.C. Code § 22–721 includes MPD investigations).

[25] *See Wynn v. United States*, 48 A.3d 181, 191 (D.C. 2012) ("While the term "official proceeding" standing alone conceivably could include an initial police investigation of street crime, 'the due administration of justice in any official proceeding' manifestly does not."). D.C. Code 22-722(a)(6) punishes anyone who "Corruptly, or by threats of force, any way obstructions or impedes or endeavors to obstruct of impede the due administration of justice in any official proceeding."

[26] The revised obstruction of justice offense explicitly states that it applies to official proceedings and criminal investigations. Thus, even though the scope of the term official proceedings is narrowed in the revised code, the scope of the catch all provision of the obstruction of justice statute is widened to include criminal investigations.

[27] *Byrd v. United States*, 598 A.2d 386, 389 (D.C. 1991).

[28] *See Blockburger v. United States*, 284 U.S. 299, 301 (1932) ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.").

justice for the exact same conduct.[29] In contrast, the RCCA obstruction of justice offense requires merger for obstruction of justice and related convictions in chapters 31, 32, 33, or 24 arising out of the same course of conduct.[30] This change improves the consistency, clarity, and proportionality of the statute.

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

The revised obstruction of justice offense requires a "purposeful" mental state with respect to whether the commission of a criminal offense constitutes obstruction of justice. Current D.C. Code § 22-722(a)(6) does not clearly codify any culpable mental state but provides that a person commits obstruction of justice when they "corruptly, or by threats of force, any way obstructs or impedes or endeavors to obstruct or impede the due administration of justice in an official proceeding." DCCA case law is ambiguous as to whether this language requires a "purposeful" or "knowingly" mental state, but has held that is requires proof of specific intent.[31] At a minimum, specific intent requires knowledge or purpose.[32] The DCCA also has held that the term "corruptly" used in D.C. Code § 22-722(a)(6) is the *mens rea* for the offense and that means something akin to an "intent to undermine the integrity of the pending investigation [or proceeding]."[33] At the same, however, the DCCA has stated that this definition is similar to federal cases interpreting "corruptly" as both acting "*knowingly* and dishonestly, with the specific intent to subvert or undermine the due administration of justice" and as acting "with an improper *purpose* and to engage in conduct knowingly and dishonestly with the specific intent to subvert, impede or obstruct the proceeding."[34] The RCCA resolves this ambiguity by expressly requiring a "purposeful" mental state with respect to obstructing or impeding a criminal

[29] For example, in *McCollugh v. United States*, 827 A.2d 48, 59-60 (D.C. 2003), the DCCA upheld separate convictions for obstruction of justice under both D.C. §22-722(a)(2) (criminalizing the use of force to prevent truthful testimony in an official proceeding) and D.C. §22-722(a)(4) (criminalizing injuring any person on account of the person giving information to an investigator in a criminal investigation) in a case where the defendant killed an eyewitness who provided information about a murder to the police.

[30] This change in merger analysis is in addition to the general changes made to merger rules provided for RCCA § 22A-214.

[31] *See Hawkins v. United States*, 119 A.3d 687, 695 (D.C. 2015) (stating that "obstruction of justice is a specific intent crime requiring intent to impair the proceeding) (citing *Crutchfield v. United States*, 779 A.2d 307, 325 (D.C. 2001).

[32] *Cf. Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005) ("[I]f the defendant lacks knowledge that his actions are likely to affect the judicial proceeding," we explained, "he lacks the requisite intent to obstruct.").

[33] *Hawkins v. United States*, 119 A.3d 687, 700 (D.C. 2015) (referring to the term "corruptly" as "the statutory *mens rea* requirement"). *Id.* at 101 ("In another recent case, *Smith v. United States,* 68 A.3d 729, 742 (D.C.2013), we implicitly equated "corruptly" with "intent to undermine the integrity of the pending investigation" when listing the elements of obstruction under subsection (a)(6)").

[34] *Hawkins v. United States*, 119 A.3d 687, 101 (D.C. 2015) (Stating the language "with intent to undermine the integrity of a pending investigation" is "is similar to the definition employed by several federal appellate courts—that to act "corruptly" means to act "knowingly and dishonestly, with the specific intent to subvert or undermine the due administration of justice" and citing *, United States v. Kay,* 513 F.3d 432, 454 (5th Cir.2007); *United States v. Gordon,* 710 F.3d 1124, 1151 (10th Cir.2013) (defining "corruptly" as "with an improper purpose and to engage in conduct knowingly and dishonestly with the specific intent to subvert, impede or obstruct the" proceeding) (quoting *United States v. Friske,* 640 F.3d 1288, 1291 (11th Cir.2011))").

investigation or the proper functioning or integrity of an official proceeding. Requiring a purposeful mental state is justified due to the breadth of the revised obstruction of justice offense and the multitude of ways a criminal offense could obstruct or impede a criminal investigation or the proper functioning and integrity of an official proceeding. It would be inappropriate to treat the commission of a criminal offense as obstruction of justice merely because the actor knew that the criminal offense would an impact on a criminal investigation when the actor did not desire to impact their actions.[35] This change improves the clarity and proportionality of the revised statute.

Other changes to the revised statue are clarificatory in nature and are not intended to substantively change current District law.

The revised obstruction of justice statute replaces the language "the due administration of justice" in current D.C. Code § 22-722(a)(6) with "the proper functioning and integrity of [] an official proceeding." The revised language is taken from DCCA case law interpreting the phrase "due administration of justice."[36] This change improves the clarity of the statute without changing current District law.

[35] *E.g.*, An actor observes X being chased by the police. While being chased, X tosses a bag containing cocaine under a car so that it is not discovered by the police. The actor, who has no interest in the potential case against X, picks up the cocaine from under the car for the actor's personal use. In this scenario, the actor has committed a criminal offense, possession of a controlled substance, with the knowledge that the actor's possession of a controlled substance would prevent the police from recovering the cocaine tossed by X. If the culpable mental state was mere knowledge, the actor would be guilty of obstruction of justice even though the actor's purpose in possessing the cocaine was wholly unrelated to a criminal investigation or official proceeding. By requiring a purposeful mental state, the revised obstruction of justice statute ensures a nexus between the actor's purpose and impeding or obstructing an official proceeding or criminal investigation.

[36] *Wynn v. United States*, 48 A.3d 181, 191 (D.C. 2012) ("The phrase "due administration of justice" is used primarily, if not exclusively, to describe the proper functioning and integrity of a court or hearing.").

RCCA § 22A-4302. Tampering with a Witness or Informant.

(a) *First Degree.* An actor commits first degree tampering with a witness or informant when the actor:
  (1) In fact, commits a crime of violence;
  (2) Knowing that an official proceeding or criminal investigation has been initiated or is likely to be initiated;
  (3) With the purpose of causing a person to:
    (A) Testify or inform falsely in the official proceeding or criminal investigation;
    (B) Withhold any testimony or information that has the natural tendency to influence, or is capable of influencing, the official proceeding or criminal investigation;
    (C) Elude legal process summoning the person to testify or supply evidence in the official proceeding;
    (D) Be absent from the official proceeding to which the person has been legally summoned; or
    (E) Destroy, conceal, remove, or alter a document, record, image, audiovisual recording, or other object so as to either:
      (i) Impair its value as evidence in the official proceeding; or
      (ii) Prevent its production or use in the official proceeding.

(b) *Second Degree.* An actor commits second degree tampering with a witness or informant when the actor:
  (1) Either:
    (A) Knowingly, directly or indirectly, offers, confers or agrees to confer upon another anything of value; or
    (B) In fact:
      (i) Commits any criminal offense other than obstruction of justice under District of Columbia law;
      (ii) With intent to cause a person to:
        (I) Fear for the person's safety or the safety of another person; or
        (II) Suffer significant emotional distress;
  (2) Knowing that an official proceeding or criminal investigation has been initiated or is likely to be initiated;
  (3) With the purpose of causing a person to:
    (A) Testify or inform falsely in the official proceeding or criminal investigation;
    (B) Withhold any testimony or information that has the natural tendency to influence, or is capable of influencing, the official proceeding or criminal investigation;
    (C) Elude legal process summoning the person to testify or supply evidence in the official proceeding;
    (D) Be absent from the official proceeding to which the person has been legally summoned; or

(E) Destroy, conceal, remove, or alter a document, record, image, audiovisual recording, or other object so as to either:
(i) Impair its value as evidence in the official proceeding; or
(ii) Prevent its production or use in the official proceeding.

(c) *Third Degree*. An actor commits third degree tampering with a witness or informant when the actor:
(1) In fact, commits any criminal offense other than obstruction of justice under District of Columbia law;
(2) Knowing that an official proceeding or criminal investigation has been initiated or is likely to be initiated;
(3) With the purpose of causing a person to:
(A) Testify or inform falsely in the official proceeding or criminal investigation;
(B) Withhold any testimony or information that has the natural tendency to influence, or is capable of influencing, the official proceeding or criminal investigation;
(C) Elude legal process summoning the person to testify or supply evidence in the official proceeding;
(D) Be absent from the official proceeding to which the person has been legally summoned; or
(E) Destroy, conceal, remove, or alter a document, record, image, audiovisual recording, or other object so as to either:
(i) Impair its value as evidence in the official proceeding; or
(ii) Prevent its production or use in the official proceeding.

(d) *Penalties*.
(1) First degree tampering with a witness or informant is a Class 7 felony.
(2) Second degree tampering with a witness or informant is a Class 9 felony.
(3) Third degree tampering with a witness or informant is a Class A misdemeanor.
(4) *Merger.*
(A) A conviction for tampering with a witness or informant shall not merge with a conviction for any offense specified in paragraphs (a)(1) or, (b)(1) of this section when arising from the same act or course of conduct except as provided in subparagraph (d)(4)(B) of this paragraph.
(B) A conviction for tampering with a witness or informant shall merge with a conviction for any other offense under chapters 31, 32, 33, or 34 of this title arising from the same course of conduct. The sentencing court shall follow the procedures specified in subsections (b) and (c) of § 22A-214.

Explanatory Note. *The RCCA tampering with a witness or informant offense punishes crimes of violence, bribery, and any otherwise criminal offense performed with the purpose of causing a person to engage in specified conduct in relation to a criminal investigation or official proceeding. The penalty gradations in this new offense are based on the seriousness of the underlying criminal offense or bribery committed with the purpose of causing the person to engage in one of the specified acts. The RCCA tampering with a witness or informant offense is divided into three degrees, two felonies and one misdemeanor, and will merge with other offenses in Chapters 31, 32, 33, and 34. A conviction for RCCA tampering with a witness or informant in the first or second degree will not merge with a conviction for an underlying offense arising out of the same course of conduct. Tampering with a witness or informant offense is a new offense that replaces certain provisions*[37] *previously covered by current D.C. Code § 22-722.*

Subsection (a) specifies the prohibited conduct for first degree tampering with a witness or informant. Paragraph (a)(1) provides that first degree tampering with a witness or informant requires the actual commission of a crime of violence. The term "crime of violence" is defined in RCCA § 22A-101 and includes a criminal attempt under RCCA § 22A-301, a criminal solicitation under RCCA § 22A-302, or a criminal conspiracy under RCCA § 22A-303 to commit any other crime of violence. To prove that the actor committed a crime of violence, each element of the underlying crime of violence must be established beyond a reasonable doubt. This paragraph requires proof only of a crime of violence by the actor and does not require that the victim of the crime of violence be a witness or informant or a potential witness or informant.[38] "In fact," a defined term in RCCA § 22A-207, is used to indicate that there is no culpable mental state requirement as to a given element, here whether the accused committed one of the specified offenses. The use of "in fact" does not change the culpable mental states required in the specified offenses.

Paragraph (a)(2) specifies as an element that the actor must "know" that an official proceeding or criminal investigation has been initiated or is likely to be initiated. This paragraph requires proof that an official proceeding or criminal investigation had been or was likely to be initiated. The terms "official proceeding" and "criminal investigation" are defined terms in RCCA § 22A-101. The culpable mental state for the paragraph is "knowing" which is a defined term in RCCA § 22A-206. Applied here, "knowing" means that the actor must be practically certain that an official proceeding or criminal investigation has been initiated or is likely to be initiated.

---

[37] *See* D.C. Code §§ 22-722(a)(2)-(a)(3), (a)(6). Some of these provisions also apply to officers and jurors. The RCCA tampering with a witness or informant offense replaces these provisions only to the extent that they apply to witnesses and jurors. The RCCA tampering with a juror or court official offenses replaces these provisions with respect to jurors and court officials. The RCCA retaliation against a witness, informant, juror, or court official offense replaces §§ 22-722(a)(4)-(a)(5) which deal with retaliation against informants, witnesses, jurors, and officers.

[38] *E.g.*, An actor who commits a crime of violence against the relative of a witness with the purpose of causing the witness to testify falsely in official proceeding is guilty of the offense of tampering with a witness or informant even though the crime of violence was committed against the relative and not the witness because their purpose was to cause the witness to testify falsely.

Paragraph (a)(3) specifies multiple alternative elements, one of which must be proven for liability for the offense. The culpable mental state for paragraph (a)(3) is "purposely," a defined term under RCCA § 22A-206 that here requires that the actor consciously desire that the crime of violence committed by the actor cause another person to engage in conduct enumerated in paragraphs (a)(3)(A), (a)(3)(B), (a)(3)(C), (a)(3)(D), and (a)(3)(E). 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 phrase. Here it is not necessary to prove that the actor's commission of a crime of violence actually caused another person to engage in specified conduct. Proof that the actor consciously desired to cause a person to engage in such conduct is sufficient. This also means that an actor only commits the offense of tampering with a witness or informant if the actor commits the crime of violence with the specific purpose of causing a witness or informant to engage in the specified conduct. It is not sufficient for the government to establish that an actor committed a crime of violence that caused or could have caused a person to engage in conduct covered under subparagraphs (a)(3)(A), (a)(3)(B), (a)(3)(C), (a)(3)(D), and (a)(3)(E).[39] Finally, the use of the term "person" means that the government is not required to prove the person is a witness or informant. An actor commits the offense of first degree tampering with a witness or informant if the actor commits a crime of violence with the purpose of causing a person to do any of the specified acts in subparagraphs (a)(3)(A), (a)(3)(B), (a)(3)(C), (a)(3)(D), and (a)(3)(E) in relation to the official proceeding or criminal investigation specified in paragraph (a)(2) regardless of whether the person is already acting as a witness or informant.

Subparagraphs (a)(3)(A), (a)(3)(B), (a)(3)(C), (a)(3)(D), and (a)(3)(E) specify the actions related to the official proceeding or criminal investigation that the actor must have the purpose of causing another person to take as a result of the actor's commission of a crime of violence as well as the circumstance elements that the actor must be practically certain exist. Per RCCA §§ 22A-205-07, the culpable mental state of "purposely" in paragraph (a)(3) applies to each object in subparagraphs (a)(3)(A), (a)(3)(A), (a)(3)(C), (a)(3)(D), and (a)(3)(E). 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 phrase.

Subparagraph (a)(3)(A) establishes that an actor commits first degree tampering with a witness or informant when the actor commits a crime of violence with the purpose of causing a person to testify or inform falsely in the official proceeding or criminal investigation specified in paragraph (a)(2). This subparagraph requires proof that the actor

[39] *E.g.*, An actor commits a crime of violence against a person in connection to a dispute involving the person and the actor. The person is also a witness in an upcoming trial involving a close friend of the actor. Because the actor committed a crime of violence against the person, the person fears that testifying against the actor's close friend might cause the actor to cause further harm to the person. The person subsequently commits perjury at the trial of the actor's close friend. In that instance, the actor's commission of a crime of violence did, in fact, cause a person to testify falsely. Nonetheless, the actor would not be guilty of the offense of tampering with a witness or informant because the actor did not have the purpose of causing the person to testify falsely when the actor committed the crime of violence.

consciously desired to cause a person to provide testimony or information that the actor was practically certain were false in the official proceeding or criminal investigation. The government need not prove that the actor, in fact, caused a witness or informant to provide false testimony or information. The government need only prove that the actor committed a crime of violence with the conscious objective of causing a person to testify or inform falsely in the official proceeding or criminal investigation.

Subparagraph (a)(3)(B) establishes that an actor commits first degree tampering with a witness or informant when the actor commits a crime of violence with the purpose of causing a person "to withhold any testimony or information that has the natural tendency to influence, or is capable of influencing, the official proceeding or criminal investigation." This subparagraph requires proof that the actor consciously desired to cause a person to withhold testimony or information that the actor was practically certain had the natural tendency to influence, or was capable of influencing, the official proceeding or criminal investigation specified in paragraph (a)(2).[40] The government need not prove that that actor, in fact, caused a person to withhold such testimony or information from the official proceeding or criminal investigation so long as the government proves the actor had the purpose of causing such a result

Subparagraph (a)(3)(C) establishes that an actor commits first degree tampering with a witness or informant when the actor commits a crime of violence with the purpose of causing a person to "elude legal process summoning the person to testify or supply evidence in the official proceeding." This paragraph requires proof that the actor consciously desired to cause a person to elude legal process summoning the person to testify or supply evidence in the official proceeding specified in paragraph (a)(2). Because the phrase "legal process" necessitates a connection to an official proceeding, this subparagraph does not apply to criminal investigations. Additionally, the phrase "legal process" requires that the actor have the purpose of causing a person to elude a legally enforceable summons.

Subparagraph (a)(3)(D) establishes that an actor commits first degree tampering with a witness or informant when the actor commits a crime of violence with the purpose of causing a person to "be absent from the official proceeding." This paragraph requires proof that the actor was practically certain the person had been legally summoned to testify or supply evidence in an official proceeding and consciously desired to cause a person to be absent from the official proceeding specified in paragraph (a)(2). Because the term "legal process" necessitates a connection to an official proceeding, including grand jury proceedings, this subparagraph does not apply to criminal investigations.

Subparagraph (a)(3)(E) establishes that an actor commits first degree tampering with a witness or informant when the actor commits a crime of violence with the purpose of causing a person to tamper with evidence. The subparagraph contains two parts. The first part, specifies that the actor must consciously desire to cause another person to destroy,

[40] It is not sufficient for the government to prove that the actor had the purpose of causing a person to withhold *any* information or testimony. *E.g.*, An actor who commits a crime of violence with the purpose of causing person to withhold embarrassing information that the actor does not believe is material to the outcome of an investigation or official proceeding is not guilty of the offense of tampering with a witness or informant.

conceal, remove, or alter a document, record, image, audiovisual recording, or other object. The second part, in sub-sub-paragraphs (a)(3)(E)(i) and (a)(3)(E)(ii), specifies that the actor's purpose in destroying, concealing, removing, or altering a document, record, image, audiovisual recording or other object must be to either impair the value of the evidence or prevent its production in the official proceeding specified in paragraph (a)(2). The government need not prove that the document, record, image, audiovisual recording, or other object is evidence or likely to be evidence in an official proceeding. It is sufficient for the government to prove that the actor believed the object to be evidence or potential evidence and that the actor believed or was practically certain that destroying, concealing, removing, or materially altering the object could impair its value as evidence or prevent its production in an official proceeding.

Subsection (b) establishes the RCCA offense of second degree tampering with a witness of informant. Second degree tampering with a witness or informant differs from first degree tampering with a witness or informant only with respect to paragraph (b)(1).

Paragraph (b)(1) specifies two alternative elements. Subparagraph (b)(1)(A) proscribes knowingly, directly or indirectly, offering, conferring or agreeing to confer on another person anything of value. "Knowingly" is a defined term[41] and applied here means the actor must be practically certain that they are offering, conferring, or agreeing to confer on another anything of value. The government need not prove the actor *directly* offered, conferred, or agreed to confer something of value on another. The government may show that the actor indirectly offered, conferred, or agreed to confer something of value on another person as long as the government also shows that the actor acted with the requisite knowledge.

Subparagraph (b)(1)(B) and sub-subparagraph (b)(1)(B)(i) specify, alternatively, that the commission of a criminal offense other than obstruction of justice also satisfies the conduct element of second degree tampering with a witness or informant. The proscribed conduct includes any criminal offense under District law other than obstruction of justice. Acts that are criminal in other jurisdictions but not criminal offenses under District law are not covered by this paragraph. To prove that the actor committed a criminal offense, each element of the underlying offense must be established beyond a reasonable doubt. "In fact," a defined term in RCCA § 22A-207, is used to indicate that there is no culpable mental state requirement as to a given element, here whether the accused committed one of the specified offenses. The use of "in fact" does not change the culpable mental states required in the specified offenses.

Sub-subparagraph (b)(1)(B)(ii) and sub-sub-subparagraphs (b)(1)(B)(ii)(I) and (II) require that the criminal offense committed under paragraph (b)(1) be performed with either the intent to cause a person to fear for the person's safety or the safety of another person or the intent to cause a person to suffer significant emotional distress. "Significant emotional distress" is a defined term in RCCA § 22A-101 that means substantial, ongoing mental suffering that may, but does not necessarily, require medical or other professional treatment or counseling. The distress must rise significantly above the level of uneasiness,

[41] "Knowingly" is defined in RCCA § 22A-206.

nervousness, unhappiness, or similar feelings commonly experienced in day to day living. This paragraph does not require the actor to commit a criminal act that typically causes or is intended to cause a bodily injury or significant emotional distress and does not require the criminal act to be against a witness or informant themselves. Rather, the paragraph requires that the criminal act be intended to cause *any person*[42] to fear for the person's safety or the safety of another person or to suffer significant emotional distress. "Intent" is a defined term in RCCA § 22A-206 that here means the actor was practically certain that his or her conduct would cause a person to fear for the person's safety or the safety of another person or suffer significant emotional distress. Per RCCA § 22A-205, the object of the phrase "with intent to" 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. The government need not prove that the actor actually caused a person to fear for the person's safety or the safety of another person or suffer significant emotional distress. It is sufficient for the government to prove that the actor believed or was practically certain the criminal offense in paragraph (b)(1) would cause such a fear or another person to suffer significant emotional distress.

Paragraph (b)(2) is identical to paragraph (a)(2) and specifies that an actor must know that an official proceeding or criminal investigation has been initiated or is likely to be initiated.

Subparagraphs (b)(3)(A), (b)(3)(B), (b)(3)(C), (b)(3)(D), and (b)(3)(E) specify actions related to an official proceeding or criminal investigation that the actor must have the purpose of causing another person to take as a result of the actor's commission of a criminal offense. These subparagraphs are identical the subparagraphs (a)(3)(A), (a)(3)(B), (a)(3)(C), (a)(3)(D), and (a)(3)(E).

Paragraph (c) establishes the elements required for third degree tampering with a witness or informant. Third degree tampering with a witness or informant differs from first degree and second degree tampering with a witness or informant only with respect to paragraph (c)(1). Paragraph (c)(1) specifies that the commission of any criminal offense under District law other than obstruction of justice satisfies the conduct element of third degree tampering with a witness or informant. To prove that the actor committed a criminal offense, each element of the underlying offense must be established beyond a reasonable doubt. "In fact," a defined term in RCCA § 22A-207, is used to indicate that there is no culpable mental state requirement as to a given element, here whether the accused

[42] *E.g.*, An actor commits a criminal act with the intent to cause the relative of a witness to fear for their safety believing that the relative will relay their fear to the witness and cause the witness to engage in one of the enumerated acts in subparagraphs (a)(2)(A), (a)(2)(B), (a)(2)(C), (a)(2)(D), and (a)(2)(E). This would constitute second degree tampering with a witness or informant even if the actor did not intend to cause the witness to fear for their safety or the safety of another. This accounts for cases where the actor commits a criminal act with the intent to cause a person to fear for their safety believing that the other person's fear will cause a witness or informant to act in a certain manner for reasons other fear of the safety of another. E.g., The actor believes that causing a relative of the witness to fear for their safety could cause the relative to put pressure on the witness to withhold material testimony. The witness could subsequently withhold material testimony in response to pressure from the relative regardless of whether the witness feared for their own safety or the safety of another.

committed one of the specified offenses. The use of "in fact" does not change the culpable mental states required in the specified offenses.

Subparagraphs (c)(3)(A), (c)(3)(B), (c)(3)(C), (c)(3)(D), and (c)(3)(E) specify actions related to an official proceeding or criminal investigation that the actor must have the purpose of causing another person to take a specified action as a result of the actor's conduct. These subparagraphs are identical the subparagraphs (a)(3)(A), (a)(3)(B), (a)(3)(C), (a)(3)(D), and (a)(3)(E).

Subsection (d) establishes the penalties for first, second, and third degree tampering with a witness or informant. [*See* RCCA §§ 22A-603 and 22A-604 for the imprisonment terms and fines for each penalty class.] In addition, subparagraph (d)(4)(1) states that a conviction for tampering with a witness or informant shall not merge with any offense in paragraphs (a)(1) or (b)(1) arising from the same course of conduct except as provided in subparagraph (d)(4)(2). Subparagraph (d)(4)(2) states that a conviction for tampering with a witness or informant shall merge with a conviction for any other offense under chapters 31, 32, 33, or 34 of title 22. These chapters include the offenses of bribery, impersonation of an official, perjury, false swearing, tampering with a witness or informant, tampering with evidence, escape, and other related offenses. Thus, if a person commits the offense of tampering with a witness or informant and obstruction of justice, the tampering with a witness or informant conviction would merge with the obstruction of justice conviction pursuant to the RCCA's rules of priority in RCCA § 22A-214. Tampering with a witness or informant merges with other offenses in chapters 31, 32, 33, or 34 regardless of whether they otherwise merge under § 22A-214. For all other offenses, a conviction tampering with a witness or informant may or may not merge with a conviction for that offense. The determination of merger with a conviction outside of chapters 31, 32, 33, or 34 is made pursuant to § 22A-214.

Relation to Current District Law. *The new tampering with a witness or informant offense changes District law in seven main ways.*

First, the RCCA tampering with a witness or informant offense is a new, separate offense specifically addressing criminal offenses committed with the purpose of causing a witness or informant to engage in certain conduct in connection with a criminal investigation or official proceeding that could affect the course or outcome of the investigation or proceeding. Current D.C. Code § 22-722(a) contains six paragraphs each enumerating multiple forms of obstruction of justice, including conduct that would fall under the RCCA tampering with a witness or informant statute. All forms of obstruction in the current code are subject to the same three to thirty-year penalty. In contrast, the RCCA creates a new, separate offense of tampering with a witness or informant covering instances where the actor seeks to bribe a person or commits a criminal offense and the actor has the purpose of affecting the course or outcome of an investigation or official proceeding by causing a witness or informant to engage in specified conduct. Although the conduct constituting tampering with a witness or informant overlaps with the revised obstruction of justice statute, the RCCA treats conduct that threatens or harms a person for the purpose of obstructing a criminal investigation or an official proceeding as more serious

than other forms of obstructing justice and authorizes a higher maximum penalty for the offense of tampering with a witness or informant than for obstruction of justice. This change improves the organization and proportionality of the revised statutes

Second, the RCCA tampering with a witness or informant offense establishes three grades based primarily on the seriousness of the criminal offense committed by the actor. Currently, the offense of obstruction of justice in D.C. Code § 22-722 is not graded and the statutory penalty range is three to thirty-years for all forms of covered conduct.[43] In contrast, the RCCA tampering with a witness or informant statute has three grades based primarily on the level of violence or non-violence of the actor's criminal act. The commission of a crime of violence to tamper with a witness or informant is punished more severely than the commission of a non-violent offense or bribery-type conduct. This grading scheme recognizes the greater harm to both participants and the justice system when the underling conduct involves violence or threatened violence. This change improves the proportionality of the revised statutes.

Third, the RCCA tampering with a witness or informant offense requires a person to engage in some type of separately-defined criminal offense or bribery-type conduct. Current D.C. Code § 22-722(a)(2) enumerates as one element "knowingly us[ing] intimidating or physical force, threaten[ing] or corruptly persuad[ing] another person, or by threatening letter or communication, endeavor[ing] to influence, intimidate, or impede a witness or officer in an official proceeding. . . ." The statute does not define the term "corruptly" and efforts to define the term have not cleared up confusion.[44] DCCA case law has repeatedly sought to address the meaning of the term, following similar Supreme Court jurisprudence, and interpreted the word to mean something akin to an "intent to undermine the integrity of the pending investigation."[45] Similarly, D.C. Code § 22-

[43] *E.g.*, an actor who murdered a witness is guilty of the same offense as an actor who tries to bribe a witness to evade a subpoena even though the harm to the witness is miniscule in comparison.

[44] *See United States v. Poindexter*, 951 F.2d 369, 378 (D.C. Cir. 1991) ("We must acknowledge that, on its face, the word "corruptly" is vague; that is, in the absence of some narrowing gloss, people must "guess at its meaning and differ as to its application."); Daniel A. Shtob, *Corruption of A Term: The Problematic Nature of 18 U.S.C. S1512(c), the New Federal Obstruction of Justice Provision*, 57 VAND. L. REV. 1429, 1441–42 (2004) ("The use of "corruptly" as a scienter requirement within the obstruction of justice statutes has elicited judicial struggle and made application and enforcement of its provisions unduly difficult. Unable to rely on clear precedent, multiple circuits have referenced dictionary definitions, antiquated legislative histories, and nuances in linguistic analysis to define the term.").

[45] *Hawkins v. United States*, 119 A.3d 687, 101 (D.C. 2015) ("This court recently discussed the definition of "corruptly" in *Brown v. United States,* 89 A.3d 98 (D.C.2014), where we noted that in *Arthur Andersen LLP v. United States,* 544 U.S. 696, 125 S.Ct. 2129, 161 L.Ed.2d 1008 (2005), the Supreme Court "analyzed the term 'corruptly'" in the federal obstruction-of-justice statute by "distilling its connotations into the word 'wrongdoing.'" *Brown,* 89 A.3d at 104; *see Arthur Andersen,* 544 U.S. at 705, 125 S.Ct. 2129 (suggesting that the word "corruptly" is normally associated with "wrongful, immoral, depraved, or evil" acts); *see also Riley v. United States,* 647 A.2d 1165, 1169 n.11 (D.C.1994) (citing to the Black's Law Dictionary definition of "corruptly" as "a wrongful design to acquire some pecuniary or other advantage") (citing Black's Law Dictionary 345 (6th ed.1990)). In another recent case, *Smith v. United States,* 68 A.3d 729, 742 (D.C.2013), we implicitly equated "corruptly" with "intent to undermine the integrity of the pending investigation" when listing the elements of obstruction under subsection (a)(6). That language is similar to the definition employed by several federal appellate courts—that to act "corruptly" means to act "knowingly and dishonestly, with the specific intent to subvert or undermine the due administration of justice." *See, e.g.,*

722(a)(3) punishes "harass[ing] another person with the intent to hinder, delay, prevent, or dissuade, the person…." without defining the term "harass." The DCCA has said that the use of "words or actions having a reasonable tendency to badger, disturb, or pester the ordinary person" can constitutes harassment under § 22-722(a)(3).[46] In contrast, the revised statute eliminates the ambiguous terms "corruptly" and "harass" and requires some predicate criminal offense or bribery-type conduct for there to be liability for tampering with a witness or informant. Both the inclusion of bribery-type conduct[47] and the breadth of the criminal code, which includes non-violent offenses such as contempt, solicitation of perjury, bribery, blackmail, as well as inchoate and accomplice liability, provides liability for attempts to tamper with a witness or informant.[48] The requirement of an otherwise criminal act or bribery-type conduct promotes uniformity in application, guards against the criminalization of protected speech, and also ensures that there is fair notice of what conduct is prohibited. This change improves the clarity and consistency of the revised statutes.

Fourth, the RCCA tampering with a witness or informant offense specifically provides liability for the commission of a criminal offense, or bribery-type conduct, done with the purpose of causing another person to tamper with physical evidence. Under current law, the commission of a criminal offense with the purpose of causing another person to engage in evidence tampering may fall under the catch-all provision of the obstruction of justice statute[49] or constitute tampering with evidence[50] depending on the facts of the case, but the conduct is not specifically proscribed. There is no case law directly on point. In contrast, the RCCA tampering with a witness or informant offense explicitly prohibits specified conduct done for the purpose of causing another to tamper with physical

---

United States v. Kay, 513 F.3d 432, 454 (5th Cir.2007); *United States v. Gordon,* 710 F.3d 1124, 1151 (10th Cir.2013) (defining "corruptly" as "with an improper purpose and to engage in conduct knowingly and dishonestly with the specific intent to subvert, impede or obstruct the" proceeding) (quoting *United States v. Friske,* 640 F.3d 1288, 1291 (11th Cir.2011)). The language in *Smith* also mirrors the jury instruction provided in this case—'with the intent to undermine the integrity of the proceeding.'"); *see also United States v. Brady*, 168 F.3d 574, 578 (1st Cir. 1999) ("There is no hope in one opinion of providing a definitive gloss on the word 'corruptly'; neither would it be wise to try.").

[46] *Wynn v. United States*, 80 A.3d 211, 217 (D.C. 2013).

[47] *E.g.*, If an actor offers a witness something of value to "disappear" and elude legal service, the actor could be liable of second degree tampering with a witness or informant even if the actor did not commit a separate criminal offense.

[48] *E.g.*, If an actor attempts to persuade a witness to testify falsely and acts with the requisite culpable mental state, the actor has committed the offense of attempted solicitation of perjury and the requirement that the actor commit any criminal offense in the tampering with a witness or informant statute would be satisfied.

[49] D.C. Code §22-722(a)(6).

[50] D.C. Code §22-723. The current tampering with physical evidence statute in D.C. Code §22-723 requires the actor themselves to tamper with evidence: "knowing or having reason to believe an official proceeding has begun or knowing that an official proceeding is likely to be instituted, that person alters, destroys, mutilates, conceals, or removes a record, document, or other object, with intent to impair its integrity or its availability for use in the official proceeding." However, a person who by bribery-type behavior or commission of a crime coerces another person to tamper with evidence may still be liable under an accomplice theory or treated as a principal who is coercing an innocent person under RCCA § 22A-211 (Criminal Liability for Conduct by an Innocent or Irresponsible Person).

evidence. This change improves the clarity of the revised statutes and ensures fair notice of what conduct is prohibited.

Fifth, the RCCA tampering with a witness or informant offense does not require as an element that any person was, in fact, a witness, informant or potential witness or informant. Current D.C. Code § 22-722(a)(2) requires that the government prove as an element of the offense that the complainant was, in fact, a "witness" in a grand jury investigation, trial, hearing, criminal investigation, or proceeding conducted in a Court of the District of Columbia, by the District Council, or by an agency or department of the District government. The DCCA has defined "witness" under the current statute broadly as "a person who (1) 'knows or is supposed to know material facts about a case which is pending,' and (2) 'may be called to testify' about that knowledge.'"[51] Thus, proof that the complainant was a witness currently is an element of the offense, although the government need not prove that the complainant actually give testimony or was legally summoned to testify.[52] In contrast, the RCCA tampering with a witness or informant offense focuses on the actor's purpose in committing a criminal offense or bribery-type conduct and does not require that any person, in fact, be a witness, informant,[53] or potential witness or informant.[54] Instead of using the terms "witness" and "informant", the RCCA specifies actions that an actor would cause a witness or informant to take in connection to an official proceeding or criminal investigation. This change maintains a nexus between the actor's conduct and the actions or potential actions of a witness or informant in an official proceeding or criminal investigation. This change improves the clarity of the revised statutes and may reduce a possible gap in liability.

Sixth, the RCCA tampering with a witness or informant statute introduces a materiality requirement with respect to testimony or information that the actor desires be withheld. Currently, D.C. Code § 22-722(a)(2)(B) requires an actor to act with intent to "to cause or induce the person to withhold truthful testimony or a record, document, or other object from an official proceeding" while D.C. Code § 22-722(a)(3) requires that the actor act with intent to hinder, delay, prevent, or dissuade a person from "reporting to a law enforcement officer the commission of, or any information, concerning a criminal offense." Because there is no requirement that the actor believe that the testimony has the natural tendency to influence, or is capable of influencing, an official proceeding or criminal investigation, the current provision covers conduct that is not intended to affect the course

---

[51] *Crutchfield v. United States*, 779 A.2d 307, 325 (D.C. 2001) (quoting *Smith v. United States*, 591 A.2d 229 (D.C.1991)).

[52] *See also Smith v. United States*, 591 A.2d 229, 232 (D.C. 1991) ("The provision at issue here by its language covers the broad category of participants, potential or actual, in pending criminal proceedings, and its application extends not only to those who inherently fall within that category by their actual knowledge of material facts but those as well who are by the defendant's own acts brought within that category.").

[53] In contrast to current D.C. Code §22-722(a)(2), current D.C. Code §22-722(a)(3)—punishing "harassing another person with intent to hinder, delay, prevent, or dissuade the person" from engaging in certain conduct—already focuses on the actor's intent and does not require as an element that the person be a witness or informant.

[54] Though not elements of the offense, whether a person was, in fact, a witness or informant and whether an official proceeding or criminal investigation had, in fact, or was, in fact, likely to be initiated could still be relevant to proof of the actor's intent.

or outcome of an official proceeding or criminal investigation.[55] In contrast, the revised tampering with a witness or informant statute requires that the actor have the purpose of causing the person to withhold testimony or information that the actor believes has the natural tendency to influence, or is capable of influencing, the criminal investigation or official proceeding. The phrase "natural tendency to influence, or is capable of influencing," comes from DCCA case law defining materiality.[56] This is more consistent with the underlying purpose of the tampering with a witness or informant offense—to protect the integrity of an official proceeding or criminal investigation. Imposing liability on an actor for conduct not directed at undermining a criminal proceeding or official proceeding does not substantially further the statute's purpose. This change ensures consistency and proportionality of the revised statutes.

Seventh, the revised statute explicitly states that convictions for tampering with a witness or informant merge with convictions for offenses found in chapters 31, 32, 33, or 34 arising from the same course of conduct but first and second degree tampering convictions do not merge with convictions for the underlying criminal offense. The current D.C. Code does not include a general merger provision, and the DCCA has held that offenses merge only if the elements of one offense are necessarily included in the elements of the other offense.[57] Application of this test, sometimes called the *Blockburger*[58] rule, to the obstruction of justice statute been inconsistent and has resulted in persons receiving multiple convictions for obstruction of justice for the exact same conduct.[59] In contrast, the RCCA tampering with a witness or informant offense requires merger for related convictions in chapters 31, 32, 33, or 24 arising out of the same course of conduct.[60] At the same time, the RCCA precludes merger with a underlying criminal offense for first and

[55] For example, if an actor seeks to cause a witness to withhold testimony that could embarrass a third person but would have no impact on the proceedings if withheld, the actor would still be liable under the current obstruction of justice statute.

[56] *See Smith v. United States*, 68 A.3d 729, 740 (D.C. 2013) ("In order to prove materiality the government must show that the statement "has a natural tendency to influence, or was capable of influencing, the decision of the decision-making body to which it was addressed."); *see also Kungys v. United States*, 485 U.S. 759, 770 (1988) (explaining that "federal courts have long displayed a quite uniform understanding of the "materiality" concept" and that "the most common formulation of that understanding is that a concealment or misrepresentation is material if it "has a natural tendency to influence, or was capable of influencing, the decision of" the decision-making body to which it was addressed").

[57] *Byrd v. United States*, 598 A.2d 386, 389 (D.C. 1991).

[58] *See Blockburger v. United States*, 284 U.S. 299, 301 (1932) ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.").

[59] For example, in *McCollugh v. United States*, 827 A.2d 48, 59-60 (D.C. 2003), the DCCA upheld separate convictions for obstruction of justice under both D.C. §22-722(a)(2) (criminalizing the use of force to prevent truthful testimony in an official proceeding) and D.C. §22-722(a)(4) (criminalizing injuring any person on account of the person giving information to an investigator in a criminal investigation) in a case where the defendant killed an eyewitness who provided information about a murder to the police.

[60] This change in merger analysis is in addition to the general changes made to merger rules provided for RCCA § 22A-214.

second degree tampering with a witness or informant.[61] Precluding merger with the underlying criminal offense is appropriate given the statutory purpose of protecting both persons and the integrity of official proceedings and criminal investigations. This change improves the consistency, clarity, and proportionality of the statute.

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

First, the RCCA tampering with a witness or informant statute requires a "purposeful" mental state to establish that the actor's criminal conduct constitutes tampering with a witness or informant. Current D.C. Code § 22-722 (a)(2), which applies to witnesses, proscribes "knowingly us[ing] intimidation or physical force, threaten[ing] or corruptly persuad[ing] another person, or by threatening letter or communication, endeavor[ing] to influence, intimidate, or impede a witness or officer in any official proceeding" when such actions are done "with intent" to cause a witness to take certain specified actions. Though this paragraph uses the term "knowingly," the term is undefined in the statute. Also, the DCCA has held that the term "corruptly," used in D.C. Code § 22-722 (a)(2), is a *mens rea* for the offense[62] that means something akin to an "intent to undermine the integrity of the pending investigation [or proceeding]."[63] At the same, however, the DCCA has stated that this definition is similar to federal cases interpreting "corruptly" as both acting "*knowingly* and dishonestly, with the specific intent to subvert or undermine the due administration of justice" as well as another federal case interpreting "corruptly" as acting "with an improper *purpose* and to engage in conduct knowingly and dishonestly with the specific intent to subvert, impede or obstruct the proceeding."[64]

Additionally, the statutory terms "endeavors"[65] and "with intent"[66] provide similarly vague, undefined statements of the requisite culpable mental states. The DCCA has stated that the term "endeavors," found in paragraph (a)(2), requires that a defendant make "any effort or essay to accomplish the evil *purpose* that the statute was enacted to prevent" suggesting that conduct modified by the term "endeavors" requires a purposeful

---

[61] *E.g.*, An actor is convicted of second degree assault, first degree tampering with a witness or informant, and first degree obstruction of justice for assaulting a witness with the purpose of causing the witness to commit perjury. In that scenario, the conviction for obstruction of justice would merge into the first degree tampering with a witness or informant offense. The second degree assault and first degree tampering with a witness or informant convictions, however, would not merge.

[62] *Hawkins v. United States*, 119 A.3d 687, 700 (D.C. 2015) (referring to the term "corruptly" as "the statutory mens rea requirement").

[63] *Hawkins v. United States*, 119 A.3d 687, 101 (D.C. 2015) ("In another recent case, *Smith v. United States,* 68 A.3d 729, 742 (D.C.2013), we implicitly equated "corruptly" with "intent to undermine the integrity of the pending investigation" when listing the elements of obstruction under subsection (a)(6)").

[64] *Hawkins v. United States*, 119 A.3d 687, 101 (D.C. 2015) (Stating the language "with intent to undermine the integrity of a pending investigation" is "is similar to the definition employed by several federal appellate courts—that to act "corruptly" means to act "knowingly and dishonestly, with the specific intent to subvert or undermine the due administration of justice." *See, e.g., United States v. Kay,* 513 F.3d 432, 454 (5th Cir.2007); *United States v. Gordon,* 710 F.3d 1124, 1151 (10th Cir.2013) (defining "corruptly" as "with an improper purpose and to engage in conduct knowingly and dishonestly with the specific intent to subvert, impede or obstruct the" proceeding) (quoting *United States v. Friske,* 640 F.3d 1288, 1291 (11th Cir.2011))").

[65] "Endeavors" is found in paragraphs (a)(1) and (a)(2).

[66] "With intent" is found in paragraphs (a)(2) and (a)(3).

mental state.[67] The phrase "with intent," has not been clearly defined as requiring knowledge or purpose in District case law either generally[68] or with respect to the obstruction of justice statute. DCCA case law holds that obstruction of justice is a "specific intent" offense which would require at least a knowingly or purposeful mental state.[69] However, it does not appear that the DCCA has expressly stated with respect to the obstruction of justice statute whether "with intent" requires proof of knowledge or purpose with respect to the objects of the phrase.

To resolve these ambiguities, the RCCA tampering with a witness or informant statute expressly requires a purposeful mental state with respect to the result that an actor desires to cause by commission of a criminal offense. Requiring a purposeful mental state is justified due to the breadth of the revised tampering with a witness or informant statute and the potential for witnesses or informants to respond to things other than an actor's conduct. It would be inappropriate to treat the commission of a criminal offense as tampering with a witness or informant merely because the actor knew that the criminal offense might have an impact on a witness or informant when the actor did not desire to impact their actions. This change improves the clarity and proportionality of the statute.

Second, the RCCA tampering with a witness or informant statute explicitly excludes "criminal investigations" from the definition of "official proceeding." Current District law defines an "official proceeding" as "any trial, hearing, investigation, or other proceeding in a court of the District of Columbia or conducted by the Council of the District of Columbia or an agency or department of the District of Columbia government, or a grand jury proceeding."[70] "Criminal investigation" is separately defined as "an investigation of a violation of any criminal statute in effect in the District of Columbia."[71] The DCCA has held that police investigations are encompassed by this definition of "official proceeding,"[72] even though contextual language in several paragraphs of current D.C. Code § 22-721 clearly indicates that those paragraphs would not apply to a police investigation.[73] To resolve this ambiguity, the RCCA continues to define both the term "criminal investigation" and the term "official proceeding" but specifically excludes criminal investigations from the definition of "official proceeding" so that criminal investigations are implicated only where the statue expressly states. Some subparagraphs in the RCCA

[67] *Irving v. United States*, 673 A.2d 1284, 1289 (D.C. 1996).
[68] See RCCA commentary to § 22A-206.
[69] *See Hawkins v. United States*, 119 A.3d 687, 695 (D.C. 2015) (stating that "obstruction of justice is a specific intent crime requiring intent to impair the proceeding) (citing *Crutchfield v. United States*, 779 A.2d 307, 325 (D.C. 2001); *Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005) ("[I]f the defendant lacks knowledge that his actions are likely to affect the judicial proceeding," we explained, "he lacks the requisite intent to obstruct.").
[70] *See* D.C. Code § 22-721(4).
[71] *See* D.C. Code § 22-721(3).
[72] *Mason v. United States*, 170 A.3d 182, 191 (D.C. 2017) (holding "[b]y its plain language, D.C. Code § 22–721 (4) [] defines an "official proceeding" to include an MPD investigation").
[73] *E.g.,* D.C. Code § 22-721(a)(2) broadly refers to intimidating, etc. a "witness or officer in any official proceeding" but, in (a)(2)(C) refers further to an intent to "evade a legal process that summons the person to appear as a witness or produce a document in an official proceeding." Given this contextual language regarding a "legal process that summons the person to appear," it does not appear that D.C. Code §22-721(a)(2)(C) was intended to include criminal investigations.

tampering with a witness or informant statute apply to both criminal investigations and official proceedings while some only apply to official proceedings. With the exception of the subparagraphs addressing tampering with evidence, however, the actions in the subparagraphs limited to official proceedings are not actions that could be taken in connection with a criminal investigation.[74] This change improves the clarity and consistency of the revised statute.

[74] *E.g.*, Subparagraph (a)(2)(C) applies to conduct done with the purpose of causing a person to elude legal process summoning the person to testify or supply evidence in an official proceeding. Legal process summoning a person to testify is necessarily connected to an official proceeding rather than a criminal investigation. Thus, the fact that the RCCA does not include the term "criminal investigation" in this paragraph would not be a substantial change in law.

RCCA-§ 22A-4303. Tampering with a Juror or Court Official.

(a) *First Degree.* An actor commits first degree tampering with a juror or court official in a judicial proceeding when the actor:
  (1) In fact, commits a crime of violence;
  (2) Knowing that an official proceeding has been initiated or is likely to be initiated;
  (3) With the purpose of:
    (A) Influencing the vote, opinion, decision, deliberation, or other official action of a juror in the official proceeding;
    (B) Influencing the opinion, decisions, or other official action of a court official in the official proceeding;
    (C) Causing a juror to withhold any testimony or information that has the natural tendency to influence, or is capable of influencing, the official proceeding; or
    (D) Causing a person to be absent from jury service to which the person has been legally summoned or ordered to return.

(b) *Second Degree.* An actor commits second degree tampering with a juror or court official when the actor:
  (1) Either:
    (A) Knowingly, directly or indirectly, offers, confers or agrees to confer upon another anything of value; or
    (B) In fact:
      (i) Commits any criminal offense other than obstruction of justice under District of Columbia law;
      (ii) With intent to cause a person to:
        (I) Fear for the person's safety or the safety of another person; or
        (II) Suffer significant emotional distress;
  (2) Knowing that an official proceeding has been initiated or is likely to be initiated;
  (3) With the purpose of:
    (A) Influencing the vote, opinion, decision, deliberation, or other official action of a juror in the official proceeding;
    (B) Influencing the opinion, decisions, or other official action of a court official in the official proceeding;
    (C) Causing a juror to withhold any testimony or information that has the natural tendency to influence, or is capable of influencing, the official proceeding; or
    (D) Causing a person to be absent from jury service to which the person has been legally summoned or ordered to return.

(c) *Third Degree.* An actor commits third degree tampering with a juror or court official when the actor:
  (1) In fact, commits any criminal offense other than obstruction of justice under District of Columbia law;
  (2) Knowing that an official proceeding has been initiated or is likely to be initiated;

(3) With the purpose of:
(A) Influencing the vote, opinion, decision, deliberation, testimony, or other official action of a juror in the official;
(B) Influencing the opinion, decisions, testimony, or other official action of a court official in the official proceeding;
(C) Causing a juror to withhold any testimony or information that has the natural tendency to influence, or is capable of influencing, the official proceeding; or
(D) Causing a person to be absent from jury service to which the person has been legally summoned or ordered to return.

(d) *Penalties.*
(1) First degree tampering with a juror or court official is a Class 7 felony.
(2) Second degree tampering with a juror or court official is a Class 9 felony.
(3) Third degree tampering with a juror or court official is a Class A misdemeanor.
(4) *Merger.*
(A) A conviction for tampering with a juror or court official shall not merge with a conviction for any offense specified in paragraphs (a)(1) or (b)(1) of this section when arising from the same act or course of conduct except as provided in subparagraph (d)(4)(B) of this paragraph.
(B) A conviction for tampering with a juror or court official shall merge with a conviction for any other offense under chapters 31, 32, 33, or 34 of this title arising from the same course of conduct. The sentencing court shall follow the procedures specified in subsections (b) and (c) of § 22A-214.

Explanatory Note. *The RCCA tampering with a juror or court official offense punishes crimes of violence, bribery, and any otherwise criminal offense performed with the purpose of influencing or causing certain actions by a juror or court official in an official proceeding. The penalty gradations in this new offense are based on the seriousness of the underlying criminal offense or bribery committed with the purpose of influencing or causing certain actions by a juror or court official in an official proceeding. The RCCA tampering with a juror or court official is divided into three degrees, two felonies and one misdemeanor, and will merge with other offenses in Chapters 31, 32, 33, and 34. A conviction for RCCA tampering with a juror or court official in the first or second degree will not merge with a conviction for an underlying offense arising out of the same course of conduct. Tampering with a juror or court official is a new offense that replaces certain provisions*[75] *in current D.C. Code § 22-722.*

[75] *See* D.C. Code §§ 22-722(a)(1)-(a)(3), (a)(6). Some of these provisions also apply to witnesses and informants. The RCCA tampering with a juror or court official offense replaces these provisions only to the extent that they apply to jurors and court officers. The RCCA tampering with a witness or informant offense replaces these provisions with respect to witnesses and informants. The RCCA retaliation against a witness, informant, juror, or court official offense replaces §§ 22-722(a)(4)-(a)(5) which deal with retaliation against informants, witnesses, jurors, and officers.

Subsection (a) specifies the elements of first degree tampering with a juror or court official.

Paragraph (a)(1) provides that first degree tampering with a juror or court official requires the actual commission of a crime of violence. The term "crime of violence" is defined in RCCA § 22A-101 and includes a criminal attempt under RCCA § 22A-301, a criminal solicitation under RCCA § 22A-302, or a criminal conspiracy under RCCA § 22A-303 to commit any other crime of violence. To prove that the actor committed a crime of violence, each element of the underlying offense must be established beyond a reasonable doubt. This paragraph requires proof only of a crime of violence by the actor and does not require that the victim of the crime of violence be a juror or court official.[76] "In fact," a defined term in RCCA § 22A-207, is used to indicate that there is no culpable mental state requirement as to a given element, here whether the accused committed one of the specified offenses. The use of "in fact" does not change the culpable mental states required in the specified offenses.

Paragraph (a)(2) specifies as an element that the actor must know that an official proceeding has been initiated or is likely to be initiated. The culpable mental state for the paragraph is "knowing" which is a defined term in RCCA § 22A-206. Applied here, "knowing" means that the actor must be practically certain that an official proceeding has been initiated or is likely to be initiated. This paragraph also requires proof that an official proceeding had been or was likely to be initiated. The terms "official proceeding" and "criminal investigation" are defined terms in RCCA § 22A-101.

Paragraph (a)(3) specifies multiple alternative elements, one of which must be proven for liability for the offense. The culpable mental state for paragraph (a)(3) is "purposely" a defined term under RCCA § 22A-206 that here requires that the actor consciously desire that the crime of violence committed by the actor results in influencing or causing specified conduct by a juror or court official in the official proceeding specified in paragraph (a)(2) as enumerated subparagraphs (a)(3)(A), (a)(3)(B), (a)(3)(C), and (a)(3)(D). 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 phrase. Here it is not necessary to prove that the actor's commission of a crime of violence actually influenced or caused a juror or court official to act in a specified way. Proof that the actor consciously desired to influence or cause a juror or court official to act in a specified way by committing a crime of violence is sufficient. This also means that an actor only commits the offense of tampering with a juror or court official if the actor commits the crime of violence with the specific purpose of influencing or causing specified actions by a juror or court official in the official proceeding specified in paragraph (a)(2). It is not sufficient for the government to establish that an actor committed a crime of violence that caused or could have influenced or caused certain

[76] *E.g.*, An actor who commits a crime of violence against the relative of a juror with the purpose of causing the juror to vote to acquit a person at trial is guilty of the offense of first degree tampering with a juror or court official even though the crime of violence was committed against the relative and not the juror because their purpose in committing the crime of violence was to cause the juror to vote to acquit.

actions by a juror or court official in the official proceeding person as specified in subparagraphs (a)(3)(A), (a)(3)(B), (a)(3)(C), and (a)(3)(D).[77]

Subparagraphs (a)(3)(A), (a)(3)(B), (a)(3)(C), and (a)(3)(D) specify the conduct the actor must have the purpose of influencing or causing a juror or court official to take as a result of the actor's commission of a crime of violence as well as the circumstance elements that the actor must believe to be true. Per RCCA §§ 22A-205-07, the culpable mental state of purposely in paragraph (a)(3) applies to each object in subparagraphs (a)(3)(A), (a)(3)(A), (a)(3)(C), and (a)(3)(D). 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 phrase.

Subparagraph (a)(3)(A) establishes that an actor commits first degree tampering with a juror or court officer when an actor commits a "crime of violence" with the purpose of "influencing the vote, opinion, decision, deliberation, or other official action of a juror in the official proceeding." This subparagraph requires proof that the actor consciously desired to influence a juror's vote, opinion, decision, deliberation, or other official action in the official proceeding specified in paragraph (a)(2). The government need not prove that actor, in fact influenced the vote, opinion, decision, deliberation, or other official action of a juror Official actions under this subparagraph include voting, developing and sharing opinions in connection to the official proceeding, deliberating, and other actions that are part of the jurors' duties in the official proceeding. ." "Crime of violence" and "juror" are defined terms in RCCA § 22A-101.

Subparagraph (a)(3)(B) establishes that an actor commits first degree tampering with a juror or court official when an actor commits a crime of violence with the purpose of "influencing the opinion, decisions, or other official action of a "court official" in the official proceeding." "Court official" is a defined term in RCCA § 22A-101. This subparagraph requires proof that the actor consciously desired to influence a court official's opinion, decision, or other official action in the official proceeding from paragraph (a)(2). The government need not prove that the actor, in fact, influenced the opinion, decision, or other official action of a court official

Subparagraph (a)(3)(C) establishes that an actor commits first degree tampering with a juror or court official when an actor commits a crime of violence with the purpose of "causing a juror to withhold any testimony or information that has the natural tendency to influence, or is capable of influencing, in the official proceeding." This paragraph requires proof that the actor consciously desired to cause a juror to withhold testimony or information that has the natural tendency to influence, or is capable of influencing, the

[77] *E.g.*, An actor commits a crime of violence against a person in connection to a dispute involving the person and the actor. The person is also a juror in a trial involving a close friend of the actor. Because the actor committed a crime of violence against the person, the person fears that convicting the actor's close friend might cause the actor to cause further harm to the person. The person subsequently votes to acquit the actor's close friend. In that instance, the actor's commission of a crime of violence did, in fact, influence a juror's vote. Nonetheless, the actor would not be guilty of the offense of tampering with a juror or court official because the actor did not have the purpose of influencing the juror's vote when the actor committed the crime of violence.

official proceeding specified in paragraph (a)(2). The term "juror" is a defined term in RCCA § 22A-101. from paragraph (a)(2).

Subparagraph (a)(3)(D) establishes that an actor commits first degree tampering with a juror or court official when an actor commits a crime of violence with the purpose of "causing a person to be absent from jury service to which the person has been legally summoned or ordered to return." This paragraph requires proof that the actor consciously desired to cause a person to be absent from jury service to which the actor was practically certain that the juror was legally summoned to or ordered to return. The government is not required to prove that the person had actually been summoned or ordered to return to jury service. Rather, the government need only prove that the actor was practically certain that the person had been summoned or ordered to return to jury service and that the crime of violence could cause the person to absent themselves from that jury service.

Subsection (b) establishes the RCCA offense of second degree tampering with a juror or court official. Second degree tampering with a juror or court official differs from first degree tampering with a juror or court official only with respect to paragraphs (b)(1).

Paragraph (b)(1) specifies two alternative elements. Subparagraph (b)(1)(A) proscribes knowingly, directly or indirectly, offering, conferring or agreeing to confer on another anything of value. "Knowingly" is a defined term[78] and applied here means the actor must be practically certain that they are offering, conferring, or agreeing to confer on another anything of value. The government need not prove that the actor directly offered, conferred, or agreed to confer something of value on another. The government may show that the actor indirectly offered, conferred, or agreed to confer something of value on another person as long as the government also shows that the actor acted with the requisite knowledge.

Paragraph (b)(1)(B) and sub-subparagraph (b)(1)(B)(i) specify, alternatively that the commission of a criminal offense other than obstruction of justice also satisfies the conduct element of second degree tampering with a witness or informant. The proscribed conduct includes any criminal act other than obstruction of justice under District law. Acts that are criminal in other jurisdictions but not criminal under District law are not covered by this paragraph. To prove that the actor committed a criminal act, each element of the underlying offense must be established beyond a reasonable doubt. "In fact," a defined term in RCCA § 22A-207, is used to indicate that there is no culpable mental state requirement as to a given element, here whether the accused committed one of the specified offenses. The use of "in fact" does not change the culpable mental states required in the specified offenses.

Sub-subparagraph (b)(1)(B)(ii) and sub-sub-subparagraphs (b)(1)(B)(ii)(I) and (II) require that the criminal offense committed under subparagraph (b)(1)(B) be performed with the intent to either cause a person to fear for the person's safety or the safety of another person or to cause a person to suffer significant emotional distress. "Significant emotional distress" is a defined term in RCCA § 22A-101 that means substantial, ongoing mental

[78] "Knowingly" is defined in RCCA § 22A-206.

suffering that may, but does not necessarily, require medical or other professional treatment or counseling. The distress must rise significantly above the level of uneasiness, nervousness, unhappiness, or similar feelings commonly experienced in day to day living. This paragraph does not require the actor to commit a criminal act that typically causes or is intended to cause a bodily injury or significant emotional distress and does not require the criminal act to be committed against a juror or court official themselves. Rather, the paragraph requires that the criminal act be intended to cause *any person*[79] to fear for the person's safety or the safety of another person or significant emotional distress. "Intent" is a defined term in RCCA § 22A-206 that here means the actor was practically certain that his or her conduct would cause a person to fear for the person's safety or the safety of another person. Per RCCA § 22A-205, the object of the phrase "with intent to" 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. The government need not prove that the actor actually caused a person to fear for the person's safety or the safety of another person. It is sufficient for the government to prove that the actor believed the criminal offense in paragraph (b)(1) would cause such a fear.

Paragraph (b)(2) is identical to paragraph (a)(2) and specifies that an actor must know that an official proceeding has been initiated.

Subparagraphs (b)(3)(A), (b)(3)(B), (b)(3)(C), and (b)(3)(D) specify the conduct the actor must have the purpose of influencing or causing a juror or court official to take as a result of the actor's commission of a criminal act or bribery-type conduct. These subparagraphs are identical the subparagraphs (a)(3)(A), (a)(3)(B), (a)(3)(C), and (a)(3)(D).

Paragraph (c) establishes the elements required for third degree tampering with a juror or court official. Third degree tampering with a juror or court official differs from first degree tampering with a juror or court official only with respect to paragraph (c)(1). Paragraph (c)(1) specifies that the commission of any criminal offense other than obstruction of justice under District law satisfies the conduct element of third degree tampering with a juror or court official. To prove that the actor committed a criminal offense, each element of the underlying offense must be established beyond a reasonable doubt. "In fact," a defined term in RCCA § 22A-207, is used to indicate that there is no culpable mental state requirement as to a given element, here whether the accused committed one of the specified offenses. The use of "in fact" does not change the culpable mental states required in the specified offenses.

[79] *E.g.*, An actor commits a criminal act with the intent to cause the relative of a judge to fear for their safety believing that the relative will relay their fear to the judge and cause the judge to engage in one of the enumerated acts in subparagraphs (a)(2)(A), (a)(2)(B), (a)(2)(C), and (a)(2)(D). This would constitute second degree tampering with a witness or informant even if the actor did not intend to cause the judge to fear for their safety or the safety of another. This accounts for cases where the actor commits a criminal act with the intent to cause a person to fear for their safety believing that the other person's fear will cause a judge to act in a certain manner for reasons other fear of the safety of another. For example, if the actor believes that causing a relative of the judge to fear for their safety could cause the relative to put pressure on the judge to rule a certain way due to the judge's responsiveness to the relative rather than the judge's fear.

Paragraph (c)(2) is identical to paragraphs (a)(2) and (b)(2) and specifies that an actor must know that an official proceeding has been initiated.

Subparagraphs (c)(3)(A), (c)(3)(B), (c)(3)(C), and (c)(3)(D) specify the conduct the actor must have the purpose of influencing or causing a juror or court official to take a specified action as a result of the actor's commission of a criminal act. These subparagraphs are identical the subparagraphs (a)(3)(A), (a)(3)(B), (a)(3)(C), and (a)(3)(D).

Subsection (d) establishes the penalties for first, second, and third degree tampering with a juror or court official. [*See* RCCA §§ 22A-603 and 22A-604 for the imprisonment terms and fines for each penalty class.] In addition, subparagraph (d)(4)(A) states that a conviction for first or second degree tampering with a juror or court official shall not merge with a conviction for any offense specified in paragraphs (a)(1) or (b)(1) when arising out of the same course of conduct. Subparagraph (d)(4)(B) states that a conviction for tampering with a juror or court official shall merge with a conviction for any other offense under chapters 31, 32, 33, or 34 of title 22 when arising out of the same course of conduct. These chapters include the offenses of bribery, impersonation of an official, perjury, false swearing, tampering with a witness or informant, tampering with evidence, escape, and other related offenses. Thus, if a person commits the offense of tampering with a juror or court official and obstruction of justice, the tampering with a juror or court official conviction would merge with the obstruction of justice conviction pursuant to the RCCA's rules of priority in RCCA § 22A-214. Tampering with a juror or court official merges with other offenses in chapters 31, 32, 33, or 34 regardless of whether they otherwise merge under § 22A-214. For all other offenses, a conviction tampering with a juror or court official may or may not merge with a conviction for that offense. The determination of merger with a conviction outside of chapters 31, 32, 33, or 34 is made pursuant to § 22A-214.

Relation to Current District Law. *The new tampering with a juror or court official offense changes District law in four main ways.*

First, the RCCA tampering with a juror or court official is a new, separate offense specifically addressing criminal offenses committed with the purpose of causing a juror or court official to engage in certain conduct in connection with an official proceeding. Current D.C. Code § 22-722(a) contains six paragraphs each enumerating multiple forms of obstruction of justice, including conduct that would fall under the RCCA tampering with a juror or court official statute.[80] All forms of obstruction of justice in the current code are subject to the same three to thirty-year penalty. In contrast, the RCCA creates a new, separate offense of tampering with a juror or court official covering instances where the actor seeks to bribe a person or commits a criminal offense and the actor has the purpose of affecting the actions of a juror or court officer or official proceeding. Although the conduct constituting tampering with a juror or court official overlaps with the revised

[80] D.C. Code §22-722(a)(1) applies to jurors and §§ 22-722(a)(2), (a)(3), and (a)(5) apply to officers and jurors.

obstruction of justice statute,[81] the RCCA treats conduct that threatens or harms a juror or court official participating in an official proceeding as more serious than other forms of obstructing justice and authorizes a higher maximum penalty for the offense of tampering with a juror or court officer than for obstruction of justice. This change improves the organization and proportionality of the revised statutes

Second, the RCCA tampering with a juror or court official offense establishes three grades based primarily on the seriousness of the criminal offense committed by the actor. Currently, the offense of obstruction of justice in D.C. Code § 22-722 is not graded and the statutory penalty range is 3 to 30 years for all forms of covered conduct.[82] In contrast, the RCCA tampering with a juror or court official statute has three grades based primarily on the seriousness of underlying conduct. The commission of a crime of violence to tamper with a juror or court official is punished more severely than the commission of a non-violent offense or bribery-type conduct. This grading scheme recognizes the greater harm to both participants and the justice system when the underling conduct involves violence or threatened violence. This change improves the proportionality of the revised statutes.

Third, the RCCA tampering with a juror or court official offense requires a person to engage in some type of separately-defined criminal offense or bribery-type conduct. Current D.C. Code § 22-722(a)(2) enumerates as one way of committing the offense "knowingly us[ing] intimidating or physical force, threaten[ing] or corruptly persuad[ing] another person, or by threatening letter or communication, endeavor[ing] to influence, intimidate, or impede a witness or officer in an official proceeding. . . ." Also, D.C. Code § 22-722(a)(6) punishes "corruptly, or by threats of force. . . obstruct[ing] or imped[ing] or endeavor[ing] to obstruct or impede the due administration of justice in any official proceeding." The statute does not define the term "corruptly" with respect to either provision and efforts to define the term have not cleared up confusion.[83] DCCA case law has repeatedly sought to address the meaning of the term, following similar Supreme Court jurisprudence, and interpreted the word to mean something akin to an "intent to undermine the integrity of the pending investigation."[84] Similarly, D.C. Code § 22-722(a)(3) punishes

[81] Pursuant to paragraph (d)(4), a conviction for RCCA tampering with a juror or court official would merge with a conviction for the revised obstruction of justice offense when arising from the same course of conduct.
[82] *E.g.*, An actor who murdered a juror or judge is guilty of the same offense as an actor who tries to bribe a juror or judge even though the harm to the juror or judge is miniscule in comparison.
[83] *See United States v. Poindexter*, 951 F.2d 369, 378 (D.C. Cir. 1991) ("We must acknowledge that, on its face, the word "corruptly" is vague; that is, in the absence of some narrowing gloss, people must "guess at its meaning and differ as to its application."); Daniel A. Shtob, *Corruption of A Term: The Problematic Nature of 18 U.S.C. S1512(c), the New Federal Obstruction of Justice Provision*, 57 VAND. L. REV. 1429, 1441–42 (2004) ("The use of "corruptly" as a scienter requirement within the obstruction of justice statutes has elicited judicial struggle and made application and enforcement of its provisions unduly difficult. Unable to rely on clear precedent, multiple circuits have referenced dictionary definitions, antiquated legislative histories, and nuances in linguistic analysis to define the term.").
[84] *Hawkins v. United States*, 119 A.3d 687, 101 (D.C. 2015) ("This court recently discussed the definition of "corruptly" in *Brown v. United States,* 89 A.3d 98 (D.C.2014), where we noted that in *Arthur Andersen LLP v. United States,* 544 U.S. 696, 125 S.Ct. 2129, 161 L.Ed.2d 1008 (2005), the Supreme Court "analyzed the term 'corruptly'" in the federal obstruction-of-justice statute by "distilling its connotations into the word 'wrongdoing.'" *Brown,* 89 A.3d at 104; *see Arthur Andersen,* 544 U.S. at 705, 125 S.Ct. 2129 (suggesting

"harass[ing] another person with the intent to hinder, delay, prevent, or dissuade, the person…." without defining the term "harass." The DCCA has said that the use of "words or actions having a reasonable tendency to badger, disturb, or pester the ordinary person" can constitutes harassment under § 22-722(a)(3).[85] In contrast, the revised statute eliminates the ambiguous terms "corruptly" and "harass" and requires some predicate criminal offense or bribery-type conduct for there to be liability for tampering with a witness or informant. Both the inclusion of bribery-type conduct[86] and the breadth of the criminal code, which includes non-violent offenses such as contempt, solicitation of perjury, bribery, blackmail, as well as inchoate and accomplice liability, provides liability for attempts to tamper with a juror or court official.[87] The requirement of an otherwise criminal act or bribery-type conduct promotes uniformity in application, guards against the criminalization of protected speech, and also ensures that there is fair notice of what conduct is prohibited. This change improves the clarity and consistency of the revised statutes.

Fourth, the revised statute explicitly states that convictions for tampering with a juror or court official merge with convictions for offenses found in chapters 31, 32, 33, or 34 arising from the same course of conduct but do not merge with convictions for the underlying criminal offense. The current D.C. Code does not include a general merger provision, and the DCCA has held that offenses merge only if the elements of one offense are necessarily included in the elements of the other offense.[88] Application of this test, sometimes called the *Blockburger*[89] rule, to the obstruction of justice statute has been

---

that the word "corruptly" is normally associated with "wrongful, immoral, depraved, or evil" acts); *see also Riley v. United States,* 647 A.2d 1165, 1169 n.11 (D.C.1994) (citing to the Black's Law Dictionary definition of "corruptly" as "a wrongful design to acquire some pecuniary or other advantage") (citing Black's Law Dictionary 345 (6th ed.1990)). In another recent case, *Smith v. United States,* 68 A.3d 729, 742 (D.C.2013), we implicitly equated "corruptly" with "intent to undermine the integrity of the pending investigation" when listing the elements of obstruction under subsection (a)(6). That language is similar to the definition employed by several federal appellate courts—that to act "corruptly" means to act "knowingly and dishonestly, with the specific intent to subvert or undermine the due administration of justice." *See, e.g., United States v. Kay,* 513 F.3d 432, 454 (5th Cir.2007); *United States v. Gordon,* 710 F.3d 1124, 1151 (10th Cir.2013) (defining "corruptly" as "with an improper purpose and to engage in conduct knowingly and dishonestly with the specific intent to subvert, impede or obstruct the" proceeding) (quoting *United States v. Friske,* 640 F.3d 1288, 1291 (11th Cir.2011)). The language in *Smith* also mirrors the jury instruction provided in this case—'with the intent to undermine the integrity of the proceeding.'"); *see also United States v. Brady*, 168 F.3d 574, 578 (1st Cir. 1999) ("There is no hope in one opinion of providing a definitive gloss on the word 'corruptly'; neither would it be wise to try.").

[85] *Wynn v. United States*, 80 A.3d 211, 217 (D.C. 2013).

[86] *E.g*., If an actor offers a juror something of value with the purpose of causing the juror not to return to deliberate, the actor could be liable of second degree tampering with a juror or court official even if the actor did not commit a separate criminal offense.

[87] *E.g*., If an actor threatens to accuse a judge of a criminal offense that the actor knows the judge did not commit with the purpose of causing the judge to grant a motion to suppress evidence, the actor has committed the offense of blackmail and the requirement that the actor commit any criminal offense in the tampering with a juror or court official statute would be satisfied.

[88] *Byrd v. United States*, 598 A.2d 386, 389 (D.C. 1991).

[89] *See Blockburger v. United States*, 284 U.S. 299, 301 (1932) ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.").

inconsistent and has resulted in persons receiving multiple convictions for obstruction of justice for the exact same conduct.[90] In contrast, the RCCA tampering with a juror or court official offense requires merger for related convictions in chapters 31, 32, 33, or 24 arising out of the same course of conduct.[91] At the same time, the RCCA precludes merger with a underlying criminal offense for first and second degree tampering with a juror or court official.[92] Precluding merger with the underlying criminal offense is appropriate given the statutory purpose of protecting both the integrity of official proceedings and its participants. This change improves the consistency, clarity, and proportionality of the statute.

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

First, the RCCA tampering with a juror or court official statute requires a "purposeful" mental state to establish that the actor's criminal conduct constitutes tampering with a juror or court official. Current D.C. Code § 22-722 (a)(1), which applies only to jurors, proscribes "knowingly us[ing] intimidation or physical force, threaten[ing] or corruptly persuad[ing] another person, or by threatening letter or communication, endeavor[ing] to influence, intimidate, or impede a juror in the discharge of the juror's official duties." Similarly. D.C. Code § 22-722(a)(2), which applies to court officials generally, uses the same language—"knowingly us[ing] intimidation or physical force, threaten[ing] or corruptly persuad[ing] another person, or by threatening letter or communication, endeavor[ing] to influence, intimidate, or impede"—when such actions are done "with intent" to cause an officer to take certain specified actions. Though these paragraphs use the term "knowingly," the term is undefined in the statute. Also, the DCCA has held that the term "corruptly," used in D.C. Code § 22-722 (a)(2), is a *mens rea* for the offense[93] that means something akin to an "intent to undermine the integrity of the pending investigation [or proceeding]."[94] At the same, however, the DCCA has stated that

[90] For example, in *McCollugh v. United States*, 827 A.2d 48, 59-60 (D.C. 2003), the DCCA upheld separate convictions for obstruction of justice under both D.C. §22-722(a)(2) (criminalizing the use of force to prevent truthful testimony in an official proceeding) and D.C. §22-722(a)(4) (criminalizing injuring any person on account of the person giving information to an investigator in a criminal investigation) in a case where the defendant killed an eyewitness who provided information about a murder to the police.

[91] This change in merger analysis is in addition to the general changes made to merger rules provided for RCCA § 22A-214.

[92] *E.g.*, An actor is convicted of second degree assault, first degree tampering with a juror or court official, and first degree obstruction of justice for assaulting a juror with the purpose of causing the juror to reach a certain verdict. In that scenario, the conviction for obstruction of justice would merge into the first degree tampering with a juror or court official offense. The second degree assault and first degree tampering with a juror or court official convictions, however, would not merge.

[93] *Hawkins v. United States*, 119 A.3d 687, 700 (D.C. 2015) (referring to the term "corruptly" as "the statutory mens rea requirement").

[94] *Hawkins v. United States*, 119 A.3d 687, 700 (D.C. 2015) (referring to the term "corruptly" as "the statutory mens rea requirement"). *Id.* at 101 ("In another recent case, *Smith v. United States,* 68 A.3d 729, 742 (D.C.2013), we implicitly equated "corruptly" with "intent to undermine the integrity of the pending investigation" when listing the elements of obstruction under subsection (a)(6)"). More recently, the DCCA noted concern about using the phrase specific intent to describe the *mens rea* of the obstruction of justice

this definition is similar to federal cases interpreting "corruptly" as both acting "*knowingly* and dishonestly, with the specific intent to subvert or undermine the due administration of justice" as well as another federal case interpreting "corruptly" as acting "with an improper *purpose* and to engage in conduct knowingly and dishonestly with the specific intent to subvert, impede or obstruct the proceeding."[95]

Additionally, the statutory terms "endeavors"[96] and "with intent"[97] provide similarly vague, undefined statements of the requisite *mens rea*. The DCCA has stated that the term "endeavors," found in paragraphs (a)(1) and (a)(2), requires that a defendant make "any effort or essay to accomplish the evil *purpose* that the statute was enacted to prevent" suggesting that conduct modified by the term "endeavors" requires a purposeful mental state.[98] The phrase "with intent," has not been clearly defined as requiring knowledge or purpose in District case law either generally[99] or with respect to the obstruction of justice statute. DCCA case law holds that obstruction of justice is a "specific intent" offense which would require at least a knowingly or purposeful mental state.[100] However, it does not appear that the DCCA has expressly stated with respect to the obstruction of justice statute whether "with intent" requires proof of knowledge or purpose with respect to the objects of the phrase.

To resolve all these ambiguities, the RCCA tampering with a juror or court official statute expressly requires a purposeful mental state with respect to the result that an actor desires to cause by commission of a criminal offense. Requiring a purposeful mental state is justified due to the breadth of the revised tampering with a juror or court official statute and the potential for jurors or court officials to respond to things other than an actor's conduct. It would be inappropriate to treat the commission of a criminal offense as tampering with a juror or court official merely because the actor knew that the criminal

---

statute. *See Fitzgerald v. United States*, 228 A.3d 429, 441 n.13 (D.C. 2020) (noting that prior case law has recognized that D.C. Code §22-722(a)(6) requires specific intent but expressing concern regarding the use of specific intent to describe mens rea) (citing *Carrell v. United States*, 165 A.3d 314, 323-34 & nn.26 & 27 (D.C. 2017) (*en banc*)); *see also Jones v. United States*, 124 A.3d 127, 130 n.3 (D.C. 2015) ("Ideally, instead of describing a crime as a 'general intent' or 'specific intent' crime, courts and legislatures would simply make clear what mental state . . . is required for whatever material element is at issue (for example, conduct, resulting harm, or an attendant circumstance such as dealing drugs in a school zone or assaulting a police officer).").

[95] *Hawkins v. United States*, 119 A.3d 687, 101 (D.C. 2015) (Stating the language "with intent to undermine the integrity of a pending investigation" is "is similar to the definition employed by several federal appellate courts—that to act "corruptly" means to act "knowingly and dishonestly, with the specific intent to subvert or undermine the due administration of justice." *See, e.g., United States v. Kay,* 513 F.3d 432, 454 (5th Cir.2007); *United States v. Gordon,* 710 F.3d 1124, 1151 (10th Cir.2013) (defining "corruptly" as "with an improper purpose and to engage in conduct knowingly and dishonestly with the specific intent to subvert, impede or obstruct the" proceeding) (quoting *United States v. Friske,* 640 F.3d 1288, 1291 (11th Cir.2011))").

[96] "Endeavors" is found in paragraphs (a)(1) and (a)(2).

[97] "With intent" is found in paragraphs (a)(2) and (a)(3).

[98] *Irving v. United States*, 673 A.2d 1284, 1289 (D.C. 1996).

[99] *See* RCCA commentary to § 22A-206.

[100] *See Hawkins v. United States*, 119 A.3d 687, 695 (D.C. 2015) (stating that "obstruction of justice is a specific intent crime requiring intent to impair the proceeding) (citing *Crutchfield v. United States*, 779 A.2d 307, 325 (D.C. 2001); *Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005) ("[I]f the defendant lacks knowledge that his actions are likely to affect the judicial proceeding," we explained, "he lacks the requisite intent to obstruct.").

offense might have an impact on a juror or court official when the actor did not desire to impact their actions. This change improves the clarity and proportionality of the statute.

Second, the RCCA tampering with a juror or court official offense specifies the actions taken by jurors that an actor must have the purpose of impacting through the commission of a criminal act or bribery-type conduct. Currently, the D.C. Code § 22-722 obstruction of justice statute creates liability for "endeavor[ing] to influence, intimidate, or impede a juror in the discharge of the juror's official duties."[101] The statute does not state more specifically what actions would fall under the "discharge of official duties." There is no DCCA case law on point. To resolve this ambiguity, the RCCA statute specifies that voting, providing opinions, making decisions, and participating in deliberations are official actions taken by jurors and opinions and decision are actions taken by court officials. In addition, the RCCA uses the phrase "other official action" as a catch-all encompassing actions that may be part of a juror or court official's official duties but do not fall under the other actions specified. This change provides more clarity on what is required to establish the culpable mental state.

Other changes to the revised statute are clarificatory in nature and not intended to substantively change current District law.

The RCCA tampering with a juror or court official offense uses a newly defined term in RCCA § 22A-101 "court official." The term "officer" is used, but not defined, in the current D.C. Code § 22-722 obstruction of justice statute. D.C. Code § 1-301.45 states that the term "officer" in any act or resolution "includes any person authorized by law to perform the duties of the office." However, there is no case law on point applying this definition to the current obstruction of justice statute. Through use of the RCCA definition for "court official", the RCCA tampering with a juror or court official offense provides greater clarity and specificity as to the scope of the offense.

[101] D.C. Code §22-722(a)(1).

RCCA § 22A-4304. Retaliation against a witness, informant, juror, or court official.

(a) *First degree.* An actor commits first degree retaliation against a witness, informant, juror, or court official when the actor:
  (1) With the purpose of harming another person because of the person's prior:
    (A) Appearance at or testimony in an official proceeding;
    (B) Provision of any information, document, record, image, audiovisual recording, or other object related to a violation of any criminal statute to a court official in an official proceeding or law enforcement officer in a criminal investigation; or
    (C) Performance of their official duties as a juror or court official in an official proceeding;
  (2) In fact, commits a crime of violence against any person.

(b) *Second degree.* An actor commits first degree retaliation against a witness, informant, juror, or court official when the actor:
  (1) With the purpose, in whole or part, of harming another person because of the person's prior:
    (A) Appearance at or testimony in an official proceeding;
    (B) Provision of any information, document, record, image, audiovisual recording, or other object related to a violation of any criminal statute to a court official in an official proceeding or law enforcement officer in a criminal investigation; or
    (C) Performance of their official duties as a juror or court official in an official proceeding;
  (2) In fact, commits a "predicate offense" against any person.

(c) *Penalties*.
  (1) First degree retaliation against a witness, informant, juror, or court official is a Class 9 felony.
  (2) Second degree retaliation against a witness, informant, juror, or court official is a Class B misdemeanor.
  (3) *Merger.*
    (A) A conviction for retaliation against a witness, informant, juror, or court official shall not merge with a conviction for any offense specified in paragraphs (a)(2) or (b)(2) of this section when arising from the same act or course of conduct except as provided in subparagraph (c)(3)(B) of this paragraph.
    (B) A conviction for retaliation against a witness, informant, juror, or court official shall merge with a conviction for any other offense under chapters 31, 32, 33, or 34 of this title arising from the same course of conduct. The sentencing court shall follow the procedures specified in subsections (b) and (c) of § 22A-214.

(d) *Definitions*.
  (1) In this section, the term "predicate offense" means:
    (A) Any crime under this title that includes as an element in a bodily injury, sexual act, sexual contact, confinement or death;

(B) Any crime under this title that includes as an element damage to or destruction of a dwelling, building, or the property of another;
(C) A criminal attempt, solicitation, or conspiracy to commit any crime under this title that includes as an element:
(i) A bodily injury, sexual act, sexual contact, confinement, death; or
(ii) Damage to or destruction of a dwelling, building, or the property of another.

Explanatory Note. *The RCCA retaliation against a witness, informant, juror, or court official offense punishes crimes of violence and predicate criminal offenses performed with the purpose of harming a person in retaliation for their participation in a criminal investigation or official proceeding as a witness, informant, juror, or court official. The RCCA retaliation against a witness, informant, juror, or court official is divided into two degrees, one felony and one misdemeanor, based on the seriousness of the criminal offense committed against another person. A conviction for retaliation against a witness, informant, juror, or court official merges with other offenses in Chapters 31, 32, 33, and 34 but does not merge with a conviction for an underlying offense. For all other offenses arising out of the same course of conduct, merger is determined by the criteria stated in RCCA § 22A-214. Retaliation against a witness, informant, juror, or court official is a new offense that replaces certain provisions previously covered by current D.C. Code § 22-722.*[102]

Subsection (a) specifies the conduct prohibited as first degree retaliation against a witness, informant, juror, or court official. Paragraph (a)(1) specifies the culpable mental state of purposely under RCCA § 22A-206(a) for the offense of retaliation against a witness, informant, juror, or court official. The paragraph requires that the actor consciously desire to harm a person because of the person's participation in an official proceeding or criminal investigation. Subparagraphs (a)(1)(A), (a)(1)(B), and (a)(1)(C) specify acts of participation by persons protected by the statute. 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 the phrase. Here it is not necessary that the person the actor desires to harm actually participated in a criminal investigation or official proceeding in one of the manners stated. Proof that the actor believed that the person participated in a criminal investigation or official proceeding in one of the manners specified in (a)(1)(A)-(a)(1)(C) is sufficient. The terms "official proceeding", "law enforcement officer". "juror", and "court official" in (a)(1)(A)-(a)(1)(C) are defined terms in RCCA § 22A-101.

Paragraph (a)(2) states that the prohibited conduct is the commission of any "crime of violence" against any person when done with the purpose of harming another based on their participation in an official proceeding or criminal investigation. This requires that the government prove that the actor, in fact, committed a crime of violence under District law. "Crime of violence" and "in fact", are defined terms in RCCA §§ 22A-101 and 22A-207

[102] *See* D.C. Code § 22-722(a)(4)-(a)(5).

respectively. The term "in fact" is used to indicate that there is no culpable mental state requirement as to a given element, here whether the accused committed a crime of violence. The use of "in fact" does not change the culpable mental states required in the specified offense constituting a crime of violence.

Subsection (b) states the elements for second degree retaliation against a witness, informant, juror, or court official. Second degree retaliation against a witness, informant, juror, or court official differs from first degree retaliation against a witness, informant, juror, or court official only with respect to paragraph (b)(2). Paragraph (b)(2) establishes the conduct required for second degree retaliation against a witness, informant, juror, or court official. The proscribed conduct includes the commission of a "predicate offense" against any person for the purpose of harming a participant in an official proceeding or criminal investigation. The term "predicate offense" is defined for this section only to include any crime (or an attempt, solicitation, or conspiracy to commit such crime) that includes as an element a bodily injury, sexual act, sexual contact, confinement, death, or damage to or destruction of a dwelling, building, or the property of another. The terms "bodily injury", "sexual act", "sexual contact", "dwelling", "building" and "property of another are defined terms in RCCA § 22-101.

Subsection (c) establishes the penalties for first and second degree retaliation against a witness, informant, juror, or court official. [*See* RCCA §§ 22A-603 and 22A-604 for the imprisonment terms and fines for each penalty class.] In addition, paragraph (c)(3)(A) states that a conviction for retaliation against a witness, informant, juror, or court official shall not merge with a conviction for any offense specified in paragraphs (a)(2) or (b)(2) when arising from the same act or course of conduct except as provided in paragraph (c)(3)(B). Paragraph (c)(3)(B) states that a conviction for retaliation against a witness, informant, juror, or court reporter shall merge with a conviction for any other offense under chapters 31, 32, 33, or 34 of title 22 when arising out of the same course of conduct. Retaliation against a witness, informant, juror, or court official merges with other offenses in chapters 31, 32, 33, or 34 regardless of whether they otherwise merge under § 22A-214. The RCCA's rules of priority in RCCA § 22A-214 apply to merger under this subsection. For all other offenses, a conviction for retaliation against a witness, informant, juror, or court official may or may not merge with a conviction for that offense. The determination of merger with a conviction outside of chapters 31, 32, 33, or 34 is made pursuant to § 22A-214.

Subsection (d) defines "predicate offense" for this section only. The terms "bodily injury," "building," "crime of violence," "dwelling," "property of another," "sexual act," and "sexual contact" are defined terms in RCCA § 22A-101.

Relation to Current District Law*. The RCCA retaliation against a witness, informant, juror, or court official changes District law in five main ways.*

First, the RCCA retaliation against a witness, informant, juror, or court official is a new, separate offense specifically addressing criminal offenses committed in retaliation for a person's participation in an official proceeding or criminal investigation. Current D.C. Code § 22-722(a) contains six paragraphs each enumerating multiple forms of obstruction

of justice, including conduct that would fall under the RCCA retaliation against a witness, informant, juror, or court official statute. All forms of obstruction of justice in the current code are subject to the same three to thirty-year penalty. In contrast, the RCCA creates a new, separate offense of retaliation against a witness, informant, juror, or court official covering instances where the actor commits a specified criminal offense with the purpose of harming a person in retaliation for that person's participation in an official proceeding or criminal investigation. This change improves the organization and proportionality of the revised statutes.

Second, the RCCA retaliation against a witness, informant, juror, or court official offense establishes two grades based on the seriousness of the crime committed with the purpose of harming a person in retaliation for their participation in an official proceeding or criminal investigation. Currently, the offense of obstruction of justice in D.C. Code § 22-722 is not graded and the statutory penalty range is three to thirty-years for all forms of covered conduct.[103] In contrast, the RCCA retaliation against a witness, informant, juror, or court official statute has two grades based on the seriousness of the crime committed in retaliation for a person's participation in an official proceeding or criminal investigation. The commission of a crime of violence in retaliation against a witness, informant, juror, or court official is punished more severely than the commission of a less serious criminal offense. This change improves the proportionality of the revised statutes.

Third, the RCCA retaliation against a witness, informant, juror, or court official requires an actor to commit a separately-defined criminal offense. Current D.C. Code § 22-722(a)(4)-(a)(5) prohibit "injur[ing] or threaten[ing] to injure" any person or their property on account of a person's provision of information in an investigation or performance of their official duties as a juror, witness, or officer respectively. The statute does not define the terms "injures" or "threatens" and does not reference any criminal statute dealing with those concepts. DCCA case law does not clearly establish the scope of these terms.[104] In contrast, the RCCA retaliation against a witness, informant, juror, or court official statute requires the commission of a "crime of violence" or "predicate offense" and proof of each established element for that offense. This change improves the clarity of the statute.

Fourth, the RCCA retaliation against a witness, informant, juror, or court official offense does not require as an element that any person was, in fact, a witness, informant, juror, or court official. Current D.C. Code § 22-722(a)(4)-(a)(5) prohibit injuring or threatening to injure any person or their property on account of a person's provision of information in an investigation or performance of their official duties as a juror, witness,

[103] *E.g.*, an actor who murdered a witness is guilty of the same offense as an actor who tries to bribe a witness to evade a subpoena even though the harm to the witness in miniscule in comparison.

[104] It is possible that threatens to injury could extend to blackmail. One case interpreting a prior version of the statute containing the language "injures any person or his property" suggests that even threats to "a person's personal or business reputation" could be covered by this language. *Ball v. United States*, 429 A.2d 1353, 1359 (D.C. 1981)(noting that a conviction for a threat to tell a witness' family about her prostitution unless she agrees not to testify was upheld under the federal obstruction of justice statute) (citing *Courtney v. United States*, 390 F.2d 521, 523 (9th Cir.), *cert. denied*, 393 U.S. 857, 89 S.Ct. 98, 21 L.Ed.2d 126 (1968)); *see also Hall v. United States*, 343 A.2d 35, 39 (D.C. 1975) ("That is to say it is not necessary that the 'threats or force' utilized to influence the witness entail physical violence; acts such as blackmail and unfulfilled threats of violence could support an obstruction of justice charge.").

or officer respectively. These provisions require that the government proves as elements that a person retaliated against, in fact, provided information in a criminal investigation[105] or that the person was, in fact, a witness, juror or officer performing their official duties.[106] In contrast, the RCCA retaliation with a witness, informant, juror, or court official offense focuses on the actor's purpose in committing a crime of violence or predicate offense and does not require that any person, in fact, have participated in an official proceeding or criminal investigation as a witness, juror, court official, or informant. This change improves the clarity of the revised statutes and may reduce a possible gap in liability.

Fifth, the revised retaliation against a witness, informant, juror, or court official explicitly states that convictions for retaliation against a witness, informant, juror, or court official merge with convictions for offenses found in chapters 31, 32, 33, or 34 arising from the same course of conduct but do not merge with convictions for the underlying criminal offense. The current D.C. Code does not include a general merger provision, and the DCCA has held that offenses merge only if the elements of one offense are necessarily included in the elements of the other offense. Application of this test, sometimes called the *Blockburger* rule, to the obstruction of justice statute been inconsistent and has resulted in persons receiving multiple convictions for obstruction of justice for the exact same conduct. In contrast, the RCCA retaliation against a witness, informant, juror, or court official offense requires merger for related convictions in chapters 31, 32, 33, or 24 arising out of the same course of conduct. At the same time, the RCCA precludes merger of a conviction for an underlying criminal offense with a conviction for retaliation against a witness, informant, juror, or court official. Precluding merger with the underlying criminal offense is appropriate given the statutory purpose of protecting the integrity of criminal investigations and official proceedings as well as their participants. This change improves the consistency, clarity, and proportionality of the statute.

Beyond these five changes to current District law, one other aspect of the revised statute may constitute a substantive change to District law.

The RCCA retaliation against a witness, informant, juror, or court official offense requires a "purposeful" mental state to establish that the actor's criminal conduct constitutes retaliation against a witness, informant, juror, or court official. Current D.C. Code §§ 22-722(a)(4)-(a)(5), which prohibit threatening to injure persons in retaliation for providing information in a criminal investigation and or performing their official duties as witnesses, jurors, or officers, respectively, do not specify a mental state. The DCCA has not directly addressed *mens rea* with respect to these provisions but has noted that two other provisions of § 22-722 have been held to require specific intent.[107] Simultaneously, however, the DCCA expressed concern about using the phrase "specific intent" at all. At

[105] D.C. Code § 22-722(a)(4).
[106] D.C. Code § 22-722(a)(5).
[107] *Fitzgerald v. United States*, 228 A.3d 429, 441n. 13(D.C. 2020) ("We note that our case law has not addressed the *mens rea* element of (a)(4), but has recognized that two other subsections of D.C. Code § 22-722 require specific intent: (a)(2), which pertains to interfering with witnesses in official proceedings, *Crutchfield v. United States*, 779 A.2d 307, 325 (D.C. 2001), and (a)(6), which pertains to impeding "the due administration of justice in any official proceeding," *Hawkins v. United States*, 119 A.3d 687, 695 (D.C. 2015)").

a minimum, specific intent requires knowledge or purpose. The RCCA resolves this ambiguity by expressly requiring a "purposeful" mental state with respect to the commission of a crime of violence or predicate offense. Requiring a purposeful mental state is justified due to the breadth of the RCCA retaliation against a witness, informant, juror, or court official. This change improves the clarity and proportionality of the statute.

RCCA § 22A-4305. Tampering with evidence.

(a) *First Degree.* An actor commits tampering with evidence in the first degree when the actor:
  (1) Knowingly destroys, conceals, removes, or alters a document, record, image, audiovisual recording, or other object, regardless of medium, either:
    (A) With the purpose of impairing its value as evidence in an official proceeding or criminal investigation that, in fact, has been or is likely to be initiated for a predicate felony; or
    (B) With the purpose of preventing its production or use in an official proceeding or criminal investigation that, in fact, has been or is likely to be initiated for a predicate felony; or
  (2) Knowingly makes, presents, or uses any document, record, image, audiovisual recording, or other object, regardless of medium:
    (A) With the purpose of deceiving another person as to its veracity; and
    (B) With the purpose of affecting the course or outcome of an official proceeding or criminal investigation that, in fact, has been or is likely to be initiated for a predicate felony.

(b) *Second Degree.* An actor commits tampering with evidence in the second degree when the actor:
  (1) Knowingly destroys, conceals, removes, or alters a document, record, image, audiovisual recording, or other object, regardless of medium, either:
    (A) With the purpose of impairing its value as evidence in an official proceeding or criminal investigation that, in fact, has been or is likely to be initiated; or
    (B) With the purpose of preventing its production or use in an official proceeding or criminal investigation that, in fact, has been or is likely to be initiated; or
  (2) Knowingly makes, presents, or uses any document, record, image, audiovisual recording, or other object, regardless of medium:
    (A) With the purpose of deceiving another person as to its veracity; and
    (B) With the purpose of affecting the course or outcome of an official proceeding or criminal investigation that, in fact, has been or is likely to be initiated.

(c) *Penalties.*
  (1) First degree tampering with evidence is a Class 9 felony.
  (2) Second degree tampering with evidence is a Class B misdemeanor.
  (3) *Merger*. A conviction for tampering with evidence shall merge with a conviction for any other offense under chapters 31, 32, 33, or 34 of this title arising from the same course of conduct. The sentencing court shall follow the procedures specified in subsections (b) and (c) of § 22A-214.

(d) *Definitions*.

(1) In this section, the term "predicate felony" means:
  (A) Any Class 1, 2, 3, 4, 5, 6, or 7 crime under this title that includes as an element in a bodily injury, sexual act, sexual contact, confinement or death; or
  (B) A criminal attempt, solicitation, or conspiracy to commit any Class 1, 2, 3, 4, 5, 6, or 7 crime under this title that includes as an element a bodily injury, sexual act, sexual contact, confinement or death.

Explanatory Note. *The RCCA tampering with evidence primarily punishes the destruction, concealment, removal, or material alteration of physical evidence with the purpose of impairing its value as evidence in an official proceeding or preventing its production or use in an official proceeding or criminal investigation. The statute also punishes making, presenting or using physical evidence with the purpose of deceiving another and affecting an official proceeding or criminal investigation. The penalty gradations are based on the seriousness of the offense underlying the official proceeding. The RCCA tampering with evidence offense is divided into two degrees, one felony and one misdemeanor, and merges with convictions for other offenses in Chapters 31, 32, 33, and 34. For all other offenses arising out of the same course of conduct, merger is determined by the criteria stated in RCCA § 22A-214. The revised tampering with evidence offense replaces the tampering with physical evidence offense in current. D.C. Code § 22-723.*

Subsection (a) specifies the elements of crimes the first degree tampering with evidence offense.

Paragraph (a)(1) prohibits knowingly destroying, concealing, removing, or altering a document, record, image, audiovisual recording, or other object. The terms "audiovisual recording" and "image" have the meanings specified in RCCA § 22A-101. "Knowingly" is a defined term in RCCA § 22A-206, and as applied here means that an actor must be aware or believe that their conduct is practically certain to cause the destruction, concealment, removal, or alteration of a document, record, image, audiovisual recording, or other object. The medium of the object, e.g., a record on a computer hard disk, is irrelevant. Finally, paragraph (a)(1) specifies that that the conduct must be committed as further specified in subparagraph (a)(1)(A) or (a)(1)(B).

Subparagraph (a)(1)(A) specifies that an actor must act with the purpose of impairing the evidence's value as evidence in an official proceeding or criminal investigation that has, in fact, been initiated or is likely to be initiated for a "predicate felony." "Purpose" is a defined term in RCCA § 22A-206 that refer to a conscious desire for a result to occur. 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. Per RCCA § 22A-205, the actor need only consciously desire that the destruction, concealment, removal, or alteration of the document, record, image, audiovisual record, or other object impairs the value of the evidence in an official proceeding or criminal investigation. The government need not prove that the document, record, image, audiovisual recording, or other object actually is evidence or likely to be evidence in an official proceeding or criminal investigation. It is

sufficient for the government to prove that the actor believed the document, record, image, audiovisual record, or other object to be evidence or potential evidence and that the actor believed destroying, concealing, removing, or altering the document, record, image, audiovisual record, or other object could impair its value as evidence in an official proceeding or criminal investigation. The subparagraph also specifies that the government must prove that an official proceeding or criminal investigation has, in fact, been initiated or is likely to be initiated for a "predicate felony". The phrase "in fact" in subparagraph (a)(1) indicates there is no culpable mental state requirement for the requirement that the official proceeding or criminal investigation has been initiated or is likely to be initiated for a "predicate felony". Applied here, this means the government need not prove that the actor knew the criminal investigation or official proceeding had been initiated or was likely to be initiated for a predicate felony. The terms "official proceeding" and "criminal investigation" are defined terms in RCCA § 22A-101.

Subparagraph (a)(1)(B) specifies an alternative prohibited purpose of preventing the production or use of the evidence in an official proceeding or criminal investigation for a "predicate felony." Per RCCA § 22A-205, the actor need only consciously desire that the destruction, concealment, removal, or alteration of the document, record, image, audiovisual record, or other object impairs prevents its production of use in an official proceeding or criminal investigation that the actor believes has been initiated or is likely to be initiated. The government need not prove that the document, record, image, audiovisual recording, or other object actually is evidence or likely to be evidence in an official proceeding or criminal investigation. It is sufficient for the government to prove that the actor believed the document, record, image, audiovisual record, or other object to be evidence or potential evidence and that the actor believed destroying, concealing, removing, or altering the document, record, image, audiovisual record, or other object could prevent its production or use in an official proceeding or criminal investigation. The subparagraph also specifies that the government must prove that an official proceeding has, in fact, been initiated or is likely to be initiated for a "predicate felony". The phrase "in fact" in subparagraph (a)(1) indicates there is no culpable mental state requirement for the requirement that the official proceeding or criminal investigation has been initiated or is likely to be initiated for a "predicate felony". Applied here, this means the government need not prove that the actor knew the criminal investigation or official proceeding had been initiated or was likely to be initiated for a predicate felony. The terms "official proceeding" and "criminal investigation" are defined terms in RCCA § 22A-101.

The term "predicate felony" is defined for this offense in subsection (e) only to include Class 1, 2, 3, 4, 5, 6, and 7 crimes that include as an element a bodily injury, sexual act, sexual contact, confinement, or death as well as any criminal attempt, solicitation, or conspiracy to commit a Class 1, 2, 3, 4, 5, 6, or 7 crime where an element of the offense includes a bodily injury, sexual act, sexual contact, confinement, or death. Because this definition includes all felonies resulting in a bodily injury, sexual act, sexual contact, confinement, or death, the term predicate felony is broader than the term "crime of violence" in RCCA § 22A-101. At the same time, the statute does not encompass felonies that do not require a criminal bodily, injury, sexual act, sexual contact, confinement, or

death unless the felony was an inchoate offense of attempt, solicitation, or conspiracy where one of the required elements was a bodily injury, sexual act, sexual contact, confinement, or death.

Paragraph (a)(2) prohibits knowingly making, presenting, or using any document, record, image, audiovisual recording or other object with the purpose of deceiving another as to its veracity and affecting the course or outcome of an official proceeding or criminal investigation for a "predicate felony." The medium of the object, e.g., a record on a computer hard disk, is irrelevant. "Knowingly" is a defined term in RCCA § 22A-206, and as applied here means that an actor must be aware or believe that their conduct is practically certain to result in the manufacture, presentation, or use of a document, record, image, audiovisual recording, or other object. Finally, paragraph (a)(2) specifies that that the conduct must be committed as further specified in either subparagraph (a)(1)(A) and (a)(1)(b).

Subparagraph (a)(2)(A) specifies that an actor must act with the purpose of deceiving another person as to the veracity of fabricated, presented, or utilized evidence. "Purpose" is a defined term in RCCA § 22A-206 that refers to a conscious desire for a result to occur. 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 the actor need only consciously desire that the fabricated, presented, or utilized evidence deceives another as to its veracity and affects the course or outcome of an official proceeding or criminal investigation. The government need not prove that the fabricated, presented, or utilized evidence actually deceived another person as to its veracity or affected the course or outcome of an official proceeding or criminal investigation. It is sufficient for the government to prove that the actor believed the that the fabricated, presented, or utilized evidence could deceive another as to its veracity and affect the course or outcome of an official proceeding or criminal investigation. The subparagraph also specifies that the government must prove that an official proceeding has, in fact, been initiated or is likely to be initiated for a "predicate felony". The phrase "in fact" in subparagraph (a)(1) indicates there is no culpable mental state requirement for the requirement that the official proceeding has been initiated or is likely to be initiated for a "predicate felony". Applied here, this means the government need not prove that the actor knew the criminal investigation or official proceeding had been initiated or was likely to be initiated for a predicate felony. The terms "official proceeding" and "criminal investigation" are defined terms in RCCA § 22A-101.

The term "predicate felony" is defined for this offense in subsection (e) and has the same meaning as in subparagraph (a)(1)(A).

Subsection (b) states the elements for second degree tampering with evidence. The sole difference between first and second degree tampering with evidence is that second degree tampering with evidence does not require that the official proceeding or criminal investigation that has been or is likely to be initiated be for a "predicate felony." This difference is accomplished by the removal of the phrase "for a predicate felony" in subparagraphs (b)(1)(A), (b)(1)(B), and (b)(2)(B). The statutory text for second degree

tampering with evidence is otherwise identical to the statutory text of first degree tampering with evidence.

Subsection (c) establishes the penalties for first and second tampering with evidence. [*See* RCCA §§ 22A-603 and 22A-604 for the imprisonment terms and fines for each penalty class.] In addition, paragraph (c)(3) states that a conviction for tampering with evidence shall merge with a conviction for any other offenses under chapters 31, 32, 33, or 34 of title 22. These chapters include the offenses of bribery, impersonation of an official, perjury, false swearing, tampering with a witness or informant, tampering with evidence, escape, and other related offenses. Thus, if a person commits obstruction of justice by tampering with evidence, the tampering with evidence conviction would merge with the obstruction of justice conviction pursuant to the RCCA's rules of priority in RCCA § 22A-214. Tampering with evidence merges with other offenses in chapters 31, 32, 33, or 34 regardless of whether they otherwise merge under § 22A-214. For all other offenses, a conviction for tampering with evidence may or may not merge with a conviction for that offense. The determination of merger with a conviction outside of chapters 31, 32, 33, or 34 is made pursuant to § 22A-214.

Subsection (e) defines the term "predicate felony" for this section only. The terms "bodily injury", "sexual act", and "sexual contact" are defined terms in RCCA § 22A-101.

Relation to Current District Law. *The revised tampering with evidence statute changes District law in three main ways.*

First, the revised tampering with evidence statute establishes two grades of the offense based on the seriousness of the underlying predicate felony. Currently, the D.C. Code § 22-723(b) tampering with evidence offense is not graded and carries a maximum possible punishment of three years in prison and/or $12,500 in fines regardless of the seriousness of the case.[108] In contrast, the RCCA divides the offense into two degrees based on the seriousness of the official proceeding or criminal investigation. Where the subject of the official proceeding or criminal investigation is a predicate felony, the offense of tampering with evidence is a Class 9 felony. In cases involving misdemeanors or felonies that do not have as an element a bodily injury, sexual act, sexual contact, confinement or death, tampering with evidence is a Class B misdemeanor. This grading scheme recognizes that the community interest in prosecution for more serious offenses involving a bodily injury, sexual act, sexual contact, confinement or death, remains greater than the interest in prosecution for lesser offenses, even if the impact on the integrity of the proceedings is the same. This change improves the proportionality of the revised statutes.

Second, the revised tampering with evidence statute establishes liability for fabricating or using fabricated evidence in an official proceeding or criminal investigation. Current D.C. Code § 22-723(a) proscribes altering, destroying, mutilating, concealing, or removing physical evidence with intent to impair its integrity or its availability for use in the official proceeding or criminal investigation. However, the tampering with evidence statute in D.C. Code § 22-723 does not address fabricating real evidence or using fabricated

[108] For example, an actor who tampers with physical evidence in a shoplifting case is subject to the same penalty as a person who tampers with evidence in a first-degree sexual assault case.

evidence in an official proceeding or criminal investigation.[109] In contrast, the revised tampering with evidence specifies that it is an offense to knowingly make, present, or use any document, record, image, audiovisual recording, or other object with the purpose of deceiving another person as to its veracity and affecting the course or outcome of an official proceeding or criminal investigation that has been initiated or is likely to be initiated. This change reduces a potential gap in liability and improves the clarity of the revised statutes.

Third, the revised statute explicitly states that convictions for tampering with evidence merge with convictions for offenses found in chapters 31, 32, 33, or 34 arising from the same course of conduct but do not merge with convictions for the underlying criminal offense. The current D.C. Code does not include a general merger provision, and the DCCA has held that offenses merge only if the elements of one offense are necessarily included in the elements of the other offense.[110] Application of this test, sometimes called the *Blockburger*[111] rule, to the obstruction of justice statute been inconsistent and has resulted in persons receiving multiple convictions for obstruction of justice for the exact same conduct.[112] In contrast, the revised tampering with evidence requires merger for related convictions in chapters 31, 32, 33, or 24 arising out of the same course of conduct.[113] This change improves the consistency, clarity, and proportionality of the statute.

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

First, the revised tampering with evidence statute requires a "purposeful" mental state to establish that the actor's knowing destruction, concealment, removal, or alteration of evidence constitutes tampering with evidence. Current D.C. Code § 22-723(a) proscribes altering, destroying, mutilating, concealing or removing a record, document, or other object "with intent to impair its integrity or availability for use in [an] official proceeding." The phrase "with intent" is not defined by D.C. Code § 22-723(a) and there is no case law directly on point. However, dicta in tampering with evidence case law suggests that "with intent" under the current law requires a "purposeful" mental state.[114]

---

[109] Fabrication of evidence may fall under the current obstruction of justice statute's catch-all provision. *See* D.C. Code §22-722(a) ("A person commits the offense of obstruction of justice if that person…[c]orruptly, or by threats of force, any way obstructs or impedes or endeavors to obstruct or impede the due administration of justice in any official proceeding.").

[110] *Byrd v. United States*, 598 A.2d 386, 389 (D.C. 1991).

[111] *See Blockburger v. United States*, 284 U.S. 299, 301 (1932) ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.").

[112] For example, in *McCollugh v. United States*, 827 A.2d 48, 59-60 (D.C. 2003), the DCCA upheld separate convictions for obstruction of justice under both D.C. § 22-722(a)(2) (criminalizing the use of force to prevent truthful testimony in an official proceeding) and D.C. § 22-722(a)(4) (criminalizing injuring any person on account of the person giving information to an investigator in a criminal investigation) in a case where the defendant killed an eyewitness who provided information about a murder to the police.

[113] This change in merger analysis is in addition to the general changes made to merger rules provided for RCCA § 22A-214.

[114] *See Timberlake v. United States*, 758 A.2d 978, 983 (D.C. 2000) ("Because the object of the knowledge element of the offense is an "official proceeding," there must be a meaningful distinction between

Resolving this ambiguity, the revised tampering with evidence statute requires that a person act with the purpose of impairing an objects value as evidence, preventing its use or production, or deceiving a person as to its veracity and affecting the course or outcome of an official proceeding or criminal investigation. Requiring a purposeful mental state is justified due to the breadth of the revised tampering with evidence statute. It would be inappropriate to treat the destruction, concealment, removal, alteration, or fabrication of evidence as tampering with evidence if the actor did not have the purpose of affecting an official proceeding or criminal investigation. This change improves the clarity and proportionality of the statute.

Second, the revised tampering with evidence offense requires a "knowingly" mental state with respect to the actor's conduct in destroying, concealing, removing, altering, making, presenting, or using any document or object with the specified intent. Current D.C. Code § 22-723(a) requires a person to act "knowing or having reason to believe an official proceeding has begun or knowing that an official proceeding is likely to be instituted," while the statute is unclear what, if any, mental state applies to the following actions of "alters, destroys, mutilates, conceals, or removes a record, document, or other object." The terms "knowing" and "having reason to believe" are not defined by the statute. There is no DCCA case law on the meaning of "having reason to believe" or what mental state is required for alteration, etc., and the limited case law[115] considering application of the "knowing" requirement does not explain the meaning of the term. Resolving this ambiguity, the revised tampering with evidence statute explicitly states that proof of knowledge is required with respect to these conduct elements. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[116] Requiring a knowing culpable mental state also makes the revised statute consistent with the conduct elements of other obstruction of justice statutes.[117] This change improves the clarity and consistency of the revised statutes.

concealment to avoid detection by a suspect, i.e. concealment to prevent an official proceeding from ever being instituted, and the concealment of evidence that constitutes tampering, i.e. concealment which occurs after an individual knows or has reason to know that an official proceeding has begun or knows that such a proceeding is likely to be instituted, the purpose of which is to make that evidence unavailable to the proceeding.").

[115] *See, e.g., Timberlake v. United States*, 758 A.2d 978, 983 (D.C. 2000); *Mason v. United States*, 170 A.3d 182, 190 (D.C. 2017).

[116] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[117] *See, e.g.,* RCCA § 22A-4303 (c)(1)(A) (tampering with a juror or court official).

RCCA § 22A-4305. Hindering Apprehension or Prosecution.

(a) *First Degree.* An actor commits first degree hindering apprehension or prosecution when the actor:
  (1) With the purpose of impeding or preventing the apprehension, prosecution, conviction, or punishment of another person for prior conduct;
  (2) Knowingly:
    (A) Harbors or conceals the other person; or
    (B) Provides or aids in providing the other person a weapon, transportation, disguise or other means of avoiding apprehension; and
  (3) The prior conduct that the other person is charged with or liable to be charged with, in fact, constitutes a "predicate felony."

(b) *Second Degree.* An actor commits second degree hindering apprehension or prosecution when the actor:
  (1) With the purpose of impeding or preventing the apprehension, prosecution, conviction, or punishment of another person for prior conduct;
  (2) Knowingly:
    (A) Harbors or conceals the other person; or
    (B) Provides or aids the other person by providing a weapon, transportation, disguise or other means of avoiding apprehension.

(c) *Penalties*.
  (1) First degree hindering apprehension or prosecution is a Class 9 felony.
  (2) Second degree hindering apprehension or prosecution is a Class A misdemeanor.
  (3) *Merger.* A conviction for hindering apprehension or prosecution shall merge with a conviction for any other offense under chapters 31, 32, 33, or 34 of this title arising from the same course of conduct. The sentencing court shall follow the procedures specified in subsections (b) and (c) of § 22A-214.

(d) *Definitions*.
  (1) In this section, the term "predicate felony" means:
    (A) Any Class 1, 2, 3, 4, 5, 6, or 7 crime under this title that includes as an element in a bodily injury, sexual act, sexual contact, confinement or death; or
    (B) A criminal attempt, solicitation, or conspiracy to commit any Class 1, 2, 3, 4, 5, 6, or 7 crime under this title that includes as an element a bodily injury, sexual act, sexual contact, confinement or death.

Explanatory Note. *The RCCA hindering apprehension or prosecution offense punishes specified conduct in aid of another with the purpose of preventing the apprehension, prosecution, conviction, or punishment of another offense. The RCCA*

hindering apprehension or prosecution is divided into two degrees, one felony and one misdemeanor, based on the seriousness of the underlying criminal charges against the person aided by the actor. A conviction for the offense merges with other offenses in Chapters 31, 32, 33, and 34. For all other offenses arising out of the same course of conduct, merger is determined by the criteria stated in RCCA § 22A-214. This offense replaces the accessory after the fact offense in the current D.C. Code.[118]

Subsection (a) specifies the elements of the first degree hindering apprehension or prosecution offense.

Paragraph (a)(1) establishes that the actor must engage in conduct with the purpose of impeding or preventing the apprehension, prosecution, conviction, or punishment of another person for prior conduct. "Purpose" is a defined term in RCCA § 22A-206 that refers to a conscious desire for a result to occur. 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. The paragraph requires only that an actor consciously desire to impede or prevent the apprehension, prosecution, conviction, or punishment of another person for prior conduct by engaging in the conduct specified in paragraph (a)(2).

Paragraph (a)(2) specifies two alternative conduct elements for the offense and provides that the culpable mental state for either conduct element is "knowingly." Subparagraph (a)(2)(A) specifies as prohibited conduct harboring or concealing the person whose apprehension, prosecution, conviction, or punishment, the actor consciously desires to prevent. Subparagraph (a)(2)(B) specifies as prohibited conduct providing or aiding someone else in providing the other person a weapon, transportation, disguise, or other means of avoiding apprehension. Knowingly is a defined term in RCCA § 22A-206 and, applied here, means that the actor must be aware or believe that their conduct is practically certain to harbor or conceal the other person, or else provide or aid in providing the other person with a weapon, transportation, disguise, or other means of avoiding apprehension.

Paragraph (a)(3) states as a circumstance element for first degree hindering apprehension or prosecution that the person aided by the actor must, in fact, be charged with or liable to be charged with a "predicate felony" for their prior conduct. "Predicate felony" is a defined term in subsection (d). The modifier "prior" requires that the alleged criminal conduct of the other person have occurred prior to the assistance by the actor. "In fact," a defined term in RCCA § 22A-207, is used to indicate that there is no culpable mental state requirement as to a given element, here whether the accused committed one of the specified predicate offenses. The use of "in fact" does not change the culpable mental states required in the specified offenses.

Subsection (b) establishes the RCCA offense of second degree hindering apprehension or prosecution. Second degree hindering apprehension or prosecution does not require as a circumstance that the person aided be charged with or liable to be charged with a predicate felony. In all other respects, second degree hindering apprehension or prosecution is identical to first degree hindering apprehension or prosecution.

[118] D.C. Code §22-1806.

Subsection (c) establishes the penalties for first and second degree hindering apprehension or prosecution. [*See* RCCA §§ 22A-603 and 22A-604 for the imprisonment terms and fines for each penalty class.] In addition, paragraph (c)(3) states that a conviction for hindering apprehension or prosecution shall merge with a conviction for any other offense under chapters 31, 32, 33, or 34 of title 22 when arising out of the same course of conduct. Hindering apprehension or prosecution merges with other offenses in chapters 31, 32, 33, or 34 regardless of whether they otherwise merge under § 22A-214. The rules of priority in RCCA § 22A-214 apply to merger under this subsection. For all other offenses, a conviction for hindering apprehension or prosecution may or may not merge with a conviction for that offense. The determination of merger with a conviction outside of chapters 31, 32, 33, or 34 is made pursuant to § 22A-214.

Subsection (d) defines the term "predicate felony" for this offense. The terms "bodily injury", "sexual act", and "sexual contact" are defined terms in RCCA § 22A-101.

Relation to Current District Law. *The RCCA's new hindering apprehension or prosecution offense changes District law in three main ways.*

First, the RCCA establishes hindering apprehension or prosecution as an offense against the government rather than an offense against individuals that merges with convictions for any other offense under chapters 31, 32, 33, or 34 arising from the same course of conduct. Current D.C. Code § 22-1806, the accessory after the fact statute, specifies penalties but does not define the elements of the crime. The elements of the accessory after the fact offense are defined wholly by case law.[119] Current District case law holds that the offense of accessory after the fact is an offense against the individual victim of a crime rather than an offense against government operations.[120] Consequently, "whether these convictions merge, depends on whether the underlying offenses of the principal merge."[121] Thus, a person may be convicted of multiple counts of accessory after the fact for the same course of conduct unless the principal's convictions would merge.[122]

---

[119] Pursuant to case law, the elements of the offense have been summarized as: "(1) that the offense [] had been committed, (2) that the defendant knew that this offense had been committed, (3) that, knowing that this offense had been committed, the defendant provided assistance to the person who committed it, and (4) that the defendant did so with the specific intent to hinder or prevent that person's arrest, trial, or punishment." *Jones v. United States*, 716 A.2d 160, 163 (D.C. 1998).

[120] *Heard v. United States*, 686 A.2d 1026, 1030 (D.C. 1996). The appellant in *Heard* argued that accessory after the fact was a form of obstructing justice and, thus, a crime against the government, not against individuals. The DCCA stated that this was true jurisdictions that have broken with the common law by statute but not in the District where the offense was still based on the common law. *Id*. This holding makes the District an outlier as nearly all other jurisdictions treat accessoryship after the fact as an offense separate from the offense committed by the principal. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.03(A)(5) (4d ed. 2006). The holding means that an actor who provides assists a principal who committed multiple offenses in avoiding apprehension can be punished as an accessory after the fact for each offense committed by the principal even though the actor engaged in a single course of conduct to frustrate apprehension and prosecution.

[121] *Heard v. United States*, 686 A.2d 1026, 1031 (D.C. 1996).

[122] *Heard v. United States*, 686 A.2d 1026, 1030 (D.C. 1996) ("Because the statute clearly ties the punishment of the accessory to the underlying crime committed by the principal and because under the common law principles of accessory after the fact made applicable by D.C. Code § 49-301 the accessory is considered to

In contrast, the RCCA categorizes and treats the offense of hindering apprehension or prosecution as an offense against the government not individuals. Liability under the RCCA hindering apprehension or prosecution offense is wholly distinct from accomplice liability. Thus, an actor who hinders the apprehension of an individual charged with multiple counts through a single course of conduct is guilty of a single count of hindering apprehension or prosecution under the RCCA.[123] This moots the DCCA's prior holding that multiple counts of accessory after the fact do not merge and allows convictions for multiple counts of hindering apprehension or prosecution to merge pursuant to RCCA § 22A-214 when arising from the same course of conduce, even when the principal's convictions would not merge.[124] In addition, the RCCA offense includes a merger provision that provides that a conviction for hindering apprehension or prosecution merges with any conviction under Chapters 31, 32, 33, or 34 arising from the same course of conduct. These changes more accurately reflect the nature of the offense of hindering apprehension or prosecution as an offense against the government and improve the proportionality of code. This change improves the organization, clarity, and proportionality of the revised statutes.

Second, the RCCA imposes liability for conduct designed to hinder apprehension or prosecution of another person who has been charged or is liable to be charged with a crime regardless of whether the other person actually committed the offense. Current D.C. Code § 22-1806, the accessory after the fact statute, specifies penalties but does not define the elements of the crime. The elements of the accessory after the fact offense are defined wholly by case law.[125] Under current District case law, the crime of accessory after the fact is inextricably linked to the principal's crime and the commission of an offense by another is a prerequisite to conviction for accessory after the fact.[126] In contrast, the RCCA imposes liability where the actor acts with the purpose of preventing the apprehension, prosecution, conviction, or punishment of another irrespective of whether the other person

---

be an accomplice of the principal, we conclude that multiple convictions of the accessory based on a single course of conduct can be obtained when one act forms, or would form, the basis for convicting the principal of multiple violations of the same statute.").

[123] The RCCA does distinguish first degree and second degree based on the seriousness of the offense the other person is charged with or liable to be charged with. Thus, to establish first-degree hindering apprehension or prosecution in cases where the other person was charged with or liable to be charged with multiple offenses, the government would need to establish that at least one of the offenses was a predicate felony. A second degree hindering apprehension or prosecution conviction arising from the same course of conduct would merge into the first degree conviction as a lesser-included offense.

[124] As with other offenses in this chapter, a conviction for hindering apprehension or prosecution would also merge with a conviction for any other provides that a conviction for hindering apprehension or prosecution merges with a conviction for any other offense under chapters 31, 32, 33, or 34 arising from the same course of conduct pursuant to RCCA § 22A-4305(c)(3) and similar provisions.

[125] Pursuant to case law, the elements of the offense have been summarized as: "(1) that the offense [] had been committed, (2) that the defendant knew that this offense had been committed, (3) that, knowing that this offense had been committed, the defendant provided assistance to the person who committed it, and (4) that the defendant did so with the specific intent to hinder or prevent that person's arrest, trial, or punishment." *Jones v. United States*, 716 A.2d 160, 163 (D.C. 1998).

[126] *Heard v. United States*, 686 A.2d 1026, 1030 (D.C. 1996).

committed an offense.[127] The crux of the RCCA offense is impeding or preventing the apprehension, prosecution, conviction, or punishment of a person that the actor believes has been charged with or is liable to be charged with an offense. Such conduct is more appropriately treated as distinct from the crimes of the principal. An actor who harbors another person knowing that an arrest warrant has been issued for that person with the intent to prevent their prosecution is not blameless merely because the government is unable to establish guilt beyond a reasonable doubt of the person the actor harbors. Similarly, the fact that an actor harbors another person who committed more serious crimes does not have a more culpable mental state than a person who harbors another person wanted on less serious crimes.[128] This change improves the proportionality of the revised statutes.

Third, the revised offense of hindering apprehension or prosecution has two gradations based on the seriousness of the offense, with fixed maximum sentences for each gradation. D.C. Code § 22-1806, the accessory after the fact statute, currently authorizes a maximum penalty of 20 years incarceration when the underlying offense is punishable by death[129] and a maximum of ½ the maximum fine or penalty for offenses punishable by incarceration or fine. In contrast, the revised code continues to authorize different penalties based on the seriousness of the offense committed by another but distinguishes gradations on whether the conduct that the other person is charged with is a "predicate felony." This change improves the clarity, consistency, and proportionality of the revised statutes.

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

First, the RCCA hindering apprehension or prosecution offense requires a "purposeful" mental state to establish that an actor's conduct in harboring, concealing, or providing aid to a person constitutes the offense. Current D.C. Code § 22-1806, the accessory after the fact statute, specifies penalties but does not define the elements of the crime. The elements of the accessory after the fact offense are defined wholly by case law.[130] Under current case law, accessory after the fact requires proof that the actor rendered their assistance with the "specific intent that it prevent the principal's arrest, trial,

[127] Because the RCCA does not require the commission of an offense, proof of knowledge of commission of an offense is likewise not required. The RCCA instead ensures that the government must prove that the actor believed that the other person had been charged or was liable to be charged with an offense by specifying that the actor must intent to impede the apprehension, prosecution, conviction or punishment of another.

[128] The RCCA's decision to differentiate first and second degree hindering apprehension or prosecution is based on the impact of the actor's conduct rather than the actor's mental state.

[129] The District repealed the death penalty in 1981 rendering this part of the statute seemingly moot. *See* District of Columbia Death Penalty Repeal Act of 1980, D.C. Law 3-113 (Feb. 26, 1981). Nonetheless, the DCCA has held that the phrase "crimes punishable by death" is "still viable as a shorthand reference to a category of particularly serious offenses" formally punishable by death. *Butler v. United States*, 481 A.2d 431, 447 (D.C. 1984).

[130] Pursuant to case law, the elements of the offense have been summarized as: "(1) that the offense [] had been committed, (2) that the defendant knew that this offense had been committed, (3) that, knowing that this offense had been committed, the defendant provided assistance to the person who committed it, and (4) that the defendant did so with the specific intent to hinder or prevent that person's arrest, trial, or punishment." *Jones v. United States*, 716 A.2d 160, 163 (D.C. 1998).

or punishment."[131] However, the DCCA has never clearly defined the meaning of the phrase "specific intent"—indeed, as one DCCA judge has observed, the phrase itself is little more than a "rote incantation[]" of "dubious value" which obscures "the different *mens rea* elements of a wide array of criminal offenses."[132] Resolving this ambiguity, the RCCA requires the actor to "purposely" try to impede or prevent the apprehension, prosecution, conviction, or punishment of another. "Purposely" is a standardized culpable mental state term that is defined in the RCCA general part and is similar in meaning to a specific intent *mens rea*.[133] A purposeful culpable mental state requirement is consistent with the standard for liability as an accomplice under the RCCA[134] and current District law,[135] and distinguishes liability for those who only knowingly provide assistance (but do not necessarily desire to do so) or provide humanitarian assistance or shelter. This change improves the clarity and proportionality of the statute.

Second, the RCCA hindering apprehension or prosecution offense requires a "knowingly" mental state with respect to the actor's conduct in harboring, concealing, or providing (or aiding in providing) means of avoiding apprehension. Current D.C. Code § 22-1806, the accessory after the fact statute, specifies penalties but does not define the elements of the crime. The elements of the accessory after the fact offense are defined wholly by case law.[136] Under current case law, accessory after the fact requires proof that the actor had knowledge that the person they were assisting committed an offense,[137] but there is no case law on point as to the culpable mental state required as to the provision of assistance. Resolving this ambiguity, the RCCA hindering apprehension or prosecution statute requires a knowing culpable mental state as to the conduct of harboring, concealing, or otherwise providing assistance. Applying a knowing culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established

---

[131] *Jones v. United States*, 716 A.2d 160, 165–66 (D.C. 1998); *Little v. United States*, 709 A.2d 708, 710 (D.C. 1998).

[132] *Buchanan v. United States*, 32 A.3d 990, 1000 (D.C. 2011) (Ruiz, J. concurring).

[133] *See* RCCA § 22A-206, Definitions and Hierarchy of Culpable Mental States. As the commentary on RCCA § 22A-206 describes, District case law variously describes a specific intent *mens rea* as similar to either a knowing or purposeful culpable mental state requirement, depending on context.

[134] *See* RCCA § 22A-210, Accomplice Liability.

[135] *Wilson-Bey v. United States*, 903 A.2d 818, 831 (D.C. 2006) ("[t]o establish a defendant's criminal liability as an aider and abettor, [] the government must prove . . . that the accomplice . . . *wished to bring about* [the criminal venture], and [] *sought by his action to make it succeed*.") (emphasis added)).

[136] Pursuant to case law, the elements of the offense have been summarized as: "(1) that the offense [] had been committed, (2) that the defendant knew that this offense had been committed, (3) that, knowing that this offense had been committed, the defendant provided assistance to the person who committed it, and (4) that the defendant did so with the specific intent to hinder or prevent that person's arrest, trial, or punishment." *Jones v. United States*, 716 A.2d 160, 163 (D.C. 1998).

[137] *Butler v. United States*, 481 A.2d 431, 442 (D.C. 1984). As noted above, the RCCA hindering apprehension or prosecution offense does not require as an element the actual commission of an offense by another. The RCCA's requirement that the actor have knowledge that the actor is harboring, concealing, or providing aid or assistance in avoiding apprehension means that the actor must be practically certain that person is wanted, or likely to be wanted, for the commission of an offense even if the statute no longer requires knowledge of the commission of an offense.

practice in American jurisprudence.[138] Requiring a knowing culpable mental state also makes the revised statute consistent with the conduct elements of other obstruction of justice statutes.[139] This change improves the clarity and consistency of the revised statutes.

Third, the RCCA hindering apprehension or prosecution offense specifies the conduct an actor must engage in for the purpose of impeding or preventing the apprehension, prosecution, conviction, or punishment of another person. Current D.C. Code § 22-1806, the accessory after the fact statute, specifies penalties but does not define the elements of the crime. The elements of the accessory after the fact offense are defined wholly by case law.[140] Current case law provides that an actor must provide "assistance" that has the possibility of helping another person in evading apprehension,[141] but does not further specify what types of assistance are prohibited. Resolving this ambiguity, the RCCA hindering apprehension or prosecution statute specifies that harboring, concealing, or providing aid in the form of a weapon, transportation, or disguise is prohibited. In addition, the RCCA statute includes aiding a person by providing "other means of avoiding apprehension" to encompass any other, unspecified means of avoiding apprehension. This change improves the clarity of the revised statutes.

Fourth, the RCCA hindering apprehension or prosecution offense applies only to assistance provided after the alleged criminal conduct by the other person. Current D.C. Code § 22-1806, the accessory after the fact statute, specifies penalties but does not define the elements of the crime. The elements of the accessory after the fact offense are defined wholly by case law.[142] DCCA case law currently requires that an offense must be completed before accessory liability attaches and that an accessory after the fact must not be a principal in the commission of the offense.[143] Resolving the scope of when liability attaches, the RCCA hindering apprehension or prosecution offense specifies that liability

---

[138] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[139] *See, e.g.,* RCCA § 22A-4303 (c)(1)(A) (tampering with a juror or court official).

[140] The elements of the offense have been summarized in case law as: "(1) that the offense [] had been committed, (2) that the defendant knew that this offense had been committed, (3) that, knowing that this offense had been committed, the defendant provided assistance to the person who committed it, and (4) that the defendant did so with the specific intent to hinder or prevent that person's arrest, trial, or punishment." *Jones v. United States*, 716 A.2d 160, 163 (D.C. 1998).

[141] *Butler v. United States*, 481 A.2d 431, 444 (D.C. 1984) ("The definition of accessory after the fact also requires assistance or aid designed to hinder apprehension, trial or punishment. Just as a "person cannot aid or abet a crime which has already been completed," a person cannot assist a criminal to evade apprehension or punishment where the escape has already been effected.") (internal citations omitted).

[142] The elements of the offense have been summarized in case law as: "(1) that the offense [] had been committed, (2) that the defendant knew that this offense had been committed, (3) that, knowing that this offense had been committed, the defendant provided assistance to the person who committed it, and (4) that the defendant did so with the specific intent to hinder or prevent that person's arrest, trial, or punishment." *Jones v. United States*, 716 A.2d 160, 163 (D.C. 1998).

[143] *Little v. United States*, 709 A.2d 708, 711 (D.C. 1998)(stating that the District follows Maryland case law requiring as elements that the offense be completed prior to the accessoryship and that the actor not be a principal to the commission of the felony); *United States v. Barlow*, 470 F.2d 1245, 1253 (D.C. Cir. 1972) ("The very definition of the crime also requires that the felony not be in progress when the assistance is rendered because then he who renders assistance would aid in the commission of the offense and be guilty as a principal.");

attaches only to assistance rendered to another person wanted for conduct occurring or alleged to have occurred before the assistance. This temporal requirement, which is consistent with current requirement of a completed offense in case law, means that an actor who is otherwise liable as a principal or accomplice is not also liable for hindering apprehension or prosecution by virtue of their participation in or encouragement of the underlying offense.[144] This change improves the clarity of the revised statutes.

[144] *E.g.*, An actor is the getaway driver for persons robbing a bank. Under current case law, the robbery is deemed to be in progress "so long as the robber indicates by his actions that he is dissatisfied with the location of the stolen goods immediately after the crime." *Williams v. United States*, 478 A.2d 1101, 1105 (D.C. 1984); s*ee also Stevenson v. United States*, 522 A.2d 1280, 1283 (D.C. 1987) (holding that the appellant could be convicted as an aider and abettor but not as an accessory after the fact for driving robbers away from the crime because the crime was still in progress when appellant rendered assistance). Thus, the actor in that scenario is subject to liability as the principal until asportation of the stolen goods is complete. Where the actor is subject to liability as the principal for their assistance because the offense is ongoing, liability for hindering apprehension or prosecution does not attach. In contrast, where the actor is not subject to liability for an ongoing offense because the offense has been completed, the actor is subject to liability under the RCCA hindering apprehension or prosecution statute. This is consistent with current case law which permits liability as an accessory after the fact for persons providing assistance such as transportation after the completion of an offense. *See United States v. Barlow*, 470 F.2d 1245, 1253 (D.C. Cir. 1972) (explaining "evidence of [accessory after the fact] is most frequently found in acts which harbor, protect and conceal the individual criminal such as by driving him away after he commits a murder").

Appendix A – Black Letter Text of Draft Revised Statutes

RCCA § 22A-101. Definitions. [To be incorporated with other definitions in RCCA § 22A-101]

"Court of the District of Columbia" means the Superior court of the District of Columbia or the District of Columbia Court of Appeals.

"Court Official" means any of the following persons acting within their professional role in connection to an official proceeding:

(A) Judicial officer;

(B) A lawyer or a person employed by or working with the lawyer;

(C) An employee of any Court of the District of Columbia;

(D) An employee of the Court Services and Offender Supervision Agency, Pretrial Services Agency, or Family Court Social Services Division; or

(E) An independent contractor or employee of an independent contractor hired by any Court of the District of Columbia.

"Criminal Investigation" means an investigation of a violation of any criminal law in effect in the District of Columbia.

"Juror" means a petit juror, grand juror, or any person summoned to the Superior Court of the District of Columbia for the purpose of serving on a jury.

"Official Proceeding" means:

(A) Any trial, hearing, grand jury proceeding, or other proceeding in a court of the District of Columbia; or

(B) Any hearing, official investigation, or other proceeding conducted by the Council of the District of Columbia or an agency or department of the District of Columbia government, excluding criminal investigations.

RCCA § 22A-4301. Obstruction of Justice.

(a) *First Degree*. An actor commits first degree obstruction of justice when the actor:
   (1) Knowing that an official proceeding or criminal investigation has been initiated for any crime that is, in fact, a predicate felony;
   (2) With the purpose of obstructing or impeding the criminal investigation or the proper functioning and integrity of the official proceeding;
   (3) In fact, commits any criminal offense under District of Columbia law.

(b) *Second Degree*. An actor commits second degree obstruction of justice when the actor:
   (1) Knowing that an official proceeding or criminal investigation has been initiated for any crime;

(2) With the purpose of obstructing or impeding the criminal investigation or the proper functioning and integrity of the official proceeding;

(3) In fact, commits any criminal offense under District of Columbia law.

(c) *Penalties*.

(1) First degree obstruction of justice is a Class 9 felony.

(2) Second degree obstruction of justice is a Class A misdemeanor.

(3) Merger.

(A) A conviction for obstruction of justice shall not merge with a conviction for any offense specified in paragraphs (a)(3) or (b)(3) of this section when arising from the same act or course of conduct except as provided in subparagraph (c)(3)(B) of this paragraph.

(B) A conviction for obstruction of justice shall merge with a conviction for any other offense under chapters 31, 32, 33, or 34 of this title arising from the same course of conduct. The sentencing court shall follow the procedures specified in subsections (b) and (c) of § 22A-214.

(d) *Definitions*.

(1) In this section, the term "predicate felony" means:

(A) Any Class 1, 2, 3, 4, 5, 6, or 7 crime under this title that requires as an element a bodily injury, sexual act, sexual contact, confinement or death; or

(B) A criminal attempt, solicitation, or conspiracy to commit any Class 1, 2, 3, 4, 5, 6, or 7 crime under this title that requires as an element a bodily injury, sexual act, sexual contact, confinement or death.

RCCA § 22A-4302. Tampering with a Witness or Informant.

(a) *First Degree.* An actor commits first degree tampering with a witness or informant when the actor:

(1) In fact, commits a crime of violence;

(2) Knowing that an official proceeding or criminal investigation has been initiated or is likely to be initiated;

(3) With the purpose of causing a person to:

(A) Testify or inform falsely in the official proceeding or criminal investigation;

(B) Withhold any testimony or information that has the natural tendency to influence, or is capable of influencing, the official proceeding or criminal investigation;

(C) Elude legal process summoning the person to testify or supply evidence in the official proceeding;

(D) Be absent from the official proceeding to which the person has been legally summoned; or

(E) Destroy, conceal, remove, or alter a document, record, image, audiovisual recording, or other object so as to either:

(i) Impair its value as evidence in the official proceeding; or
(ii) Prevent its production or use in the official proceeding.

(b) *Second Degree.* An actor commits second degree tampering with a witness or informant when the actor:
(1) Either:
(A) Knowingly, directly or indirectly, offers, confers or agrees to confer upon another anything of value; or
(B) In fact:
(i) Commits any criminal offense other than obstruction of justice under District of Columbia law;
(ii) With intent to cause a person to:
(I) Fear for the person's safety or the safety of another person; or
(II) Suffer significant emotional distress;
(2) Knowing that an official proceeding or criminal investigation has been initiated or is likely to be initiated;
(3) With the purpose of causing a person to:
(A) Testify or inform falsely in the official proceeding or criminal investigation;
(B) Withhold any testimony or information that has the natural tendency to influence, or is capable of influencing, the official proceeding or criminal investigation;
(C) Elude legal process summoning the person to testify or supply evidence in the official proceeding;
(D) Be absent from the official proceeding to which the person has been legally summoned; or
(E) Destroy, conceal, remove, or alter a document, record, image, audiovisual recording, or other object so as to either:
(i) Impair its value as evidence in the official proceeding; or
(ii) Prevent its production or use in the official proceeding.

(c) *Third Degree*. An actor commits third degree tampering with a witness or informant when the actor:
(1) In fact, commits any criminal offense other than obstruction of justice under District of Columbia law;
(2) Knowing that an official proceeding or criminal investigation has been initiated or is likely to be initiated;
(3) With the purpose of causing a person to:
(A) Testify or inform falsely in the official proceeding or criminal investigation;
(B) Withhold any testimony or information that has the natural tendency to influence, or is capable of influencing, the official proceeding or criminal investigation;

(C) Elude legal process summoning the person to testify or supply evidence in the official proceeding;
(D) Be absent from the official proceeding to which the person has been legally summoned; or
(E) Destroy, conceal, remove, or alter a document, record, image, audiovisual recording, or other object so as to either:
(i) Impair its value as evidence in the official proceeding; or
(ii) Prevent its production or use in the official proceeding.

(d) *Penalties*.
(1) First degree tampering with a witness or informant is a Class 7 felony.
(2) Second degree tampering with a witness or informant is a Class 9 felony.
(3) Third degree tampering with a witness or informant is a Class A misdemeanor.
(4) *Merger.*
(A) A conviction for tampering with a witness or informant shall not merge with a conviction for any offense specified in paragraphs (a)(1) or, (b)(1) of this section when arising from the same act or course of conduct except as provided in subparagraph (d)(4)(B) of this paragraph.
(B) A conviction for tampering with a witness or informant shall merge with a conviction for any other offense under chapters 31, 32, 33, or 34 of this title arising from the same course of conduct. The sentencing court shall follow the procedures specified in subsections (b) and (c) of § 22A-214.

RCCA-§ 22A-4303. Tampering with a Juror or Court Official.

(a) *First Degree.* An actor commits first degree tampering with a juror or court official in a judicial proceeding when the actor:
(1) In fact, commits a crime of violence;
(2) Knowing that an official proceeding has been initiated or is likely to be initiated;
(3) With the purpose of:
(A) Influencing the vote, opinion, decision, deliberation, or other official action of a juror in the official proceeding;
(B) Influencing the opinion, decisions, or other official action of a court official in the official proceeding;
(C) Causing a juror to withhold any testimony or information that has the natural tendency to influence, or is capable of influencing, the official proceeding; or
(D) Causing a person to be absent from jury service to which the person has been legally summoned or ordered to return.

(b) *Second Degree.* An actor commits second degree tampering with a juror or court official when the actor:
(1) Either:

(A) Knowingly, directly or indirectly, offers, confers or agrees to confer upon another anything of value; or

(B) In fact:

(i) Commits any criminal offense other than obstruction of justice under District of Columbia law;

(ii) With intent to cause a person to:

(I) Fear for the person's safety or the safety of another person; or

(II) Suffer significant emotional distress;

(2) Knowing that an official proceeding has been initiated or is likely to be initiated;

(3) With the purpose of:

(A) Influencing the vote, opinion, decision, deliberation, or other official action of a juror in the official proceeding;

(B) Influencing the opinion, decisions, or other official action of a court official in the official proceeding;

(C) Causing a juror to withhold any testimony or information that has the natural tendency to influence, or is capable of influencing, the official proceeding; or

(D) Causing a person to be absent from jury service to which the person has been legally summoned or ordered to return.

(c) *Third Degree.* An actor commits third degree tampering with a juror or court official when the actor:

(1) In fact, commits any criminal offense other than obstruction of justice under District of Columbia law;

(2) Knowing that an official proceeding has been initiated or is likely to be initiated;

(3) With the purpose of:

(A) Influencing the vote, opinion, decision, deliberation, testimony, or other official action of a juror in the official;

(B) Influencing the opinion, decisions, testimony, or other official action of a court official in the official proceeding;

(C) Causing a juror to withhold any testimony or information that has the natural tendency to influence, or is capable of influencing, the official proceeding; or

(D) Causing a person to be absent from jury service to which the person has been legally summoned or ordered to return.

(d) *Penalties.*

(1) First degree tampering with a juror or court official is a Class 7 felony.

(2) Second degree tampering with a juror or court official is a Class 9 felony.

(3) Third degree tampering with a juror or court official is a Class A misdemeanor.

(4) *Merger.*

(A) A conviction for tampering with a juror or court official shall not merge with a conviction for any offense specified in paragraphs

(a)(1) or (b)(1) of this section when arising from the same act or course of conduct except as provided in subparagraph (d)(4)(B) of this paragraph.

(B) A conviction for tampering with a juror or court official shall merge with a conviction for any other offense under chapters 31, 32, 33, or 34 of this title arising from the same course of conduct. The sentencing court shall follow the procedures specified in subsections (b) and (c) of § 22A-214.

RCCA § 22A-4304. Retaliation against a witness, informant, juror, or court official.

(a) *First degree.* An actor commits first degree retaliation against a witness, informant, juror, or court official when the actor:

(1) With the purpose of harming another person because of the person's prior:

(A) Appearance at or testimony in an official proceeding;

(B) Provision of any information, document, record, image, audiovisual recording, or other object related to a violation of any criminal statute to a court official in an official proceeding or law enforcement officer in a criminal investigation; or

(C) Performance of their official duties as a juror or court official in an official proceeding;

(2) In fact, commits a crime of violence against any person.

(b) *Second degree.* An actor commits first degree retaliation against a witness, informant, juror, or court official when the actor:

(1) With the purpose, in whole or part, of harming another person because of the person's prior:

(A) Appearance at or testimony in an official proceeding;

(B) Provision of any information, document, record, image, audiovisual recording, or other object related to a violation of any criminal statute to a court official in an official proceeding or law enforcement officer in a criminal investigation; or

(C) Performance of their official duties as a juror or court official in an official proceeding;

(2) In fact, commits a "predicate offense" against any person.

(c) *Penalties*.

(1) First degree retaliation against a witness, informant, juror, or court official is a Class 9 felony.

(2) Second degree retaliation against a witness, informant, juror, or court official is a Class B misdemeanor.

(3) *Merger.*

(A) A conviction for retaliation against a witness, informant, juror, or court official shall not merge with a conviction for any offense specified in paragraphs (a)(2) or (b)(2) of this section when arising from the same act or course of conduct except as provided in subparagraph (c)(3)(B) of this paragraph.

(B) A conviction for retaliation against a witness, informant, juror, or court official shall merge with a conviction for any other offense under chapters 31, 32, 33, or 34 of this title arising from the same course of conduct. The sentencing court shall follow the procedures specified in subsections (b) and (c) of § 22A-214.

(d) *Definitions*.

(1) In this section, the term "predicate offense" means:

(A) Any crime under this title that includes as an element in a bodily injury, sexual act, sexual contact, confinement or death;

(B) Any crime under this title that includes as an element damage to or destruction of a dwelling, building, or the property of another;

(C) A criminal attempt, solicitation, or conspiracy to commit any crime under this title that includes as an element:

(i) A bodily injury, sexual act, sexual contact, confinement, death; or

(ii) Damage to or destruction of a dwelling, building, or the property of another.

RCCA § 22A-4305. Tampering with evidence.

(a) *First Degree.* An actor commits tampering with evidence in the first degree when the actor:

(1) Knowingly destroys, conceals, removes, or alters a document, record, image, audiovisual recording, or other object, regardless of medium, either:

(A) With the purpose of impairing its value as evidence in an official proceeding or criminal investigation that, in fact, has been or is likely to be initiated for a predicate felony; or

(B) With the purpose of preventing its production or use in an official proceeding or criminal investigation that, in fact, has been or is likely to be initiated for a predicate felony; or

(2) Knowingly makes, presents, or uses any document, record, image, audiovisual recording, or other object, regardless of medium:

(A) With the purpose of deceiving another person as to its veracity; and

(B) With the purpose of affecting the course or outcome of an official proceeding or criminal investigation that, in fact, has been or is likely to be initiated for a predicate felony.

(b) *Second Degree.* An actor commits tampering with evidence in the second degree when the actor:

(1) Knowingly destroys, conceals, removes, or alters a document, record, image, audiovisual recording, or other object, regardless of medium, either:

(A) With the purpose of impairing its value as evidence in an official proceeding or criminal investigation that, in fact, has been or is likely to be initiated; or

(B) With the purpose of preventing its production or use in an official proceeding or criminal investigation that, in fact, has been or is likely to be initiated; or

(2) Knowingly makes, presents, or uses any document, record, image, audiovisual recording, or other object, regardless of medium:

(A) With the purpose of deceiving another person as to its veracity; and

(B) With the purpose of affecting the course or outcome of an official proceeding or criminal investigation that, in fact, has been or is likely to be initiated.

(c) *Penalties.*

(1) First degree tampering with evidence is a Class 9 felony.

(2) Second degree tampering with evidence is a Class B misdemeanor.

(3) *Merger*. A conviction for tampering with evidence shall merge with a conviction for any other offense under chapters 31, 32, 33, or 34 of this title arising from the same course of conduct. The sentencing court shall follow the procedures specified in subsections (b) and (c) of § 22A-214.

(d) *Definitions*.

(1) In this section, the term "predicate felony" means:

(A) Any Class 1, 2, 3, 4, 5, 6, or 7 crime under this title that includes as an element in a bodily injury, sexual act, sexual contact, confinement or death; or

(B) A criminal attempt, solicitation, or conspiracy to commit any Class 1, 2, 3, 4, 5, 6, or 7 crime under this title that includes as an element a bodily injury, sexual act, sexual contact, confinement or death.

RCCA § 22A-4305. Hindering Apprehension or Prosecution.

(a) *First Degree.* An actor commits first degree hindering apprehension or prosecution when the actor:

(1) With the purpose of impeding or preventing the apprehension, prosecution, conviction, or punishment of another person for prior conduct;

(2) Knowingly:

(A) Harbors or conceals the other person; or

(B) Provides or aids in providing the other person a weapon, transportation, disguise or other means of avoiding apprehension; and

(3) The prior conduct that the other person is charged with or liable to be charged with, in fact, constitutes a "predicate felony."

(b) *Second Degree.* An actor commits second degree hindering apprehension or prosecution when the actor:

(1) With the purpose of impeding or preventing the apprehension, prosecution, conviction, or punishment of another person for prior conduct;

(2) Knowingly:

(A) Harbors or conceals the other person; or

(B) Provides or aids the other person by providing a weapon, transportation, disguise or other means of avoiding apprehension.

(c) *Penalties*.

(1) First degree hindering apprehension or prosecution is a Class 9 felony.

(2) Second degree hindering apprehension or prosecution is a Class A misdemeanor.

(3) *Merger.* A conviction for hindering apprehension or prosecution shall merge with a conviction for any other offense under chapters 31, 32, 33, or 34 of this title arising from the same course of conduct. The sentencing court shall follow the procedures specified in subsections (b) and (c) of § 22A-214.

(d) *Definitions*.

(1) In this section, the term "predicate felony" means:

(A) Any Class 1, 2, 3, 4, 5, 6, or 7 crime under this title that includes as an element in a bodily injury, sexual act, sexual contact, confinement or death; or

(B) A criminal attempt, solicitation, or conspiracy to commit any Class 1, 2, 3, 4, 5, 6, or 7 crime under this title that includes as an element a bodily injury, sexual act, sexual contact, confinement or death.

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

"Court of the District of Columbia" means the Superior Court of the District of Columbia or the District of Columbia Court of Appeals.

"Court Official" means any of the following persons acting within their professional role in connection to an official proceeding:

(A) Judicial officer;

(B) A lawyer or a person employed by or working with the lawyer;

(C) An employee of any Court of the District of Columbia;

(D) An employee of the Court Services and Offender Supervision Agency, Pretrial Services Agency, or Family Court Social Services Division; or

(E) An independent contractor or employee of an independent contractor hired by any Court of the District of Columbia.

"Criminal Investigation" means an investigation of a violation of any criminal ~~law~~ statute in effect in the District of Columbia.

~~"Criminal investigator" means an individual authorized by the Mayor or the Mayor's designated agent to conduct or engage in a criminal investigation, or a prosecuting attorney conducting or engaged in a criminal investigation.~~

"Juror" means a petit juror, grand juror, or any person summoned to the Superior Court of the District of Columbia for the purpose of serving on a jury.

"Official Proceeding" means:

(A) Any trial, hearing, grand jury proceeding, or other proceeding in a court of the District of Columbia; or

(B) Any hearing, official investigation, or other proceeding conducted by the Council of the District of Columbia or an agency or department of the District of Columbia government, ~~or a grand jury proceeding~~ excluding criminal investigations.

RCCA § 22A-4301. Obstruction of Justice.

(a) First Degree. An actor commits first degree obstruction of justice when the actor:
  (1) Knowing that an official proceeding or criminal investigation has been initiated for a predicate felony;
  (2) With the purpose of obstructing or impeding that criminal investigation or the proper functioning and integrity of that official proceeding;
  (3) In fact, commits any criminal offense under District of Columbia law.

(b) Second Degree. An actor commits second degree obstruction of justice when the actor:

(1) Knowing that an official proceeding or criminal investigation has been initiated for any crime;

(2) With the purpose of obstructing or impeding that criminal investigation or the proper functioning and integrity of that official proceeding;

(3) In fact, commits any criminal offense under District of Columbia law.

(c) Penalties.

(1) First degree obstruction of justice is a Class 9 felony.

(2) Second degree obstruction of justice is a Class A misdemeanor.

(3) Merger.

(A) A conviction for obstruction of justice shall not merge with a conviction for any offense specified in paragraphs (a)(3) or (b)(3) of this section when arising from the same act or course of conduct except as provided in subparagraph (c)(3)(B) of this paragraph.

(B) A conviction for obstruction of justice shall merge with a conviction for any other offense under chapters 31, 32, 33, or 34 of this title arising from the same course of conduct. The sentencing court shall follow the procedures specified in subsections (b) and (c) of § 22A-214.

(d) Definitions.

(1) In this section, the term "predicate felony" means:

(A) Any Class 1, 2, 3, 4, 5, 6, or 7 crime under this title that requires as an element a bodily injury, sexual act, sexual contact, confinement or death; or

(B) A criminal attempt, solicitation, or conspiracy to commit any Class 1, 2, 3, 4, 5, 6, or 7 crime under this title that requires as an element a bodily injury, sexual act, sexual contact, confinement or death.

~~(a) A person commits the offense of obstruction of justice if that person:~~

~~(1) Knowingly uses intimidation or physical force, threatens or corruptly persuades another person, or by threatening letter or communication, endeavors to influence, intimidate, or impede a juror in the discharge of the juror's official duties;~~

~~(2) Knowingly uses intimidating or physical force, threatens or corruptly persuades another person, or by threatening letter or communication, endeavors to influence, intimidate, or impede a witness or officer in any official proceeding, with intent to:~~

~~(A) Influence, delay, or prevent the truthful testimony of the person in an official proceeding;~~

~~(B) Cause or induce the person to withhold truthful testimony or a record, document, or other object from an official proceeding;~~

~~(C) Evade a legal process that summons the person to appear as a witness or produce a document in an official proceeding; or~~

~~(D) Cause or induce the person to be absent from a legal official proceeding to which the person has been summoned by legal process;~~

~~(3) Harasses another person with the intent to hinder, delay, prevent, or dissuade the person from:~~

~~(A) Attending or testifying truthfully in an official proceeding;~~

~~(B) Reporting to a law enforcement officer the commission of, or any information concerning, a criminal offense;~~

~~(C) Arresting or seeking the arrest of another person in connection with the commission of a criminal offense; or~~

~~(D) Causing a criminal prosecution or a parole or probation revocation proceeding to be sought or instituted, or assisting in a prosecution or other official proceeding;~~

~~(4) Injures or threatens to injure any person or his or her property on account of the person or any other person giving to a criminal investigator in the course of any criminal investigation information related to a violation of any criminal statute in effect in the District of Columbia;~~

~~(5) Injures or threatens to injure any person or his or her property on account of the person or any other person performing his official duty as a juror, witness, or officer in any court in the District of Columbia; or~~

~~(6) Corruptly, or by threats of force, any way obstructs or impedes or endeavors to obstruct or impede the due administration of justice in any official proceeding.~~

~~(b) Any person convicted of obstruction of justice shall be sentenced to a maximum period of incarceration of not less than 3 years and not more than 30 years, or shall be fined not more than the amount set forth in § 22-3571.01, or both. For purposes of imprisonment following revocation of release authorized by § 24-403.01, obstruction of justice is a Class A felony.~~

RCCA § 22A-4302. Tampering with a Witness or Informant.

(a) *First Degree.* An actor commits first degree tampering with a witness or informant when the actor:

(1) In fact, commits a crime of violence;

(2) Knowing that an official proceeding or criminal investigation has been initiated or is likely to be initiated;

(3) With the purpose of causing a person to:

(A) Testify or inform falsely in the official proceeding or criminal investigation;

(B) Withhold any testimony or information that has the natural tendency to influence, or is capable of influencing, the official proceeding or criminal investigation;

(C) Elude legal process summoning the person to testify or supply evidence in the official proceeding;

(D) Be absent from the official proceeding to which the person has been legally summoned; or

(E) Destroy, conceal, remove, or alter a document, record, image, audiovisual recording, or other object so as to either:

(i) Impair its value as evidence in the official proceeding; or

(ii) Prevent its production or use in the official proceeding.

(b) *Second Degree.* An actor commits second degree tampering with a witness or informant when the actor:

(1) Either:

(A) Knowingly, directly or indirectly, offers, confers or agrees to confer upon another anything of value; or

(B) In fact:

(i) Commits any criminal offense other than obstruction of justice under District of Columbia law;

(ii) With intent to cause a person to:

(I) Fear for the person's safety or the safety of another person; or

(II) Suffer significant emotional distress;

(2) Knowing that an official proceeding or criminal investigation has been initiated or is likely to be initiated;

(3) With the purpose of causing a person to:

(A) Testify or inform falsely in the official proceeding or criminal investigation;

(B) Withhold any testimony or information that has the natural tendency to influence, or is capable of influencing, the official proceeding or criminal investigation;

(C) Elude legal process summoning the person to testify or supply evidence in the official proceeding;

(D) Be absent from the official proceeding to which the person has been legally summoned; or

(E) Destroy, conceal, remove, or alter a document, record, image, audiovisual recording, or other object so as to either:

(i) Impair its value as evidence in the official proceeding; or

(ii) Prevent its production or use in the official proceeding.

(c) *Third Degree*. An actor commits third degree tampering with a witness or informant when the actor:

(1) In fact, commits any criminal offense other than obstruction of justice under District of Columbia law;

(2) Knowing that an official proceeding or criminal investigation has been initiated or is likely to be initiated;

(3) With the purpose of causing a person to:

(A) Testify or inform falsely in the official proceeding or criminal investigation;

(B) Withhold any testimony or information that has the natural tendency to influence, or is capable of influencing, the official proceeding or criminal investigation;

(C) Elude legal process summoning the person to testify or supply evidence in the official proceeding;

(D) Be absent from the official proceeding to which the person has been legally summoned; or

(E) Destroy, conceal, remove, or alter a document, record, image, audiovisual recording, or other object so as to either:

(i) Impair its value as evidence in the official proceeding; or

(ii) Prevent its production or use in the official proceeding.

(d) *Penalties*.

(1) First degree tampering with a witness or informant is a Class 7 felony.

(2) Second degree tampering with a witness or informant is a Class 9 felony.

(3) Third degree tampering with a witness or informant is a Class A misdemeanor.

(4) *Merger.*

(A) A conviction for tampering with a witness or informant shall not merge with a conviction for any offense specified in paragraphs (a)(1) or, (b)(1) of this section when arising from the same act or course of conduct except as provided in subparagraph (d)(4)(B) of this paragraph.

(B) A conviction for tampering with a witness or informant shall merge with a conviction for any other offense under chapters 31, 32, 33, or 34 of this title arising from the same course of conduct. The sentencing court shall follow the procedures specified in subsections (b) and (c) of § 22A-214.

~~(a) A person commits the offense of obstruction of justice if that person:~~

. . . .

~~(2) Knowingly uses intimidating or physical force, threatens or corruptly persuades another person, or by threatening letter or communication, endeavors to influence, intimidate, or impede a witness or officer in any official proceeding, with intent to:~~

~~(A) Influence, delay, or prevent the truthful testimony of the person in an official proceeding;~~

~~(B) Cause or induce the person to withhold truthful testimony or a record, document, or other object from an official proceeding;~~

~~(C) Evade a legal process that summons the person to appear as a witness or produce a document in an official proceeding; or~~

~~(D) Cause or induce the person to be absent from a legal official proceeding to which the person has been summoned by legal process;~~

~~(3) Harasses another person with the intent to hinder, delay, prevent, or dissuade the person from:~~

~~(A) Attending or testifying truthfully in an official proceeding;~~

~~(B) Reporting to a law enforcement officer the commission of, or any information concerning, a criminal offense;~~

~~(C) Arresting or seeking the arrest of another person in connection with the commission of a criminal offense; or~~

~~(D) Causing a criminal prosecution or a parole or probation revocation proceeding to be sought or instituted, or assisting in a prosecution or other official proceeding;~~

~~. . . .~~

~~(6) Corruptly, or by threats of force, any way obstructs or impedes or endeavors to obstruct or impede the due administration of justice in any official proceeding.~~

~~(b) Any person convicted of obstruction of justice shall be sentenced to a maximum period of incarceration of not less than 3 years and not more than 30 years, or shall be fined not more than the amount set forth in § 22-3571.01, or both. For purposes of imprisonment following revocation of release authorized by § 24-403.01, obstruction of justice is a Class A felony.~~

RCCA-§ 22A-4303. Tampering with a Juror or Court Official.

(a) *First Degree.* An actor commits first degree tampering with a juror or court official in a judicial proceeding when the actor:

(1) In fact, commits a crime of violence;

(2) Knowing that an official proceeding has been initiated or is likely to be initiated;

(3) With the purpose of:

(A) Influencing the vote, opinion, decision, deliberation, or other official action of a juror in the official proceeding;

(B) Influencing the opinion, decisions, or other official action of a court official in the official proceeding;

(C) Causing a juror to withhold any testimony or information that has the natural tendency to influence, or is capable of influencing, the official proceeding; or

(D) Causing a person to be absent from jury service to which the person has been legally summoned or ordered to return.

(b) *Second Degree.* An actor commits second degree tampering with a juror or court official when the actor:

(1) Either:

(A) Knowingly, directly or indirectly, offers, confers or agrees to confer upon another anything of value; or

(B) In fact:

(i) Commits any criminal offense other than obstruction of justice under District of Columbia law;

(ii) With intent to cause a person to:

(I) Fear for the person's safety or the safety of another person; or

(II) Suffer significant emotional distress;

(2) Knowing that an official proceeding has been initiated or is likely to be initiated;

(3) With the purpose of:

(A) Influencing the vote, opinion, decision, deliberation, or other official action of a juror in the official proceeding;

(B) Influencing the opinion, decisions, or other official action of a court official in the official proceeding;

(C) Causing a juror to withhold any testimony or information that has the natural tendency to influence, or is capable of influencing, the official proceeding; or

(D) Causing a person to be absent from jury service to which the person has been legally summoned or ordered to return.

(c) *Third Degree.* An actor commits third degree tampering with a juror or court official when the actor:

(1) In fact, commits any criminal offense other than obstruction of justice under District of Columbia law;

(2) Knowing that an official proceeding has been initiated or is likely to be initiated;

(3) With the purpose of:

(A) Influencing the vote, opinion, decision, deliberation, testimony, or other official action of a juror in the official;

(B) Influencing the opinion, decisions, testimony, or other official action of a court official in the official proceeding;

(C) Causing a juror to withhold any testimony or information that has the natural tendency to influence, or is capable of influencing, the official proceeding; or

(D) Causing a person to be absent from jury service to which the person has been legally summoned or ordered to return.

(d) *Penalties.*

(1) First degree tampering with a juror or court official is a Class 7 felony.

(2) Second degree tampering with a juror or court official is a Class 9 felony.

(3) Third degree tampering with a juror or court official is a Class A misdemeanor.

(4) *Merger.*

(A) A conviction for tampering with a juror or court official shall not merge with a conviction for any offense specified in paragraphs (a)(1) or (b)(1) of this section when arising from the same act or course of conduct except as provided in subparagraph (d)(4)(B) of this paragraph.

(B) A conviction for tampering with a juror or court official shall merge with a conviction for any other offense under chapters 31,

32, 33, or 34 of this title arising from the same course of conduct. The sentencing court shall follow the procedures specified in subsections (b) and (c) of § 22A-214.

~~(a) A person commits the offense of obstruction of justice if that person:~~

~~(1) Knowingly uses intimidation or physical force, threatens or corruptly persuades another person, or by threatening letter or communication, endeavors to influence, intimidate, or impede a juror in the discharge of the juror's official duties;~~

~~(2) Knowingly uses intimidating or physical force, threatens or corruptly persuades another person, or by threatening letter or communication, endeavors to influence, intimidate, or impede a witness or officer in any official proceeding, with intent to:~~

~~(A) Influence, delay, or prevent the truthful testimony of the person in an official proceeding;~~

~~(B) Cause or induce the person to withhold truthful testimony or a record, document, or other object from an official proceeding;~~

~~(C) Evade a legal process that summons the person to appear as a witness or produce a document in an official proceeding; or~~

~~(D) Cause or induce the person to be absent from a legal official proceeding to which the person has been summoned by legal process;~~

~~(3) Harasses another person with the intent to hinder, delay, prevent, or dissuade the person from:~~

~~(A) Attending or testifying truthfully in an official proceeding;~~

~~(B) Reporting to a law enforcement officer the commission of, or any information concerning, a criminal offense;~~

~~(C) Arresting or seeking the arrest of another person in connection with the commission of a criminal offense; or~~

~~(D) Causing a criminal prosecution or a parole or probation revocation proceeding to be sought or instituted, or assisting in a prosecution or other official proceeding;~~

~~. . . .~~

~~(6) Corruptly, or by threats of force, any way obstructs or impedes or endeavors to obstruct or impede the due administration of justice in any official proceeding.~~

~~(b) Any person convicted of obstruction of justice shall be sentenced to a maximum period of incarceration of not less than 3 years and not more than 30 years, or shall be fined not more than the amount set forth in § 22-3571.01, or both. For purposes of imprisonment following revocation of release authorized by § 24-403.01, obstruction of justice is a Class A felony.~~

RCCA § 22A-4304. Retaliation against a witness, informant, juror, or court official.

(a) *First degree.* An actor commits first degree retaliation against a witness, informant, juror, or court official when the actor:
  (1) With the purpose of harming another person because of the person's prior:
    (A) Appearance at or testimony in an official proceeding;
    (B) Provision of any information, document, record, image, audiovisual recording, or other object related to a violation of any criminal statute to a court official in an official proceeding or law enforcement officer in a criminal investigation; or
    (C) Performance of their official duties as a juror or court official in an official proceeding;
  (2) In fact, commits a crime of violence against any person.

(b) *Second degree.* An actor commits first degree retaliation against a witness, informant, juror, or court official when the actor:
  (1) With the purpose, in whole or part, of harming another person because of the person's prior:
    (A) Appearance at or testimony in an official proceeding;
    (B) Provision of any information, document, record, image, audiovisual recording, or other object related to a violation of any criminal statute to a court official in an official proceeding or law enforcement officer in a criminal investigation; or
    (C) Performance of their official duties as a juror or court official in an official proceeding;
  (2) In fact, commits a "predicate offense" against any person.

(c) *Penalties*.
  (1) First degree retaliation against a witness, informant, juror, or court official is a Class 9 felony.
  (2) Second degree retaliation against a witness, informant, juror, or court official is a Class B misdemeanor.
  (3) *Merger.*
    (A) A conviction for retaliation against a witness, informant, juror, or court official shall not merge with a conviction for any offense specified in paragraphs (a)(2) or (b)(2) of this section when arising from the same act or course of conduct except as provided in subparagraph (c)(3)(B) of this paragraph.
    (B) A conviction for retaliation against a witness, informant, juror, or court official shall merge with a conviction for any other offense under chapters 31, 32, 33, or 34 of this title arising from the same course of conduct. The sentencing court shall follow the procedures specified in subsections (b) and (c) of § 22A-214.

(d) *Definitions*.
  (1) In this section, the term "predicate offense" means:
    (A) Any crime under this title that includes as an element in a bodily injury, sexual act, sexual contact, confinement or death;

(B) Any crime under this title that includes as an element damage to or destruction of a dwelling, building, or the property of another;

(C) A criminal attempt, solicitation, or conspiracy to commit any crime under this title that includes as an element:

(i) A bodily injury, sexual act, sexual contact, confinement, death; or

(ii) Damage to or destruction of a dwelling, building, or the property of another.

~~(a) A person commits the offense of obstruction of justice if that person:~~

. . . .

~~(4) Injures or threatens to injure any person or his or her property on account of the person or any other person giving to a criminal investigator in the course of any criminal investigation information related to a violation of any criminal statute in effect in the District of Columbia;~~

~~(5) Injures or threatens to injure any person or his or her property on account of the person or any other person performing his official duty as a juror, witness, or officer in any court in the District of Columbia; or~~

. . . .

~~(b) Any person convicted of obstruction of justice shall be sentenced to a maximum period of incarceration of not less than 3 years and not more than 30 years, or shall be fined not more than the amount set forth in § 22-3571.01, or both. For purposes of imprisonment following revocation of release authorized by § 24-403.01, obstruction of justice is a Class A felony.~~

RCCA § 22A-4305. Tampering with evidence.

(a) *First Degree.* An actor commits tampering with evidence in the first degree when the actor:

(1) Knowingly destroys, conceals, removes, or alters a document, record, image, audiovisual recording, or other object, regardless of medium, either:

(A) With the purpose of impairing its value as evidence in an official proceeding or criminal investigation that, in fact, has been or is likely to be initiated for a predicate felony; or

(B) With the purpose of preventing its production or use in an official proceeding or criminal investigation that, in fact, has been or is likely to be initiated for a predicate felony; or

(2) Knowingly makes, presents, or uses any document, record, image, audiovisual recording, or other object, regardless of medium:

(A) With the purpose of deceiving another person as to its veracity; and

(B) With the purpose of affecting the course or outcome of an official proceeding or criminal investigation that, in fact, has been or is likely to be initiated for a predicate felony.

(b) *Second Degree.* An actor commits tampering with evidence in the second degree when the actor:

(1) Knowingly destroys, conceals, removes, or alters a document, record, image, audiovisual recording, or other object, regardless of medium, either:

(A) With the purpose of impairing its value as evidence in an official proceeding or criminal investigation that, in fact, has been or is likely to be initiated; or

(B) With the purpose of preventing its production or use in an official proceeding or criminal investigation that, in fact, has been or is likely to be initiated; or

(2) Knowingly makes, presents, or uses any document, record, image, audiovisual recording, or other object, regardless of medium:

(A) With the purpose of deceiving another person as to its veracity; and

(B) With the purpose of affecting the course or outcome of an official proceeding that, in fact, has been or is likely to be initiated.

(c) *Penalties.*

(1) First degree tampering with evidence is a Class 9 felony.

(2) Second degree tampering with evidence is a Class B misdemeanor.

(3) *Merger*. A conviction for tampering with evidence shall merge with a conviction for any other offense under chapters 31, 32, 33, or 34 of this title arising from the same course of conduct. The sentencing court shall follow the procedures specified in subsections (b) and (c) of § 22A-214.

(d) *Definitions*.

(1) In this section, the term "predicate felony" means:

(A) Any Class 1, 2, 3, 4, 5, 6, or 7 crime under this title that includes as an element in a bodily injury, sexual act, sexual contact, confinement or death; or

(B) A criminal attempt, solicitation, or conspiracy to commit any Class 1, 2, 3, 4, 5, 6, or 7 crime under this title that includes as an element a bodily injury, sexual act, sexual contact, confinement or death.

~~(a) A person commits the offense of tampering with evidence if, knowing or having reason to believe an official proceeding has begun or knowing that an official proceeding is likely to be instituted, that person alters, destroys, mutilates, conceals, or removes a record, document, or other object, with intent to impair its integrity or its availability for use in the official proceeding.~~

~~(b) Any person convicted of tampering with evidence shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 3 years, or both.~~

RCCA § 22A-4306. Hindering Apprehension or Prosecution.

(a) *First Degree.* An actor commits first degree hindering apprehension or prosecution when the actor:
  (1) With the purpose of impeding or preventing the apprehension, prosecution, conviction, or punishment of another person for prior conduct;
  (2) Knowingly:
    (A) Harbors or conceals the other person; or
    (B) Provides or aids in providing the other person a weapon, transportation, disguise or other means of avoiding apprehension; and
  (3) The prior conduct that the other person is charged with or liable to be charged with, in fact, constitutes a "predicate felony."

(b) *Second Degree.* An actor commits second degree hindering apprehension or prosecution when the actor:
  (1) With the purpose of impeding or preventing the apprehension, prosecution, conviction, or punishment of another person for prior conduct;
  (2) Knowingly:
    (A) Harbors or conceals the other person; or
    (B) Provides or aids the other person by providing a weapon, transportation, disguise or other means of avoiding apprehension.

(c) *Penalties*.
  (1) First degree hindering apprehension or prosecution is a Class 9 felony.
  (2) Second degree hindering apprehension or prosecution is a Class A misdemeanor.
  (3) *Merger.* A conviction for hindering apprehension or prosecution shall merge with a conviction for any other offense under chapters 31, 32, 33, or 34 of this title arising from the same course of conduct. The sentencing court shall follow the procedures specified in subsections (b) and (c) of § 22A-214.

(d) *Definitions*.
  (1) In this section, the term "predicate felony" means:
    (A) Any Class 1, 2, 3, 4, 5, 6, or 7 crime under this title that includes as an element in a bodily injury, sexual act, sexual contact, confinement or death; or
    (B) A criminal attempt, solicitation, or conspiracy to commit any Class 1, 2, 3, 4, 5, 6, or 7 crime under this title that includes as an element a bodily injury, sexual act, sexual contact, confinement or death.

~~Whoever shall be convicted of being an accessory after the fact to any crime punishable by death shall be punished by imprisonment for not more than 20 years. Whoever shall be convicted of being accessory after the fact to any crime punishable by imprisonment shall be punished by a fine or imprisonment, or both, as the case may be, not more than 1/2 the maximum fine or imprisonment, or both, to which the principal offender may be subjected.~~

Appendix C – Penalties for Revised Obstruction of Justice & RCCA Obstruction of Justice Related Offenses[145]

The current obstruction of justice statute, D.C. Code § 22-722, contains six paragraphs each enumerating multiple forms of obstruction of justice including tampering with or retaliating against a witness, informant, juror, or court official. The offense is not graded and the maximum penalty is thirty years for all forms of covered conduct. The CCRC is not aware of any other jurisdiction that covers all such obstruction of justice-type conduct in one offense without any gradations.

The RCCA breaks out most of the specific types of wrongdoing within the obstruction of justice statute and creates three new offenses of tampering with a juror or court official, tampering with a witness or informant, and retaliation against a witness, informant, juror, or court official. The obstruction of justice offense remains as a fourth, separate, lower-level, catch-all offense for conduct not addressed in the other three new offenses.

Within these four offenses, the RCCA provides for multiple gradations. The RCCA establishes two or three grades based on the seriousness of the underlying criminal conduct for the new tampering and retaliation offenses. The RCCA also provides for two grades based primarily on the seriousness of the subject offense[146] for the revised obstruction of justice offense. These changes in organization and penalties improve the proportionality of the offenses and bring the District more in line with other jurisdictions.

The most serious obstruction-related offenses in the RCCA are first degree tampering with a witness or informant and first degree tampering with a juror or official. First degree tampering with a witness or informant and first degree tampering with a juror or court official, which require the commission of a crime of violence, are Class 7 crimes and carry maximum penalties 8 years. Second degree tampering with a witness or informant and second degree tampering with a juror or court official, which require the commission of a criminal offense intended to cause a person to fear for their safety or the safety of another, as well as first degree retaliation against a witness, informant, juror, or court official are Class 9 crimes that carry authorized maximum penalties of 2 years. Third degree tampering with a witness or informant, third degree tampering with a juror or court official, and second degree retaliation against a witness, informant, juror, or court official are Class A misdemeanor offenses with one-year maximum penalties.

Critically, for all of these obstruction of justice-type offenses, the penalties are *in addition* to the penalties applicable for the underlying criminal harm (e.g., threat or assault) that the person engages in. The RCCA includes a provision which states that convictions for an underlying criminal offense shall *not* merge with convictions for obstruction of justice, first and second degree tampering with a witness or informant, and first and second degree tampering with a juror or court official. This "no merger" rule along with the

[145] New related offenses for the purposes of this memo are: RCCA § 22A-4302. Tampering with a witness or informant; RCCA § 22A-4303. Tampering with a juror or court official, RCCA § 22A-4304. Retaliation against a witness, informant, juror, or court official.

[146] Subject offense refers to the offense that is the subject of a criminal investigation or official proceeding.

requirement of the commission of a criminal offense means that the effective authorized maximum for each of these offenses is the authorized maximum for the underlying offense *plus* 8, 2, 1, or 0.5 years, depending on the degree of the obstruction of justice-type offense conviction.

The offense classifications for the RCCA tampering with a witness or informant, tampering with a juror or court official, and retaliation offenses are based primarily on the seriousness of the offense committed by an actor with the prohibited purpose of tampering or retaliation. Neither the subject offense nor success in obstructing a criminal investigation or official proceeding affect grading. Protection of witnesses and other participants in the judicial process has historically been a primary purpose of the obstruction of justice statute in the District[147] and the RCCA maintains this emphasis on protecting participants in criminal investigations and official proceedings by punishing crimes of violence against witnesses, informants, jurors, and court officials more severely than any other form of obstructing a criminal investigation or the proper functioning and integrity of an official proceeding. The RCCA approach ensures that participants in a criminal investigation or official proceeding are protected from crimes of violence irrespective of success in obstruction or of the severity of the subject offense (or whether the severity of the subject offense is ascertainable).[148] It also ensures that the penalty ranges are not grossly disproportionate to the harm caused to persons, criminal investigations, or official proceedings.[149]

Although a few states grade these types of tampering offenses based on the seriousness of the subject offense, most jurisdictions that grade their tampering and retaliation type offenses on whether there was force, threats, and/or bodily injury.[150] Penalty ranges for these offenses vary widely in other jurisdictions with maximum penalties as high as 99 years[151] and as low as 2.5-3.75 years for the most serious tampering

[147] *See* Committee on the Judiciary, *Report on Bill 9-385, "Law Enforcement Witness Protection Amendment Act of 1992"* (May 20, 1992).

[148] For example, if an actor commits a crime of violence against a witness in a grand jury investigation where the potential charges are unknown, the actor can be convicted of first degree tampering with a witness or informant irrespective or what charges the grand jury considers or indicts on.

[149] The RCCA tampering offenses offense require only that an actor act with the purpose of impacting a criminal investigation or official proceeding and do not require any actual impact on either. Accordingly, an actor can be convicted for threatening a witness in a misdemeanor case even in cases where the witness did not feel threatened and there was no impact on the proceeding. In such a case, the RCCA grading scheme imposes twice the maximum liability of the misdemeanor offense. If the RCCA grading scheme placed threats and crimes of violence in the same grade, an actor would be subject to at least eight times the punishment of the subject offense even though the conduct had no impact on the person or proceeding.

[150] *See e.g.,* ARIZ. REV. STAT. ANN. §§ 13-2802, 2804, 2805, 2807; ARK. CODE. ANN. §§ 5-53-109, 110; COLO. REV. STAT. §§ 18-8-704, 705, 706, 707; CONN. GEN. STAT. §§ 53a-149, 151, 152 151a, 154; HAW. REV. STAT. §§ 710-1071, 1072; N.Y. PENAL LAW § 215.00, 10-13, 15-17, 19, 23, 25; WASH. REV. CODE §§ 9A.72.110, 120, 130, 140.

[151] In Texas, tampering with a witness is a third degree felony which carries a 10-year maximum or the same degree as the subject offense (which could carry a maximum of 99 years). *See* TX CODE ANN. § 36.05.

or retaliation offenses.[152] More common maximums are 5[153] and 10[154] years for the most serious tampering or retaliation conduct.

The RCCA penalties for first degree tampering offenses fall between these common 5 and 10 year penalties. For second degree tampering offenses, which include conduct intended to cause another person to fear for their safety or the safety or another, the RCCA penalties are lower than the 5-year maximum in a lot of states. However, the RCCA differs from most jurisdictions in that it places crimes of violence in a different category than offenses such as criminal threats. The RCCA classifies tampering by the commission of a crime of violence as a more severe offense than offenses which are intended to cause a person to fear for the safety or the safety of another but do not rise to level of a crime of violence. Consequently, the RCCA's 8 year maximum for first degree tampering ends up higher than the 5-year maximum for similar tampering statutes in many jurisdictions while the second and third degree tampering offense maximum penalties of 2 years are lower. The RCCA's additional classification is justified by the disparities in harms to the participants and the fact that the tampering offenses are not graded based on the seriousness of the offense or the impact on the proceedings. The RCCA's classification of third degree tampering with a witness or informant and third degree tampering with a juror or court official as misdemeanors is consistent with many states that have a misdemeanor offense for less serious conduct.[155]

The RCCA retaliation against a witness, informant, juror, or court official offense is also graded based on the seriousness of the underlying conduct. For this offense, however, the RCCA uses penalties one class lower than first and second degree tampering. This is due to the fact that retaliation, when not done with the purpose of impacting an ongoing criminal investigation or official proceeding, is less blameworthy than a criminal offense that both harms a participant and is done with the purpose of impacting an ongoing criminal investigation or official proceeding. In some jurisdictions, retaliating is graded the same as tampering conduct while others, like the RCCA, provide a lower penalty for retaliation.[156]

Notably, some conduct that constitutes third degree tampering will constitute felony offenses under the RCCA. While the RCCA's new tampering and retaliation offenses focus on underlying criminal conduct, the revised obstruction of justice offense is graded based on the seriousness of the offense that is the subject of the criminal

---

[152] *See* ARIZ. REV. STAT. ANN. §§ 13-2802 (Influencing a witness); ARIZ. REV. STAT. ANN. §§ 13-2805 (Influencing a juror).

[153] *See e.g.*, DEL. CODE REGS. §§ 11-1261, 1263, 1263a, 1264; HAW. REV. STAT. § 710-1072 (Intimidating a witness); KY. REV. STAT. ANN. §§ 524.020, 040, 050, 055, 060, 090; ME. REV. STAT. ANN. § 17-A-454 (tampering with a witness, informant, or juror); N.J. STAT. ANN. §§ 2C-28-5; N.D. CENT. CODE §12.1-09-01; OR. REV. STAT. §162.265, 285; UTAH CODE ANN. §§ 76-8-508, 508.3, 508.5.

[154] See e.g., ALA. CODE §13A-10-123 (Intimidating a witness); HAW. REV. STAT. § 710-1074 (Intimidating a juror); ME. REV. STAT. ANN. § 17-A-454 (tampering with a victim and tampering with jurors in a murder case), MO. REV. STAT. §575.095, 270 (7-year max); N.J. STAT. ANN. §§ 2C-28-5; WASH. REV. CODE §§ 9A.72.110, 130.

[155] *See e.g.,* ALASKA STAT. §11.56.545; ALA. CODE §13A-10-124; ARK. CODE. ANN. §5-53-110(b)(2); HAW. REV. STAT. § 710-1072; N.Y. PENAL LAW §215.10.

[156] *See e.g.,* ARK. CODE. ANN. §§ 5-53-109, 112.

investigation or official proceeding. This catchall offense significantly overlaps with the tampering with a witness or informant and tampering with a juror or court official offenses. Consequently, an actor who commits third degree tampering with a witness or juror or third degree tampering with a juror or court official, Class A misdemeanors, may also be subject to a felony obstruction of justice conviction in cases where the subject offense is a crime of violence. For example, the RCCA offense of criminal graffiti[157], when committed without intent to cause a person to fear for their safety or the safety of another but with the purpose of tampering with a witness or informant, constitutes third degree tampering with a witness or juror and is a Class A misdemeanor even in cases involving a predicate felony. That same conduct could also be charged under the obstruction of justice statute, however, and would constitute a Class 9 felony under the RCCA due to the seriousness of the subject felony and the greater societal interest in the proper functioning or related official proceedings. Thus, while the tampering offenses do not specifically account for the seriousness of the subject crime on their own, the seriousness of the subject crime for those same offenses is accounted for by the revised obstruction of justice catchall offense. This bifurcated approach serves as a backstop in more serious cases and ensures proportionality with respect to both the conduct and harm or potential harm to persons and criminal investigation or official proceedings.

Review of available sentencing data shows that the revised statutory penalties would cover somewhere between 50-90% of the penalties issued in D.C. Superior Court for obstruction of justice between 2010 to 2019.[158] As noted above, however, the current obstruction of justice statute is not graded, carries a maximum sentence of thirty years in prison, and covers all types of violent and non-violent conduct. Consequently, it is not possible to draw a direct comparison with the revised statute penalties and the penalties issued between 2010-2019. While some 2010-2019 penalties may be higher than the RCCA would allow, the practical effect of these higher penalties is unclear because the penalties in the court data may be set to run concurrent to another sentence and thus, have no impact on the term of incarceration actually served. Additionally, the sentence imposed may be more indicative of an increased sentencing range in the Voluntary Sentencing Guidelines based on a person's criminal history score than the conduct underlying the conviction itself. Thus, it is impossible to tell from the available sentencing data whether the revised statutory penalties would in fact result in lower penalties or what impact the RCCA penalties might have.

---

[157] *E.g.*, An actor might paint a message on the property of another to call public attention to a person with the purpose of causing them to withhold testimony in an official proceeding. Because the intent was not to cause a person to fear for their safety or the safety of another, this would constitute third degree tampering. It should be noted that not every instance of criminal graffiti for the purpose of tampering with a witness or informant would constitute third degree tampering with a witness or informant. An actor who commits the offense of criminal graffiti could be liable for second degree tampering if they also committed the offense with the intent of causing a person to fear for their safety or the safety of another.

[158] *See* D.C. CRIM. CODE REFORM COMM., REVISED CRIMINAL CODE COMPILATION, App. G. (March 31, 2021) (Comparison of RCCA Offense Penalties and District Charging and Conviction Data).

Appendix D – Disposition of Comments on Report #72 – Obstruction of Justice Offenses (First Draft)

OAG written comments received November 16, 2021:

1. OAG, on page 1, recommends replacing "that official proceeding" in paragraphs (a)(2)(e)(i) and (ii) of the tampering with a witness or informant statute with "an official proceeding" to be more precise. OAG notes the term "that" does not appear to refer to any official proceeding because (a)(1) does not refer to an "official proceeding".
    - The revised statute has not been changed to adopt this recommendation because the CCRC separately added a new paragraph (a)(2) to the tampering with a witness or informant statute (as well as the tampering with a juror or court official statute) that requires an actor know that an official proceeding or criminal investigation has been or is likely to be initiated and also changed the language in (a)(3)(E)(i) and (ii) to say "the official proceeding". The phrase "the official proceeding" in (a)(3)(E)(i) and (ii) now refers back to (a)(2). These changes resolve the imprecision flagged by OAG.
2. OAG, on page 2, identifies typos in the commentary for tampering with a juror or court official on pages 31 and 32 where the commentary incorrectly references (a)(2)(E) and (c)(2)(E).
    - The revised statute commentary has been changed to delete the incorrect references.
3. OAG, on page 2, questions whether the CCRC's commentary regarding RCC § 22A-4304, retaliation against a witness, informant, juror, or court official, has correctly articulated the required proof regarding a person's prior participation in a criminal investigation or official proceeding. Specifically, OAG questions whether the CCRC's statement that the offense "does not require that any person, in fact, have participated in an official proceeding or criminal investigation as a witness, juror, court official, or informant" is accurate. OAG notes the term "prior" implies that the person did, in fact, previously participate in some official proceeding or criminal investigation.
    - The revised statute has not been changed because the statute does not require proof that the other person in fact participated in some official proceeding or criminal investigation. 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 the phrase. In this case, reference to another person's *prior* participation is contained in the object of the phrase "with the purpose" and not modified by a new culpable mental state.[159]

[159] Per RCCA §22A-207(a), if the statute read "with the purpose of harming another person because the person, in fact, appeared at or testified in an official proceeding. . ..", OAG's interpretation would be correct.

Consequently, the reference to "prior" conduct by another person is part of the culpable mental state and only the perception by the actor as to the other person's prior participation in an official investigation or criminal investigation matters. This means, that the government must prove that the actor consciously desired to harm the other person because of the actor's belief that the person's prior participation in an official proceeding or criminal investigation but does not need to prove that the other person did, in fact, participate in an official proceeding or investigation. Although there is not requirement that the other person have actually participated in a criminal investigation or official proceeding, the inclusion of the term prior ensures that it must be the actor's perception that participation took place at a prior time. If the actor's motivation was to harm the person because the actor thought the person might testify in a future proceeding, liability would not attach under the retaliation statute as the motivation would not be prior participation.

4. OAG, on page 3, recommends deleting the term "physical" from the title of the offense as it is misleading. OAG states that the phrase "regardless of medium" necessarily means that the statute applies to evidence that is not physical in nature and therefore the title of the offense, tampering with physical evidence, is misleading.
    - The revised statute name has been changed to "tampering with evidence" to avoid confusion about the label "physical". This change is non-substantive and does not expand the scope of the statute to include evidence not covered by the language of the revised statute such as testimonial evidence.
5. OAG, on page 3, identifies a typo in the commentary to the tampering with physical evidence statute. Specifically, OAG notes that on page 49, discussion of subparagraph (a)(2)(A) references impairing the physical evidence's value as evidence in an official proceeding even though that is not part of the text of subparagraph (a)(2)(A).
    - The commentary has been corrected to reference deceiving another person as to the veracity of the evidence in accordance with the text of (a)(2)(A).

USAO written comments received November 16, 2021.

1. USAO, on page 1, recommends eliminating the requirement that the actor commit a separate criminal offense as a predicate to liability for obstruction of justice, tampering with a witness or informant, and tampering with a juror or court official.
    - The revised statute has not been changed. As a threshold matter, under the RCCA scheme predicates for liability to tampering with a witness or informant and tampering with a juror or court official include both the commission of criminal offense *and* bribery-type conduct including "directly or indirectly, offer[ing], confer[ing], or agree[ing] to confer on another anything of value." Thus, it is not accurate to say that the statute

requires the commission of a criminal offense.[160] The criminal code, in conjunction with the bribery-type conduct provision, contains a wide-enough array of offenses to cover "corrupt" persuasion and harassment while also putting actors on proper notice of what conduct is prohibited. For example, trying to persuade another person to commit perjury (previously covered as corrupt persuasion) would constitute attempted solicitation of perjury (or solicitation of perjury if the other person actually committed perjury) and be a predicate for liability under the obstruction of justice and tampering with a witness or informant statutes. In support of its recommendation, USAO hypothesizes a "domestic violence situation, where an abuser convinces a victim not to appear at trial by sending her flowers, telling her how much he loves her, etc." and indicates that the RCCA removes liability for this type of conduct. However, the RCCA actually covers such conduct in multiple ways. First, sending a gift to a complainant with the purpose of convincing the complainant not to appear at trial would be conferring a thing of value upon the complainant under (b)(2)(A) with the purpose of causing a person to be absent from an official proceeding to which the person has been legally summoned under (b)(3)(D). Alternatively, the offense of contempt[161] could be applied to the actor's conduct in encouraging another person to violate a subpoena summoning the person to appear at trial.[162] Because the inclusion of bribery-type conduct and the breadth of the criminal code—which includes threats, stalking, contempt, solicitation of perjury, bribery, blackmail, as well as inchoate and accomplice liability—means that liability will attach to unambiguous attempts to tamper with a witness, informant, juror, or court official, the proposed RCCA sufficiently provides liability for the targeted conduct.

2. USAO, on page 2, cites the current obstruction of justice statute and recommends that the RCCA codify obstructive acts based on intimidation or harassment. USAO notes the Redbook definition of "harass" means "to threaten, intimidate, or use physical force against a person or to use any words or actions that have a tendency to badger, disturb, or pester the ordinary person (meaning seriously alarm, frighten, annoy, or torment)."

[160] It is true that the obstruction of justice offense does require the commission of a separate criminal offense. However, tampering with a witness or informant and tampering with a juror or court official both qualify as separate criminal offenses. Consequently, commission of tampering with a witness or informant and tampering with a juror or court official when committed through bribery-type conduct rather than a separate criminal offense would also create liability under the obstruction of justice statute without commission of a separate criminal offense.

[161] The offense of contempt would also apply to harassing conduct in domestic violence cases where stay away orders and No Harassing, Assaulting, Threatening, or Stalking (No HATS) orders are imposed. The vast majority of domestic violence cases in Superior Court have one or the other of these orders.

[162] Other criminal statues may also provide a predicate for liability depending on other facts.

- The revised statute has been partially changed to incorporate into second degree tampering with a witness or informant and second degree tampering with a juror or court official liability where the actor commits a criminal offense with the intent to cause a person "to suffer significant emotional distress." For the reasons stated above, the CCRC does not adopt the USAO recommendation that the RCCA specify "harassment" as a stand-alone predicate for liability. The term "harass" is vague and may criminalize extremely low-level, ordinary conduct. However, the revised statute has been modified to include criminal offenses intended to cause "significant emotional distress" to another in second degree tampering with a witness or informant and second degree tampering with a juror or court official.[163] "Significant emotional distress" is a defined term in RCCA § 22A-101 that the RCCA uses instead of vague and problematic language such as "seriously alarm, frighten, annoy or torment" that is used in the current Redbook definition of "harass."[164] Incorporating conduct intended to cause "significant emotional distress" into second degree tampering with a witness or informant and second degree tampering with a juror or court official improves the proportionality of the revised statutes.

3. USAO, on page 2-3, opposes decreasing the penalties for these offenses. The USAO objects to the classification of third-degree tampering with a witness or informant and third degree tampering with a juror or court official as class A misdemeanors where the maximum penalty is one year and to the highest penalty classification for these offenses being a Class 7 felony (for first degree tampering with a witness or informant and first degree tampering with a juror or court official). The USAO also notes that it is "the threat to the system of justice—rather than simply the underlying conduct—that is at the heart of the obstruction statute" and says "the maximum penalties should be proportionate to that harm not just to the conduct underlying the obstruction offense."
    - The revised statute has not been changed. Notably, in serious cases, conduct that is punishable as a one-year[165] misdemeanor under the third-degree tampering with a witness or informant and third-degree tampering with a juror or court official will almost always be punishable as first degree obstruction of justice, a felony.[166] Further, in cases of first degree tampering with a witness or informant and first degree tampering with a juror or court official, where the maximum penalty is 8 years, the preclusion of merger with the underlying offense means the maximum possible penalty for the

[163] In the first draft, such conduct would fall within third degree tampering with a witness or informant and third degree tampering with a juror or court official.
[164] *See* Commentary on the RCCA Stalking offense, § 22A-1801.
[165] Current law classifies the majority of misdemeanors as 180 days offenses. The penalty of 1 year for Class A misdemeanors is thus a significant increase in liability for misdemeanor conduct.
[166] *See also* Report# 72 Obstruction of Justice Offenses, Appendix C- Penalties for Revised Obstruction of Justice & RCC Obstruction of Justice Related Offenses (discussing the penalty classification for obstruction of justice offenses under the RCCA).

conduct will be at least 10 years and could be as much as 53 years (or more with penalty enhancements).[167] Finally, using lower penalties for lesser conduct is an appropriate and common practice even where the principal rationale of a statute might be to protect the system of justice. A prime example of this is the USAO-DC approach to cases stemming from the attack on the United States Capitol on January 6, 2021 during which persons engaged in varying degrees of conduct in an attempt to interfere with the certification of the Electoral College by Congress. In cases stemming from that attack in federal court, the USAO-DC has charged misdemeanors and recommended sentences of no jail time or less than six months of jail time even though the harm stemming from the attack on the Capitol is likely more far-reaching than any act of obstruction of justice in a local court case. The same rationale, assessing the gravity of the conduct, is thus appropriate in obstruction of justice type cases in local courts.

4. USAO, on page 4, recommends changing the language "likely to be initiated" to "may be initiated" so that liability for obstruction type conduct arises when a criminal investigation or official proceeding is unlikely to be initiated due to the actor's conduct. The government notes that the actor's conduct could make it highly unlikely that a criminal investigation or official proceeding is initiated or make it likely that there will never be a criminal investigation initiated into the underlying conduct.
    - The revised statute has not been changed because doing so would sweep too broadly and eliminates a clear nexus requirement between the actor's conduct and a criminal investigation or official proceeding. The term "may" requires only some possibility, regardless of how likely or how remote, and there would be almost no scenario where a criminal investigation could not be initiated. The obstruction of justice statutes fall under Chapter 33. Offenses Involving Obstruction of Governmental Operations. The aim of the obstruction statutes is to protect actual and likely criminal investigations and official proceedings not to punish conduct that could impact hypothetical proceedings or investigations unlikely to ever be initiated.[168] This is especially true given that the statue applies to non-criminal proceedings and to official proceedings or criminal investigations where there is no criminal wrongdoing. A criminal investigation can be opened by any law enforcement officer irrespective of whether there is a scintilla of evidence supporting its initiation and a wide variety of hearings fall under the statute, including civil, divorce, landlord

[167] Crimes of violence as defined by RCCA § 22A-101 carry penalties ranging from 2 to 45 years.

[168] *See Timberlake v. United States*, 758 A.2d 978, 983 n.6 (D.C. 2000) (". . . there must be a meaningful distinction between concealment to avoid detection by a suspect, i.e. concealment to prevent an official proceeding from ever being instituted, and the concealment of evidence that constitutes tampering, i.e. concealment which occurs after an individual knows or has reason to know that an official proceeding has begun or knows that such a proceeding is likely to be instituted, the purpose of which is to make that evidence unavailable to the proceeding. ").

tenant, and small claims proceedings. Broadening the statute to "may" would create potential liability for innocent persons acting to prevent the remote possibility that a criminal investigation or official proceeding will be initiated for a crime that did not occur or the actor did not commit. For example, a minor child of an actor finds evidence on the actor's computer that the actor is having an extra-marital affair. The minor copies the evidence. The actor learns that the minor has the evidence and is worried that the minor will tell the actor's spouse causing the spouse to file for divorce and seek full custody of the minor. The actor convinces the minor to destroy the evidence of the affair by giving the minor gifts, including alcohol, so that the evidence could not be used against the actor if the actor's spouse found out about the affair and filed for divorce. If the statute merely required that an official proceeding could be initiated, the actor in that case could be found guilty of obstruction of justice and tampering with a witness or informant for trying to conceal a private affair that may or may not cause the spouse to file for divorce. The mere fact that the actor was married would mean a divorce proceeding "may" be initiated. By requiring that the official proceeding be initiated or likely to be initiated, the statute appropriately does not reach the actor's private conduct unless and until it would be likely to interfere with an actual divorce or custody proceeding.

- The USAO posits several hypotheticals in favor of its recommendation, including a scenario where the actor shreds all documents that would prove culpability for their offense and a scenario where the actor "grooms" a child so that the child does not report child sex abuse making it unlikely that a criminal investigation or official proceeding is ever initiated. As an initial matter, if an actor's conduct results in no criminal investigation ever being initiated, it is difficult to imagine a scenario where the actor would be charged with an obstruction of justice offense stemming from conduct to prevent the *investigation* that the actor successfully prevented from occurring. At a minimum, it is reasonable to expect that some investigation (whether timely or delayed) into an underlying criminal offense would occur before there exists evidence to charge an actor with an obstruction of justice offense even if the investigation did not lead to criminal charges. If no criminal investigation is ever initiated, an actor will likely escape liability for both the underlying conduct and any tampering or obstructive conduct irrespective of the wording of the obstruction statutes. Secondly, even in the scenario posited, whether a criminal investigation or official proceeding was likely to be initiated at the time of the actor's conduct would still be a highly fact-dependent question for trial.[169] Thus, it is not certain

[169] *Cf. Timberlake v. United States*, 758 A.2d 978, 983 n.6 (D.C. 2000) (stating that in *malum in se* crimes, it may be reasonable to infer the likelihood of an investigation from the nature of the crime). Because the obstruction statutes separately require the government to prove the actor acted with the purpose of tampering

that the actor in the hypothetical would be liable only for the more serious child sex abuse[170] conduct against the child and not the obstruction type conduct against governmental operations. Nevertheless, the mere possibility that such an actor could escape liability for offenses against the government such as obstruction of justice and tampering with a witness or informant does not warrant broadening the statue in a way that eliminates a true nexus between the actor's conduct and a likely criminal investigation or official proceeding given the statutory purpose of protecting governmental operations.[171]

5. USAO, on page 4, recommends clarifying that the definition of "official proceeding" includes all grand jury investigations, even where other court proceedings have not yet begun. USAO notes that grand jury proceedings may take place either in conjunction with a criminal case, or before a criminal case has begun in Superior Court (in the form of a Grand Jury Original).
    - The revised statute has not been changed because grand juries in the District are summoned and sworn by a judge in Superior Court even in cases where the indictment is returned as a Grand Jury Original. *See* D.C. Code § 11-1907(a); D.C. Super. Ct. Crim. R. (6)(a). Furthermore, indictments returned as Grand Jury Originals and transcripts of Grand Jury Original proceedings are captioned as Superior Court cases. The proposed RCCA language explicitly includes grand jury proceedings in a court of the District of Columbia without requiring any nexus to a particular case. Thus, there does not appear to be a need to clarify that grand jury proceedings that are not initiated in conjunction with an existing criminal case are included.
6. USAO, on page 5, recommends modifying subsections (a)(1) and (b)(a) of the obstruction of justice statute, RCCA § 22A-4301, to clarify that no mental state should apply to the nature of the underlying offense.
    - The revised statute partially adopts this recommendation by changing subsection (a)(1), but makes no changes to (b)(1). The recommended change is appropriate for subsection (a)(1) given that a person may not have an accurate understanding of the whether the official proceeding or criminal investigation is for a predicate felony. Subsection (b) on the other hand applies to any criminal offense. Thus, it is appropriate to require that the person be practically certain that the investigation is for some criminal offense.
7. USAO, on page 5, recommends removing the materiality requirement in subsections (a)(2)(B), (b)(2)(B), and (c)(2)(B) of the tampering with a witness or

---

with a criminal investigation or investigation, the government will always have to prove that the actor contemplated an investigation or official proceeding.

[170] Maximum penalties for sexual abuse of a minor range from 4-30 years under the RCCA.

[171] It is also unlikely that any actor would defend against a tampering charge by arguing that the actor enshrined fear or otherwise convinced a child sex abuse victim to remain silent and therefore did not have the requisite intent for a tampering charge.

informant statute, RCCA § 22A-4302. USAO notes that materiality is a legal concept and that most lay people would not have an understanding of what "materiality" means or what testimony or information would constitute material testimony or information.

- The revised statute has been changed to use the phrase "has a natural tendency to influence, or is capable of influencing," instead of the term "materiality" to address concerns about whether a lay person would understand the term "material." Because the phrase "has the natural tendency to influence, or is capable of influencing," comes from case law defining materiality,[172] this change does not change the substantive materiality requirement included in the first draft. The RCCA materiality requirement is part of the culpable mental state and therefore does not require proof that the information an actor desired another person to withhold from an official proceeding or criminal investigation actually had a natural tendency to influence, or was capable of influencing, a criminal investigation or official proceeding. The inclusion this materiality requirement furthers the statutory goal of punishing only those persons acting with the purpose of influencing a criminal investigation or official proceeding. The change in language improves the clarity of the revised statutes.

8. USAO, on page 6, recommends clarifying that "juror" in RCCA § 22A-4303 includes petit jurors, grand jurors, and persons selected or summoned as prospective jurors in the District.
    - The revised statute has been changed to add a definition of the term "juror" to RCCA § 22A-101. This change improves the clarity of the statute.

In addition to changes in response to received comments, the CCRC recommends the following additional changes based on its internal review:

1. The CCRC has updated citations in the statutory language (and corresponding commentary entries) to refer to the Revised Criminal Code Act of 2021 (the legislation submitted by the CCRC on October 1, 2021) rather than the Revised Criminal Code (that was issued by the CCRC March 31, 2021).
2. The CCRC has deleted cross-references in statutory language (and corresponding commentary entries) to definitions that are generally defined in Subtitle 1 of Title 22A.

[172] *See e.g.*, *Smith v. United States*, 68 A.3d 729, 740 (D.C. 2013) ("In order to prove materiality the government must show that the statement "has a natural tendency to influence, or was capable of influencing, the decision of the decision-making body to which it was addressed."); *see also Kungys v. United States*, 485 U.S. 759, 770 (1988) (explaining that "federal courts have long displayed a quite uniform understanding of the "materiality" concept" and that "the most common formulation of that understanding is that a concealment or misrepresentation is material if it "has a natural tendency to influence, or was capable of influencing, the decision of" the decision-making body to which it was addressed").

3. The CCRC has added a "knowingly" culpable mental state with respect to whether an official proceeding or criminal investigation has been initiated or likely to be initiated within the tampering with a witness or informant and tampering with a juror or court official statutes. In the first draft, reference to whether an official proceeding or criminal investigation had been or was likely to be initiated was included in the object of multiple purpose clauses. For example, one form of first degree tampering with a witness or informant required that an actor act "with the purpose of causing a person to testify or inform falsely in an official proceeding or criminal investigation that has been or is likely to be initiated." Per the RCCA rule of interpretation in § 22A-207, the culpable mental state of purposely in that language would apply to all objects of the phrase including whether an official proceeding or criminal investigation has been or was likely to be initiated. This means that, as written, an actor would need to consciously desire that an official proceeding or criminal investigation had been or was likely to be initiated. It would be illogical for an actor who is attempting to tamper with a witness or informant to desire the initiation of an official proceeding or criminal investigation. In most cases, the actor would desire that the official proceeding or criminal investigation not be initiated at all. To avoid confusion while maintaining a nexus to an official proceeding or criminal investigation, the CCRC recommends removing reference to the initiation of an official proceeding or criminal investigation from the purpose clauses and adding in as a new element to these statutes a requirement that the actor know that an official proceeding or criminal investigation has been initiated.
4. The CCRC has moved the phrase "with the purpose" in paragraphs (a)(1) and (b)(1) of the tampering with physical evidence statute to the beginning of subparagraphs (a)(1)(A), (a)(1)(B), (a)(2)(A), and (a)(2)(B). The CCRC also added the phrase "in fact" into subparagraphs (a)(1)(A), (a)(1)(B), and (a)(2)(B) so that the paragraphs require that an official proceeding, in fact, has been initiated or is likely to be initiated. The movement of "with the purpose" is clarificatory only and does not change the substance of the statute. The inclusion of the phrase "in fact" paragraphs (a)(1)(A), (a)(1)(B), and (a)(2)(B) means that there is no culpable mental state requirement regarding whether an official proceeding as been initiated or is likely to be initiated. This change prevents confusion regarding how the purposely mental state would apply to whether an official proceeding had been initiated or likely to be initiated given that an actor would not consciously desire the existence of a proceeding.
5. The CCRC has inserted the phrase "other than obstruction of justice" into paragraphs (b)(1)(B)(i) and (c)(1) of the tampering with a witness or informant and tampering with a juror or court official statutes to clarify that obstruction of justice cannot by itself serve as the predicate offense in the tampering with a witness or informant and tampering with a juror or court official statutes. The change does not substantively change the statutes but prevents confusion as to whether "any criminal offense" includes obstruction of justice, which independently requires the commission of a criminal offense committed with the purpose of obstructing or

impeding a criminal investigation or the proper functioning and integrity of an official proceeding, even though allowing obstruction of justice to be a predicate offense would be logically and temporally inconsistent with the rest of the statute.

6. The CCRC has inserted the term "criminal investigation" into the tampering with evidence statute in (a)(1)(A), (a)(1)(B), (a)(2)(B), (b)(1)(A), (b)(1)(B), and (b)(2)(B). Current D.C. Code § 22-723 uses only the term "official proceeding." However, the DCCA has said that the definition of "official proceeding" in D.C. Code § 22-721 includes criminal investigations in the tampering with physical evidence statute.[173] The RCCA has separately removed "criminal investigations" from the definition of "official proceeding" in RCCA § 22A-101 in favor of using both terms when a statute is meant to apply to both criminal investigations and official proceedings. The inclusion of only "official proceeding" in the first draft was an inadvertent substantive change to District law. The insertion of "criminal investigation" is consistent with current law.
7. The CCRC has deleted the word "criminal" before "bodily injury" in the statutory definitions of "predicate felony" in the obstruction of justice, tampering with evidence, and hindering apprehension or prosecution statutes. Likewise, the CCRC has deleted the word "criminal" before "bodily injury" in the definition of "predicate offense" in the retaliation against a witness, informant, juror, or court official statute. The modifier "criminal" in these definitions was redundant because the definitions already specify that the predicate felony or offense be a crime. These changes do not substantively change the definitions or "predicate felony" or "predicate offense".

[173] *Mason v. United States*, 170 A.3d 182, 191 (D.C. 2017); *Taylor v. United States*, No. 19-CF-1209, slip op. at 18 (January 27, 2022).