



Report #72 - Obstruction of Justice Offenses

(First Draft)

SUBMITTED FOR PUBLIC COMMENT

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DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
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Report #72—Obstruction of Justice Offenses (First Draft)

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

Written comments on the revisions in this report are welcome from government agencies, criminal justice stakeholders, and the public. Comments should be submitted via email to ccrc@dc.gov with the subject line “Comments on Report #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 November 16, 2021 (six weeks from the date of issue). Written comments received after November 16, 2021 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 (RCC) as recommended by the CCRC on March 31, 2021; and (2) commentary on the draft statutory text.

The Report’s draft statutory text is designed for inclusion in the RCC (online at <https://ccrc.dc.gov/node/1531361>) and uses the system of statutory numbering, the general provisions, definitions, penalty classification system, and other relevant aspects of the RCC as recommended by the CCRC on March 31, 2021. (Please note that the agency’s September 30, 2021 proposed legislation, the “Revised Criminal Code Act of 2021” (RCCA), uses a different system of statutory numbering and makes various non-substantive changes as compared to the RCC.)

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 & RCC Obstruction of Justice Related Offenses.

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

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Draft RCC Text and Commentary

Corresponding D.C. Code statutes in {}

- § 22E-701. Generally Applicable Definitions. {D.C. Code § 22-721}
 - “Court of the District of Columbia”
 - “Court Official”
 - “Criminal Investigation”
 - “Official Proceeding”
- § 22E-3301. Obstruction of Justice. {D.C. Code § 22-722}
- § 22E-3302. Tampering with a witness or informant. {D.C. Code § 22-722}
- § 22E-3303. Tampering with a juror or court official. {D.C. Code § 22-722}
- § 22E-3304. Retaliation against a witness, informant, juror, or court official. {D.C. Code § 22-722}
- § 22E-3305. Tampering with physical evidence. {D.C. Code § 22-723}
- § 22E-3306. Hindering apprehension or prosecution. {D.C. Code § 22-1806}

RCC § 22E-701. 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 RCC 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 RCC 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 RCC 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 RCC 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 RCC 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 RCC 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 RCC 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 RCC 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 RCC 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 RCC definition of “criminal investigation” is identical to the current definition in D.C. Code § 22-721(3) with one exception. The RCC 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.

“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.

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 RCC § 22E-3301.

⁴ RCC § 22E-3302.

⁵ RCC § 22E-3303.

Explanatory Note. The RCC 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 RCC definition of “official proceeding” is used in the revised offenses of obstruction of justice,⁶ tampering with physical evidence,⁷ tampering with a witness or informant,⁸ tampering with a juror or court official, and retaliation against a witness, informant, juror, or court official.⁹

Relation to Current District Law. The RCC definition of “official proceeding” is substantially similar to the current definition. However, the RCC 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 definition of “official proceeding” includes the word “investigations” which the DCCA recently held to include criminal investigations.¹⁰ 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).¹¹ 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.”¹² In contrast, the RCC 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.

⁶ RCC § 22E-3301.

⁷ RCC § 22E-3305.

⁸ RCC § 22E-3302.

⁹ RCC § 22E-3303.

¹⁰ *Mason v. United States*, 170 A.3d 182, 191 (D.C. 2017).

¹¹ *Wynn v. United States*, 48 A.3d 181, 191 (D.C. 2012).

¹² *Wynn v. United States*, 48 A.3d 181, 190 (D.C. 2012).

RCC § 22E-3301. 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, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
 - (2) Second degree obstruction of justice is a Class A misdemeanor subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
 - (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 RCC § 22E-214.
- (d) Definitions.
 - (1) The terms “knowing” and “purpose” have the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; the terms “actor,” “bodily injury,” “criminal investigation,” “official proceeding,” “sexual act,” and “sexual contact” have the meanings specified in RCC § 22E-701; and
 - (2) 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 criminal 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 criminal 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.¹³*

Subsection (a) specifies the conduct prohibited as first degree obstruction of justice. Paragraph (a)(1) requires a mental state of “knowing” as defined in RCC § 22E-206 with respect to two circumstance elements: (1) that an official proceeding or criminal investigation has been initiated and (2) that the official proceeding or criminal investigation was initiated for a predicate felony. Under RCC § 22E-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 or is likely to be initiated and that the official proceeding or criminal investigation be for a “predicate felony.”

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 criminal 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 criminal bodily injury, sexual act, sexual contact, confinement, or death. Because this definition includes all felonies that require as an element a criminal bodily injury, sexual act, sexual contact, confinement, or death, the term predicate felony is broader than the term “crime of violence” in RCC § 22E-701. 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 criminal bodily injury, sexual act, sexual contact, confinement, or death.

Paragraph (a)(2) specifies a culpable mental state of purposely under RCC § 22E-206(a) for the conduct of obstructing or impeding. The paragraph requires that the actor consciously desire to obstruct or impede a criminal investigation or the proper functioning of an official proceeding by commission of a criminal offense under District law. Per RCC

¹³ The remaining enumerated acts in the current obstruction of justice statute are addressed in four other RCC statutes: RCC § 22E-3302, tampering with a witness or informant; RCC § 22E-3303, tampering with a juror or court official; RCC § 22E-3305, tampering with physical evidence, and RCC § 22E-3304, retaliation against a witness, informant, juror, or court official.

§ 22E-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 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.¹⁴ 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.¹⁵

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 RCC § 22E-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 second degree obstruction of justice requires knowledge that an official proceeding or criminal investigation has been initiated or is likely to be initiated for any crime but does not require any knowledge about the nature or severity of the offense(s) underlying the criminal investigation or official proceeding. This difference is accomplished by the removal of the phrase “for a predicate felony” in paragraph (b)(1). The statutory text for second degree

¹⁴ *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.

¹⁵ 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.

obstruction of justice is otherwise identical to the statutory text of first degree obstruction of justice.

Subsection (c) establishes the penalties for first and second degree obstruction of justice. 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 physical 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 RCC's rules of priority in RCC § 22E-214. Obstruction of justice merges with other offenses in chapters 31, 32, 33, or 34 regardless of whether they otherwise merge under § 22E-214.¹⁶

Subsection (d) cross-references applicable definitions located elsewhere in the RCC and 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 RCC 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.¹⁷ In contrast, the revised obstruction of

¹⁶ *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 RCC § 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.

¹⁷ 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

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 RCC 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.¹⁸ Although the RCC 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.¹⁹ 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

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. 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.

¹⁸ 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 RCC § 22E-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.

¹⁹ 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 is greatly reduced.

felony, the offense of obstruction justice is a Class 9 felony. In cases involving misdemeanors or felonies where a criminal 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.²⁰ 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.”²¹ 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

²⁰ 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. § 1512(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.”).

²¹ *Hawkins v. United States*, 119 A.3d 687, 701 (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.”).

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 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.²² 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.²³ In contrast, the RCC 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.²⁴ 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.²⁵ Application of this test, sometimes called the *Blockburger*²⁶ 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.²⁷ In contrast, the RCC obstruction of justice offense

²² 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).

²³ 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 or impede the due administration of justice in any official proceeding.”

²⁴ 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.

²⁵ *Byrd v. United States*, 598 A.2d 386, 389 (D.C. 1991).

²⁶ 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.”).

²⁷ For example, in *McCullough 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

requires merger for obstruction of justice and related convictions in chapters 31, 32, 33, or 24 arising out of the same course of conduct.²⁸ 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 it requires proof of specific intent.²⁹ At a minimum, specific intent requires knowledge or purpose.³⁰ 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].”³¹ 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.”³² The RCC resolves this ambiguity by expressly requiring a “purposeful” mental state with respect to obstructing or impeding a criminal 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

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.

²⁸ This change in merger analysis is in addition to the general changes made to merger rules provided for RCC § 22E-214.

²⁹ 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).

³⁰ 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.”).

³¹ *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 701 (“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)).

³² *Hawkins v. United States*, 119 A.3d 687, 701 (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))”).

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 have an impact on a criminal investigation when the actor did not desire to impact their actions.³³ This change improves the clarity and proportionality of the revised statute.

Other changes to the revised statute 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.”³⁴ This change improves the clarity of the statute without changing current District law.

³³ *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.

³⁴ *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.”).

RCC § 22E-3302. 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) With the purpose of causing a person to:
 - (A) Testify or inform falsely in an official proceeding or criminal investigation that has been or is likely to be initiated;
 - (B) Withhold any material testimony or information from an official proceeding or criminal investigation that has been or is likely to be initiated;
 - (C) Elude legal process summoning the person to testify or supply evidence in an official proceeding that has been or is likely to be initiated;
 - (D) Be absent from any official proceeding that has been or is likely to be initiated 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 that official proceeding that has been or is likely to be initiated; or
 - (ii) Prevent its production or use in that official proceeding that has been or is likely to be initiated.
- (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 under District of Columbia law;
 - (ii) With intent to cause a person to fear for the person's safety or the safety of another person;
 - (2) With the purpose of causing a person to:
 - (A) Testify or inform falsely in an official proceeding or criminal investigation that has been or is likely to be initiated;
 - (B) Withhold any material testimony or information from an official proceeding or criminal investigation that has been or is likely to be initiated;
 - (C) Elude legal process summoning the person to testify or supply evidence in an official proceeding that has been or is likely to be initiated;
 - (D) Be absent from an official proceeding that has been or is likely to be initiated 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) Impairing its value as evidence in an official proceeding that has been or is likely to be initiated; or

- (ii) Preventing its production or use in an official proceeding that has been or is likely to be initiated.
- (c) *Third Degree*. An actor commits third degree tampering with a witness or informant when the actor:
 - (1) In fact, commits any criminal offense under District of Columbia law;
 - (2) With the purpose of causing a person to:
 - (A) Testify or inform falsely in an official proceeding or criminal investigation that has been or is likely to be initiated;
 - (B) Withhold any material testimony or information from an official proceeding or criminal investigation that has been or is likely to be initiated;
 - (C) Elude legal process summoning the person to testify or supply evidence in an official proceeding that has been or is likely to be initiated;
 - (D) Be absent from an official proceeding that has been or is likely to be initiated 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) Impairing its value as evidence in an official proceeding that has been or is likely to be initiated; or
 - (ii) Preventing its production or use in an official proceeding that has been or is likely to be initiated.
- (d) *Penalties*.
 - (1) First degree tampering with a witness or informant is a Class 7 felony, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
 - (2) Second degree tampering with a witness or informant is a Class 9 felony, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
 - (3) Third degree tampering with a witness or informant is a Class A misdemeanor, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
 - (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 RCC § 22E-214.
- (e) *Definitions*. The terms “intent,” “knowing,” and “purpose,” have the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; and the terms “actor,” “Court of the District of Columbia,”

“crime of violence,” “official proceeding,” have the meanings specified in RCC § 22E-701.

***Explanatory Note.** The RCC 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 RCC 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 RCC 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 provisions³⁵ 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 RCC § 22E-701 and includes a criminal attempt under RCC § 22E-301, a criminal solicitation under RCC § 22E-302, or a criminal conspiracy under RCC § 22E-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.³⁶ “In fact,” a defined term in RCC § 22E-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 multiple alternative elements, one of which must be proven for liability for the offense. The culpable mental state for paragraph (a)(2) is “purposely,” a defined term under RCC § 22E-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)(2)(A), (a)(2)(B), (a)(2)(C), (a)(2)(D), and (a)(2)(E). Per RCC § 22E-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

³⁵ See D.C. Code §§ 22-722(a)(2)-(a)(3), (a)(6). Some of these provisions also apply to officers and jurors. The RCC tampering with a witness or informant offense replaces these provisions only to the extent that they apply to witnesses and jurors. The RCC tampering with a juror or court official offenses replaces these provisions with respect to jurors and court officials. The RCC 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.

³⁶ 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.

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)(2)(A), (a)(2)(B), (a)(2)(C), (a)(2)(D), and (a)(2)(E).³⁷ 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)(2)(A), (a)(2)(B), (a)(2)(C), (a)(2)(D), and (a)(2)(E) in relation to an official proceeding or criminal investigation regardless of whether the person is already acting as a witness or informant.

Subparagraphs (a)(2)(A), (a)(2)(B), (a)(2)(C), (a)(2)(D), and (a)(2)(E) specify the 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 crime of violence as well as the circumstance elements that the actor must believe to be true. Per RCC §§ 22E-205-07, the culpable mental state of “purposely” in paragraph (a)(2) applies to each object in subparagraphs (a)(2)(A), (a)(2)(B), (a)(2)(C), (a)(2)(D), and (a)(2)(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)(2)(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 an official proceeding or criminal investigation that has been or is likely to be initiated.” This subparagraph requires proof that the actor consciously desired to cause a person to provide testimony or information that the actor believed to be false in an official proceeding or criminal investigation that the actor believed was pending or likely to be initiated. The government need not prove that the actor, in fact, caused a witness or informant to provide false testimony or information. Likewise, the government is not required to prove that a criminal investigation or official proceeding actually had been initiated or was likely to be initiated. 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 an official proceeding

³⁷ *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.

or criminal investigation that the actor believed had been initiated or was likely to be initiated.

Subparagraph (a)(2)(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 material testimony or information from an official proceeding or criminal investigation that has been or is likely to be initiated.” This subparagraph requires proof that the actor consciously desired to cause a person to withhold testimony or information that the actor believed to be material from an official proceeding or criminal investigation.³⁸ The subparagraph also requires that the actor believe that a criminal investigation or official proceeding was pending or likely to be pending. The government need not prove that that actor, in fact, caused a person to withhold material testimony or information from an official proceeding or criminal investigation so long as the government proves the actor had the purpose of causing such a result. Likewise, the government is not required to prove that a criminal investigation or official proceeding actually had been initiated or was likely to be initiated. Rather, the government need only prove that the actor believed that an official proceeding or criminal investigation had been initiated or was likely to be initiated and that the crime of violence could cause a person to withhold material testimony or information.

Subparagraph (a)(2)(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 an official proceeding that has been or is likely to be initiated.” 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 an official proceeding that the actor believed had been initiated or was likely to be initiated. 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. As in the cases of other subparagraphs, the government is not required to prove that an official proceeding actually had been initiated or was likely to be initiated. Rather, the government need only prove that the actor believed that an official proceeding had been initiated or was likely to be initiated.

Subparagraph (a)(2)(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 any official proceeding that has been or is likely to be initiated to which the person has been legally summoned.” This paragraph requires proof that the actor believed 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 that official proceeding. Because the term “legal process” necessitates a connection

³⁸ 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.

to an official proceeding, including grand jury proceedings, this subparagraph does not apply to criminal investigations. As in the cases of subparagraphs (a)(2)(A), (a)(2)(B), (a)(B)(C), the government is not required to prove that an official proceeding actually had been initiated or was likely to be initiated. Rather, the government need only prove that the actor believed that an official proceeding had been initiated or was likely to be initiated and that the crime of violence could cause the person to be absent themselves from that official proceeding.

Subparagraph (a)(2)(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 physical evidence. The subparagraph contains two parts. The first part, specifies that the actor must consciously desire to cause another person to destroy, conceal, remove, or alter a document, record, image, audiovisual recording, or other object. The second part, in sub-sub-paragraphs (a)(2)(E)(i) and (a)(2)(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 an official proceeding 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 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 destroying, concealing, removing, or materially altering the object could impair its value as evidence or prevent its production in an official proceeding. As in the cases of subparagraphs (a)(2)(A), (a)(2)(B), (a)(B)(C), (a)(B)(D), the government is not required to prove that an official proceeding actually had been initiated or was likely to be initiated. Rather, the government need only prove that the actor believed that an official proceeding had been initiated or was likely to be initiated.

Subsection (b) establishes the RCC offense of second degree tampering with a witness or 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 term³⁹ 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 also satisfies the conduct element of second degree tampering with a witness or informant. The proscribed conduct includes any

³⁹ “Knowingly” is defined in RCC § 22E-206.

criminal offense under District law. 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 RCC § 22E-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) requires that the criminal offense committed under paragraph (b)(1) be performed with the intent to cause a person to fear for the person’s safety or the safety of another person. This paragraph does not require the actor to commit a criminal act that typically causes or is intended to cause a criminal *bodily injury* and does not require the criminal act to occur to a witness or informant themselves. Rather, the paragraph requires that the criminal act be intended to cause *any*⁴⁰ person *to fear for the person’s safety or the safety of another person*. “Intent” is a defined term in RCC § 22E-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 RCC § 22E-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.

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)(2)(A), (a)(2)(B), (a)(2)(C), (a)(2)(D), and (a)(2)(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 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

⁴⁰ 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.

term in RCC § 22E-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.

Subparagraphs (c)(2)(A), (c)(2)(B), (c)(2)(C), (c)(2)(D), and (c)(2)(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)(2)(A), (a)(2)(B), (a)(2)(C), (a)(2)(D), and (a)(2)(E).

Subsection (d) establishes the penalties for first, second, and third degree tampering with a witness or informant. 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 physical 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 RCC’s rules of priority in RCC § 22E-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 § 22E-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 § 22E-214.

Subsection (e) cross-references applicable definitions located elsewhere in the RCC.

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

First, the RCC 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 RCC 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 RCC 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 RCC 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 RCC 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.⁴¹ In contrast, the RCC 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 underlying conduct involves violence or threatened violence. This change improves the proportionality of the revised statutes.

Third, the RCC tampering with a witness or informant offense requires a person to engage in some type of separately-defined criminal offense. 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 “corruptly.” However, 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.” Similarly, D.C. Code § 22-722(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 constitute harassment under § 22-722(a)(3).⁴² 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. The requirement of an otherwise criminal act 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 RCC 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

⁴¹ *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.

⁴² *Wynn v. United States*, 80 A.3d 211, 217 (D.C. 2013).

person to engage in evidence tampering may fall under the catch-all provision of the obstruction of justice statute⁴³ or constitute tampering with physical evidence⁴⁴ 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 RCC tampering with a witness or informant offense explicitly prohibits specified conduct done for the purpose of causing another to tamper with physical evidence. This change improves the clarity of the revised statutes and ensures fair notice of what conduct is prohibited.

Fifth, the RCC 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.”⁴⁵ 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.⁴⁶ In contrast, the RCC 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,⁴⁷ or potential witness or informant.⁴⁸ Instead of using the terms “witness” and “informant”, the RCC 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

⁴³ D.C. Code §22-722(a)(6).

⁴⁴ 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 RCC § 22E-211 (Criminal Liability for Conduct by an Innocent or Irresponsible Person).

⁴⁵ *Crutchfield v. United States*, 779 A.2d 307, 325 (D.C. 2001) (quoting *Smith v. United States*, 591 A.2d 229 (D.C.1991)).

⁴⁶ *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.”).

⁴⁷ 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.

⁴⁸ 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.

proceeding or criminal investigation. This change improves the clarity of the revised statutes and may reduce a possible gap in liability.

Sixth, the RCC 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 is material to an official proceeding or criminal investigation, the current provision covers conduct that is not intended to affect the course or outcome of an official proceeding or criminal investigation.⁴⁹ 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 could affect the course or outcome of the criminal investigation or official proceeding. 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.⁵⁰ Application of this test, sometimes called the *Blockburger*⁵¹ 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.⁵² In contrast, the RCC tampering with a witness or informant offense requires merger for related

⁴⁹ 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.

⁵⁰ *Byrd v. United States*, 598 A.2d 386, 389 (D.C. 1991).

⁵¹ 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.”).

⁵² For example, in *McCullough 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.

convictions in chapters 31, 32, 33, or 24 arising out of the same course of conduct.⁵³ At the same time, the RCC precludes merger with a underlying criminal offense for first and second degree tampering with a witness or informant.⁵⁴ 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 RCC 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 juror in the discharge of the juror’s official duties” 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 offense⁵⁵ that means something akin to an “intent to undermine the integrity of the pending investigation [or proceeding].”⁵⁶ 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.”⁵⁷

⁵³ This change in merger analysis is in addition to the general changes made to merger rules provided for RCC § 22E-214.

⁵⁴ *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.

⁵⁵ *Hawkins v. United States*, 119 A.3d 687, 700 (D.C. 2015) (referring to the term “corruptly” as “the statutory mens rea requirement”).

⁵⁶ *Hawkins v. United States*, 119 A.3d 687, 701 (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)”).

⁵⁷ *Hawkins v. United States*, 119 A.3d 687, 701 (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))”).

Additionally, the statutory terms “endeavors”⁵⁸ and “with intent”⁵⁹ 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 mental state.⁶⁰ The phrase “with intent,” has not been clearly defined as requiring knowledge or purpose in District case law either generally⁶¹ 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.⁶² 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 RCC 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 RCC 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.”⁶³ “Criminal investigation” is separately defined as “an investigation of a violation of any criminal statute in effect in the District of Columbia.”⁶⁴ The DCCA has held that police investigations are encompassed by this definition of “official proceeding,”⁶⁵ even though contextual language in several paragraphs of current D.C. Code

⁵⁸ “Endeavors” is found in paragraphs (a)(1) and (a)(2).

⁵⁹ “With intent” is found in paragraphs (a)(2) and (a)(3).

⁶⁰ *Irving v. United States*, 673 A.2d 1284, 1289 (D.C. 1996).

⁶¹ See RCC commentary to § 22E-206.

⁶² 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.”)).

⁶³ See D.C. Code § 22-721(4).

⁶⁴ See D.C. Code § 22-721(3).

⁶⁵ *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”).

§ 22-721 clearly indicates that those paragraphs would not apply to a police investigation.⁶⁶ To resolve this ambiguity, the RCC 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 statute expressly states. Some subparagraphs in the RCC 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 physical evidence, however, the actions in the subparagraphs limited to official proceedings are not actions that could be taken in connection with a criminal investigation.⁶⁷ This change improves the clarity and consistency of the revised statute.

⁶⁶ *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.

⁶⁷ *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 RCC does not include the term “criminal investigation” in this paragraph would not be a substantial change in law.

RCC-§ 22E-3303. 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) With the purpose of:
 - (A) Influencing the vote, opinion, decision, deliberation, or other official action of a juror in an official proceeding that has been initiated;
 - (B) Influencing the opinion, decisions, or other official action of a court official in an official proceeding that has been or is likely to be initiated;
 - (C) Causing a juror to withhold material testimony or information in an official proceeding that has been initiated; 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 under District of Columbia law;
 - (ii) With intent to cause a person to fear for the person's safety or the safety of another person;
 - (2) With the purpose of:
 - (A) Influencing the vote, opinion, decision, deliberation, or other official action of a juror in an official proceeding that has been initiated;
 - (B) Influencing the opinion, decisions, or other official action of a court official in an official proceeding that has been instituted or is likely to be initiated;
 - (C) Causing a juror to withhold material testimony or information in an official proceeding that has been initiated; 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 under District of Columbia law;
 - (2) With the purpose of:
 - (A) Influencing the vote, opinion, decision, deliberation, testimony, or other official action of a juror in an official proceeding that has been initiated;
 - (B) Influencing the opinion, decisions, testimony, or other official action of a court official in an official proceeding that has been initiated or is likely to be initiated;
 - (C) Causing a juror to withhold material testimony or information in an official proceeding that has been initiated; 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, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (2) Second degree tampering with a juror or court official is a Class 9 felony, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (3) Third degree tampering with a juror or court official is a Class A misdemeanor, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(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 RCC § 22E-214.

- (e) *Definitions.* The terms “intent,” “knowing,” and “purpose,” have the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; and the terms “actor,” “court official,” “Court of the District of Columbia,” “crime of violence,” and “official proceeding” have the meanings specified in RCC § 22E-701.

Explanatory Note. *The RCC 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 RCC 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 RCC 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 provisions⁶⁸ in current D.C. Code § 22-722.*

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

⁶⁸ See D.C. Code §§ 22-722(a)(1)-(a)(3), (a)(6). Some of these provisions also apply to witnesses and informants. The RCC tampering with a juror or court official offense replaces these provisions only to the extent that they apply to jurors and court officers. The RCC tampering with a witness or informant offense replaces these provisions with respect to witnesses and informants. The RCC 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.

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 RCC § 22E-701 and includes a criminal attempt under RCC § 22E-301, a criminal solicitation under RCC § 22E-302, or a criminal conspiracy under RCC § 22E-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.⁶⁹ “In fact,” a defined term in RCC § 22E-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 multiple alternative elements, one of which must be proven for liability for the offense. The culpable mental state for paragraph (a)(2) is “purposely” a defined term under RCC § 22E-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 an official proceeding as enumerated subparagraphs (a)(2)(A), (a)(2)(B), (a)(2)(C), (a)(2)(D), and (a)(2)(E). Per RCC § 22E-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 an official proceeding. 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 actions by a juror or court official in an official proceeding person as specified in subparagraphs (a)(2)(A), (a)(2)(B), (a)(2)(C), (a)(2)(D), and (a)(2)(E).⁷⁰

Subparagraphs (a)(2)(A), (a)(2)(B), (a)(2)(C), (a)(2)(D), and (a)(2)(E) specify the conduct the actor must have the purpose of influencing or causing a juror or court official

⁶⁹ *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.

⁷⁰ *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.

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 RCC §§ 22E-205-07, the culpable mental state of purposely in paragraph (a)(2) applies to each object in subparagraphs (a)(2)(A), (a)(2)(A), (a)(2)(C), (a)(2)(D), and (a)(2)(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)(2)(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 an 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 an official proceeding that the actor believed had been initiated. The government need not prove that actor, in fact influenced the vote, opinion, decision, deliberation, or other official action of a juror. Likewise, the subparagraph does not require that the government prove that an official proceeding actually had been initiated or was likely to be initiated. The government need only prove that the actor committed a crime of violence with the conscious object of influencing the vote, opinion, decision, or other official action of a court official in an official proceeding that had been initiated or was likely to be initiated. Official actions under this subparagraph include voting, developing and sharing opinions in connection to an official proceeding, deliberating, and other actions that are part of the jurors' duties in an official proceeding.

Subparagraph (a)(2)(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 an official proceeding." This subparagraph requires proof that the actor consciously desired to influence a court official's opinion, decision, or other official action in an official proceeding that the actor believed had been initiated, or is likely to be initiated. The government need not prove that the actor, in fact, influenced the opinion, decision, or other official action of a court official. Likewise, the subparagraph does not require that the government prove that an official proceeding actually had been initiated or was likely to be initiated. Rather, the government need only prove that the actor believed that an official proceeding had been initiated, or was likely to be initiated, and that the crime of violence could influence the opinion, decision, or other official action of a court official in that proceeding.

Subparagraph (a)(2)(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 material testimony or information in an official proceeding that has been instituted." This paragraph requires proof that the actor consciously desired to cause a juror to withhold material testimony or information in an official proceeding that has been instituted in an official proceeding that the actor believed had been initiated. As in the cases of subparagraphs (a)(2)(A) and (a)(2)(B), the government is not required to prove that an official proceeding actually had been initiated. Rather, the government need only prove that the actor believed that an official proceeding had been initiated and that

that the crime of violence could cause a juror to withhold material testimony or information in that proceeding.

Subparagraph (a)(2)(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 believed 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 believed 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 RCC 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 term⁷¹ 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 also satisfies the conduct element of second degree tampering with a witness or informant. The proscribed conduct includes any criminal act 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 RCC § 22E-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.

Subparagraph (b)(1)(B)(ii) requires that the criminal offense committed under paragraph (b)(1) be performed with the intent to cause a person to fear for the person’s safety or the safety of another person. This paragraph does not require the actor to commit a criminal act that typically causes or is intended to cause a criminal *bodily injury* and does not require the criminal act to occur to a juror or court official themselves. Rather, the

⁷¹ “Knowingly” is defined in RCC § 22E-206.

paragraph requires that the criminal act be intended to cause *any*⁷² person to fear for the person's safety or the safety of another person. "Intent" is a defined term in RCC § 22E-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 RCC § 22E-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.

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. These subparagraphs are identical the subparagraphs (a)(2)(A), (a)(2)(B), (a)(2)(C), and (a)(2)(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 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 RCC § 22E-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.

Subparagraphs (c)(2)(A), (c)(2)(B), (c)(2)(C), (c)(2)(D), and (c)(2)(E) 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)(2)(A), (a)(2)(B), (a)(2)(C), (a)(2)(D), and (a)(2)(E).

Subsection (d) establishes the penalties for first, second, and third degree tampering with a juror or court official. 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

⁷² *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), (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 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.

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 physical 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 RCC's rules of priority in RCC § 22E-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 § 22E-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 § 22E-214.

Subsection (e) cross-references applicable definitions located elsewhere in the RCC.

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

First, the RCC 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 RCC tampering with a juror or court official statute.⁷³ All forms of obstruction of justice in the current code are subject to the same three to thirty-year penalty. In contrast, the RCC 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 obstruction of justice statute,⁷⁴ the RCC 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 RCC 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.⁷⁵ In contrast, the RCC tampering with a juror or court official statute has three grades based primarily on

⁷³ 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.

⁷⁴ Pursuant to paragraph (d)(4), a conviction for RCC 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.

⁷⁵ *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.

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 underlying conduct involves violence or threatened violence. This change improves the proportionality of the revised statutes.

Third, the RCC tampering with a juror or court official offense requires a person to engage in some type of separately-defined criminal offense. 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 “corruptly” with respect to either provision. However, 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.” Similarly, D.C. Code § 22-722(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 constitute harassment under § 22-722(a)(3).⁷⁶ 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. The requirement of an otherwise criminal act 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.⁷⁷ Application of this test, sometimes called the *Blockburger*⁷⁸ rule, to the obstruction of justice statute has been inconsistent and has resulted in persons receiving multiple convictions for obstruction of justice for the exact same conduct.⁷⁹ In contrast, the RCC tampering with a juror or court

⁷⁶ *Wynn v. United States*, 80 A.3d 211, 217 (D.C. 2013).

⁷⁷ *Byrd v. United States*, 598 A.2d 386, 389 (D.C. 1991).

⁷⁸ 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.”).

⁷⁹ For example, in *McCullough 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

official offense requires merger for related convictions in chapters 31, 32, 33, or 24 arising out of the same course of conduct.⁸⁰ At the same time, the RCC precludes merger with a underlying criminal offense for first and second degree tampering with a juror or court official.⁸¹ 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 RCC 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 offense⁸² that means something akin to an “intent to undermine the integrity of the pending investigation [or proceeding].”⁸³ At the same, however, the DCCA has stated that

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.

⁸⁰ This change in merger analysis is in addition to the general changes made to merger rules provided for RCC § 22E-214.

⁸¹ 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.

⁸² *Hawkins v. United States*, 119 A.3d 687, 700 (D.C. 2015) (referring to the term “corruptly” as “the statutory mens rea requirement”).

⁸³ *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 701 (“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 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

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.”⁸⁴

Additionally, the statutory terms “endeavors”⁸⁵ and “with intent”⁸⁶ 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.⁸⁷ The phrase “with intent,” has not been clearly defined as requiring knowledge or purpose in District case law either generally⁸⁸ 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.⁸⁹ 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 RCC 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 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.

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.”).

⁸⁴ *Hawkins v. United States*, 119 A.3d 687, 701 (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))”).

⁸⁵ “Endeavors” is found in paragraphs (a)(1) and (a)(2).

⁸⁶ “With intent” is found in paragraphs (a)(2) and (a)(3).

⁸⁷ *Irving v. United States*, 673 A.2d 1284, 1289 (D.C. 1996).

⁸⁸ See RCC commentary to § 22E-206.

⁸⁹ 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.”)).

Second, the RCC 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. 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.”⁹⁰ 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 RCC 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 RCC 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 RCC tampering with a juror or court official offense uses a newly defined term in RCC § 22E-701 “court official.” The term “officer” is used, but not defined, in the current D.C. Code § 22-722 obstruction of justice statute. There is no case law on point. Through use of the RCC definition, the RCC tampering with a juror or court official offense provides greater clarity and specificity as to the scope of the offense.

⁹⁰ D.C. Code §22-722(a)(1).

RCC § 22E-3304. 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, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
 - (2) Second degree retaliation against a witness, informant, juror, or court official is a Class B misdemeanor, subject to a maximum term of imprisonment of [X], a maximum fine of [X] or both.
 - (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 RCC § 22E-214.
- (d) *Definitions.*

- (1) The term “knowing” has the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; the terms “actor,” “bodily injury,” “building,” “court official,” “crime of violence,” “dwelling,” “law enforcement officer,” “property of another,” “sexual act,” and “sexual contact” have the meanings specified in RCC § 22E-701; and
- (2) In this section, the term “predicate offense” means:
 - (A) Any crime under this title that includes as an element in a criminal 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 criminal 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 RCC 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 RCC 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 RCC § 22E-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 § 22-722.⁹¹*

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 RCC § 22E-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 RCC § 22E-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

⁹¹ See D.C. Code § 22-722(a)(4)-(a)(5).

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.

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 RCC §§ 22E-701 and 22E-207 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 criminal bodily injury, a sexual act, a sexual contact, confinement, death, or damage to or destruction of a dwelling, building, or the property of another.

Subsection (c) establishes the penalties for first and second degree retaliation against a witness, informant, juror, or court official. 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 § 22E-214. The RCC’s rules of priority in RCC § 22E-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 § 22E-214.

Subsection (d) cross-references applicable definitions located elsewhere in the RCC and defines “predicate offense” for this section only.

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

First, the RCC 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 RCC 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 RCC 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 RCC 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.⁹² In contrast, the RCC 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 RCC 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.⁹³ In contrast, the RCC 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 RCC 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

⁹² *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.

⁹³ 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.”).

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, or officer respectively. These provisions require that the government prove as elements that a person retaliated against, in fact, provided information in a criminal investigation⁹⁴ or that the person was in fact, a witness, juror or officer performing their official duty.⁹⁵ In contrast, the RCC 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 RCC 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 RCC 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 RCC 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.⁹⁶ Simultaneously,

⁹⁴ D.C. Code § 22-722(a)(4).

⁹⁵ D.C. Code § 22-722(a)(5).

⁹⁶ *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

however, the DCCA expressed concern about using the phrase “specific intent” at all. At a minimum, specific intent requires knowledge or purpose. The RCC 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 RCC retaliation against a witness, informant, juror, or court official. This change improves the clarity and proportionality of the statute.

administration of justice in any official proceeding,” *Hawkins v. United States*, 119 A.3d 687, 695 (D.C. 2015)).

RCC § 22E-3305. Tampering with Physical Evidence.

- (a) *First Degree.* An actor commits tampering with physical 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, with the purpose of:
 - (A) Impairing its value as evidence in an official proceeding that has been or is likely to be initiated for a predicate felony; or
 - (B) Preventing its production or use in an official proceeding that has been or is likely to be initiated for a predicate felony;
 - (2) Knowingly makes, presents, or uses any document, record, image, audiovisual recording, or other object, regardless of medium, with the purpose of:
 - (A) Deceiving another person as to its veracity; and
 - (B) Affecting the course or outcome of an official proceeding that has been or is likely to be initiated for a predicate felony.
- (b) *Second Degree.* An actor commits tampering with physical 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, with the purpose of:
 - (A) Impairing its value as evidence in an official proceeding that has been or is likely to be initiated; or
 - (B) Preventing its production or use in an official proceeding that 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, with the purpose of:
 - (A) Deceiving another person as to its veracity; and
 - (B) Affecting the course or outcome of an official proceeding that has been or is likely to be initiated.
- (c) *Penalties.*
 - (1) First degree tampering with physical evidence is a Class 9 felony, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
 - (2) Second degree tampering with physical evidence is a Class B misdemeanor, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
 - (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 RCC § 22E-214.
- (d) *Definitions.*

- (1) The terms “knowing” and “purpose” have the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; the terms “actor,” “audiovisual recording,” “bodily injury,” “criminal investigation,” “image,” “official proceeding,” “record,” “sexual act,” and “sexual contact” have the meanings specified in RCC § 22E-701; and
- (2) 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 criminal 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 criminal bodily injury, sexual act, sexual contact, confinement or death.

***Explanatory Note.** The RCC tampering with physical 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. The statute also punishes making, presenting or using physical evidence with the purpose of deceiving another and affecting an official proceeding. The penalty gradations are based on the seriousness of the offense underlying the official proceeding. The RCC tampering with physical 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 RCC § 22E-214. The revised tampering with physical evidence offense replaces the offense of the same name in current. D.C. Code § 22-723.*

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

Paragraph (a)(1) prohibits knowingly destroying, concealing, removing, or altering a document, record, image, audiovisual recording, or other object. “Knowingly” is a defined term in RCC § 22E-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 “with the purpose” further specified in subparagraph (a)(1)(A) or (a)(1)(B). “Purpose” is a defined term in RCC § 22E-206 that refer to a conscious desire for a result to occur. Per RCC § 22E-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.

Subparagraph (a)(1)(A) specifies that one prohibited purpose is impairing the physical evidence’s value as evidence in an official proceeding for a “predicate felony.” Per RCC § 22E-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 for a “predicate felony” 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. It is sufficient for the government to prove that the actor believed the physical object to be evidence or potential evidence and that the actor believed destroying, concealing, removing, or altering the object could impair its value as evidence in an official proceeding for a predicate felony. The government also is not required to prove that an official proceeding actually had been initiated or was likely to be initiated. Rather, the government need only prove that the actor believed that an official proceeding for a “predicate felony” had been initiated or was likely to be initiated and that the official proceeding be for a “predicate felony.”

Subparagraph (a)(1)(B) specifies an alternative prohibited purpose of preventing the production or use of the physical evidence in an official proceeding for a “predicate felony.” Per RCC § 22E-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 or use in an official proceeding 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. It is sufficient for the government to prove that the actor believed the physical object to be evidence or potential evidence and that the actor believed destroying, concealing, removing, or altering the object could prevent its production or use in an official proceeding. The government also is not required to prove that an official proceeding actually had been initiated or was likely to be initiated. Rather, the government need only prove that the actor believed that an official proceeding had been initiated or was likely to be initiated.

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 criminal 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 criminal bodily injury, sexual act, sexual contact, confinement, or death. Because this definition includes all felonies resulting in a criminal bodily injury, sexual act, sexual contact, confinement, or death, the term predicate felony is broader than the term “crime of violence” in RCC § 22E-701. 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 criminal 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 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 RCC § 22E-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 “with the purpose” further specified in subparagraph (a)(1)(A) and (a)(1)(b). “Purpose” is a defined term in RCC § 22E-206 that refers to a conscious desire for a result to occur. Per RCC § 22E-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.

Subparagraph (a)(2)(A) specifies that one prohibited purpose is impairing the physical evidence’s value as evidence in an official proceeding for a “predicate felony.” Per RCC § 22E-205, 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 that the actor believes has been initiated or is likely to be initiated for a predicate felony. 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. 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 that the actor believes had been initiated or was likely to be initiated for a “predicate felony.” The government also is not required to prove that an official proceeding for a predicate felony actually had been initiated or was likely to be initiated. Rather, the government need only prove that the actor believed that an official proceeding for a “predicate felony” had been initiated or was likely to be initiated and that the official proceeding be for a “predicate felony.” 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 physical evidence. The sole difference between first and second degree tampering with physical evidence is that second degree tampering with physical evidence does not require the actor to believe the official proceeding is 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 physical evidence is otherwise identical to the statutory text of first degree tampering with physical evidence.

Subsection (c) establishes the penalties for first and second tampering with physical evidence. In addition, paragraph (c)(3) states that a conviction for tampering with physical 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 physical evidence, escape, and other related offenses. Thus, if a person commits obstruction of justice by tampering with physical evidence, the tampering with physical evidence conviction would merge with the obstruction of justice conviction pursuant to the RCC’s rules of priority in RCC § 22E-214. Tampering with physical evidence merges with other offenses in chapters 31, 32, 33, or 34 regardless of whether they otherwise merge under §

22E-214. For all other offenses, a conviction for tampering with physical 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 § 22E-214.

Subsection (e) cross-references applicable definitions located elsewhere in the RCC and defines the term “predicate felony” for this section only.

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

First, the revised tampering with physical 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 physical 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.⁹⁷ In contrast, the RCC divides the offense into two degrees based on the seriousness of the official proceeding. Where the subject of the official proceeding is a predicate felony, the offense of tampering with physical evidence is a Class 9 felony. In cases involving misdemeanors or felonies that do not have as an element a criminal bodily injury, sexual act, sexual contact, confinement or death, tampering with physical 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 physical evidence statute establishes liability for fabricating or using fabricated evidence in an official proceeding. 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. However, the tampering with physical evidence statute in D.C. Code § 22-723 does not address fabricating physical evidence or using fabricated evidence in an official proceeding.⁹⁸ In contrast, the revised tampering with physical 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 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 physical 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

⁹⁷ 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.

⁹⁸ 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.”).

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.⁹⁹ Application of this test, sometimes called the *Blockburger*¹⁰⁰ 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.¹⁰¹ In contrast, the revised tampering with physical evidence requires merger for related convictions in chapters 31, 32, 33, or 24 arising out of the same course of conduct.¹⁰² This change improves the consistency, clarity, and proportionality of the statute.

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

First, the revised tampering with physical evidence statute requires a “purposeful” mental state to establish that the actor’s knowing destruction, concealment, removal, or alteration of evidence constitutes tampering with physical 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 physical evidence case law suggests that “with intent” under the current law requires a “purposeful” mental state.¹⁰³ Resolving this ambiguity, the revised tampering with physical 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 a proceeding. Requiring a purposeful mental state is justified due to the breadth of the revised tampering with physical evidence statute. It would be inappropriate to treat the destruction, concealment, removal, alteration, or fabrication of evidence as tampering with physical evidence if the actor did not have the purpose of affecting an official proceeding. This change improves the clarity and proportionality of the statute.

⁹⁹ *Byrd v. United States*, 598 A.2d 386, 389 (D.C. 1991).

¹⁰⁰ *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.”).

¹⁰¹ For example, in *McCullough 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.

¹⁰² This change in merger analysis is in addition to the general changes made to merger rules provided for RCC § 22E-214.

¹⁰³ *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 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.”).

Second, the revised tampering with physical 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 know” 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 law¹⁰⁴ considering application of the “knowing” requirement does not explain the meaning of the term. Resolving this ambiguity, the revised tampering with physical 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.¹⁰⁵ Requiring a knowing culpable mental state also makes the revised statute consistent with the conduct elements of other obstruction of justice statutes.¹⁰⁶ This change improves the clarity and consistency of the revised statutes.

¹⁰⁴ 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).

¹⁰⁵ 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)”).

¹⁰⁶ See, e.g., RCC § 22E-3303 (c)(1)(A) (tampering with a juror or court official).

RCC § 22E-3305. 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, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
 - (2) Second degree hindering apprehension or prosecution is a Class A misdemeanor, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
 - (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 RCC § 22E-214.
- (d) *Definitions.*
 - (1) The terms “knowingly” and “purpose” have the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; the terms “actor,” “bodily injury,” “sexual act,” and “sexual contact” have the meanings specified in RCC § 22E-701; and
 - (2) 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 criminal 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 criminal bodily injury, sexual act, sexual contact, confinement or death.

***Explanatory Note.** The RCC 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 RCC 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 RCC § 22E-214. This offense replaces the accessory after the fact offense in the current D.C. Code.¹⁰⁷*

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 RCC § 22E-206 that refers to a conscious desire for a result to occur. Per RCC § 22E-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 RCC § 22E-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. 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 RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to a given element, here

¹⁰⁷ D.C. Code §22-1806.

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 RCC 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.

Subsection (c) establishes the penalties for first and second degree hindering apprehension or prosecution. 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 § 22E-214. The RCC’s rules of priority in RCC § 22E-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 § 22E-214.

Subsection (d) cross-references applicable definitions located elsewhere in the RCC and defines the term “predicate felony” for this offense.

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

First, the RCC 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.¹⁰⁸ 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.¹⁰⁹ Consequently, “whether these convictions merge, depends on whether the underlying offenses of the

¹⁰⁸ 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).

¹⁰⁹ *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.

principal merge.”¹¹⁰ 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.¹¹¹ In contrast, the RCC categorizes and treats the offense of hindering apprehension or prosecution as an offense against the government not individuals. Liability under the RCC 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 RCC.¹¹² 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 RCC § 22E-214 when arising from the same course of conduct, even when the principal’s convictions would not merge.¹¹³ In addition, the RCC 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 RCC 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.¹¹⁴ 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

¹¹⁰ *Heard v. United States*, 686 A.2d 1026, 1031 (D.C. 1996).

¹¹¹ *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 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.”).

¹¹² The RCC 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.

¹¹³ 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 RCC § 22E-3305(c)(3) and similar provisions.

¹¹⁴ 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).

another is a prerequisite to conviction for accessory after the fact.¹¹⁵ In contrast, the RCC 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 committed an offense.¹¹⁶ The crux of the RCC 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.¹¹⁷ 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 death¹¹⁸ 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 RCC 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.¹¹⁹ Under current case law, accessory after the fact requires proof that the actor

¹¹⁵ *Heard v. United States*, 686 A.2d 1026, 1030 (D.C. 1996).

¹¹⁶ Because the RCC does not require the commission of an offense, proof of knowledge of commission of an offense is likewise not required. The RCC 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.

¹¹⁷ The RCC’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.

¹¹⁸ 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).

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

rendered their assistance with the “specific intent that it prevent the principal's arrest, trial, or punishment.”¹²⁰ 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.”¹²¹ Resolving this ambiguity, the RCC 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 RCC general part and is similar in meaning to a specific intent *mens rea*.¹²² A purposeful culpable mental state requirement is consistent with the standard for liability as an accomplice under the RCC¹²³ and current District law,¹²⁴ 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 RCC 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.¹²⁵ Under current case law, accessory after the fact requires proof that the actor had knowledge that the person they were assisting committed an offense,¹²⁶ 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 RCC hindering apprehension or prosecution statute requires a knowing culpable mental state as to the conduct of harboring, concealing,

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 *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).

¹²¹ *Buchanan v. United States*, 32 A.3d 990, 1000 (D.C. 2011) (Ruiz, J. concurring).

¹²² See RCC § 22E-206, Definitions and Hierarchy of Culpable Mental States. As the commentary on RCC § 22E-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.

¹²³ See RCC § 22E-210, Accomplice Liability.

¹²⁴ *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)).

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 *Butler v. United States*, 481 A.2d 431, 442 (D.C. 1984). As noted above, the RCC hindering apprehension or prosecution offense does not require as an element the actual commission of an offense by another. The RCC’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.

or otherwise providing assistance. Applying a knowing culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.¹²⁷ Requiring a knowing culpable mental state also makes the revised statute consistent with the conduct elements of other obstruction of justice statutes.¹²⁸ This change improves the clarity and consistency of the revised statutes.

Third, the RCC 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.¹²⁹ Current case law provides that an actor must provide “assistance” that has the possibility of helping another person in evading apprehension,¹³⁰ but does not further specify what types of assistance are prohibited. Resolving this ambiguity, the RCC 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 RCC 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 RCC 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.¹³¹ 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.¹³² Resolving the scope of when liability

¹²⁷ 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)”).

¹²⁸ See, e.g., RCC § 22E-3303 (c)(1)(A) (tampering with a juror or court official).

¹²⁹ 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).

¹³⁰ *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).

¹³¹ 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).

¹³² *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)

attaches, the RCC hindering apprehension or prosecution offense specifies that liability 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.¹³³ This change improves the clarity of the revised statutes.

(“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.”);

¹³³ *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); *see 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 RCC 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

RCC § 22E-701. Definitions. [To be incorporated with other definitions in RCC § 22E-701]

“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.

“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.

RCC § 22E-3301. 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, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (2) Second degree obstruction of justice is a Class A misdemeanor subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (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 RCC § 22E-214.

(d) Definitions.

- (1) The terms “knowing” and “purpose” have the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; the terms “actor,” “bodily injury,” “criminal investigation,” “official proceeding,” “sexual act,” and “sexual contact” have the meanings specified in RCC § 22E-701; and
- (2) 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 criminal 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 criminal bodily injury, sexual act, sexual contact, confinement or death.

RCC § 22E-3302. 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) With the purpose of causing a person to:
 - (A) Testify or inform falsely in an official proceeding or criminal investigation that has been or is likely to be initiated;
 - (B) Withhold any material testimony or information from an official proceeding or criminal investigation that has been or is likely to be initiated;

- (C) Elude legal process summoning the person to testify or supply evidence in an official proceeding that has been or is likely to be initiated;
 - (D) Be absent from any official proceeding that has been or is likely to be initiated 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 that official proceeding that has been or is likely to be initiated; or
 - (ii) Prevent its production or use in that official proceeding that has been or is likely to be initiated.
- (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 under District of Columbia law;
 - (ii) With intent to cause a person to fear for the person's safety or the safety of another person;
 - (2) With the purpose of causing a person to:
 - (A) Testify or inform falsely in an official proceeding or criminal investigation that has been or is likely to be initiated;
 - (B) Withhold any material testimony or information from an official proceeding or criminal investigation that has been or is likely to be initiated;
 - (C) Elude legal process summoning the person to testify or supply evidence in an official proceeding that has been or is likely to be initiated;
 - (D) Be absent from an official proceeding that has been or is likely to be initiated 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) Impairing its value as evidence in an official proceeding that has been or is likely to be initiated; or
 - (ii) Preventing its production or use in an official proceeding that has been or is likely to be initiated.
- (c) *Third Degree.* An actor commits third degree tampering with a witness or informant when the actor:
- (1) In fact, commits any criminal offense under District of Columbia law;
 - (2) With the purpose of causing a person to:
 - (A) Testify or inform falsely in an official proceeding or criminal investigation that has been or is likely to be initiated;

- (B) Withhold any material testimony or information from an official proceeding or criminal investigation that has been or is likely to be initiated;
- (C) Elude legal process summoning the person to testify or supply evidence in an official proceeding that has been or is likely to be initiated;
- (D) Be absent from an official proceeding that has been or is likely to be initiated 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) Impairing its value as evidence in an official proceeding that has been or is likely to be initiated; or
 - (ii) Preventing its production or use in an official proceeding that has been or is likely to be initiated.

(d) *Penalties.*

- (1) First degree tampering with a witness or informant is a Class 7 felony, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (2) Second degree tampering with a witness or informant is a Class 9 felony, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (3) Third degree tampering with a witness or informant is a Class A misdemeanor, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(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 RCC § 22E-214.

- (e) *Definitions.* The terms “intent,” “knowing,” and “purpose,” have the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; and the terms “actor,” “Court of the District of Columbia,” “crime of violence,” “official proceeding,” have the meanings specified in RCC § 22E-701.

RCC-§ 22E-3303. 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) With the purpose of:

- (A) Influencing the vote, opinion, decision, deliberation, or other official action of a juror in an official proceeding that has been initiated;
 - (B) Influencing the opinion, decisions, or other official action of a court official in an official proceeding that has been or is likely to be initiated;
 - (C) Causing a juror to withhold material testimony or information in an official proceeding that has been initiated; 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 under District of Columbia law;
 - (ii) With intent to cause a person to fear for the person's safety or the safety of another person;
 - (2) With the purpose of:
 - (A) Influencing the vote, opinion, decision, deliberation, or other official action of a juror in an official proceeding that has been initiated;
 - (B) Influencing the opinion, decisions, or other official action of a court official in an official proceeding that has been instituted or is likely to be initiated;
 - (C) Causing a juror to withhold material testimony or information in an official proceeding that has been initiated; 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 under District of Columbia law;
 - (2) With the purpose of:
 - (A) Influencing the vote, opinion, decision, deliberation, testimony, or other official action of a juror in an official proceeding that has been initiated;
 - (B) Influencing the opinion, decisions, testimony, or other official action of a court official in an official proceeding that has been initiated or is likely to be initiated;
 - (C) Causing a juror to withhold material testimony or information in an official proceeding that has been initiated; 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, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (2) Second degree tampering with a juror or court official is a Class 9 felony, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (3) Third degree tampering with a juror or court official is a Class A misdemeanor, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (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 RCC § 22E-214.
- (e) *Definitions.* The terms “intent,” “knowing,” and “purpose,” have the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; and the terms “actor,” “court official,” “Court of the District of Columbia,” “crime of violence,” and “official proceeding” have the meanings specified in RCC § 22E-701.

RCC § 22E-3304. 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, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree retaliation against a witness, informant, juror, or court official is a Class B misdemeanor, subject to a maximum term of imprisonment of [X], a maximum fine of [X] or both.

(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 RCC § 22E-214.

(d) *Definitions.*

(1) The term “knowing” has the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; the terms “actor,” “bodily injury,” “building,” “court official,” “crime of violence,” “dwelling,” “law enforcement officer,” “property of another,” “sexual act,” and “sexual contact” have the meanings specified in RCC § 22E-701; and

(2) In this section, the term “predicate offense” means:

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

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

RCC § 22E-3305. Tampering with Physical Evidence.

- (a) *First Degree.* An actor commits tampering with physical 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, with the purpose of:
 - (A) Impairing its value as evidence in an official proceeding that has been or is likely to be initiated for a predicate felony; or
 - (B) Preventing its production or use in an official proceeding that has been or is likely to be initiated for a predicate felony;
 - (2) Knowingly makes, presents, or uses any document, record, image, audiovisual recording, or other object, regardless of medium, with the purpose of:
 - (A) Deceiving another person as to its veracity; and
 - (B) Affecting the course or outcome of an official proceeding that has been or is likely to be initiated for a predicate felony.
- (b) *Second Degree.* An actor commits tampering with physical 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, with the purpose of:
 - (A) Impairing its value as evidence in an official proceeding that has been or is likely to be initiated; or
 - (B) Preventing its production or use in an official proceeding that 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, with the purpose of:
 - (A) Deceiving another person as to its veracity; and
 - (B) Affecting the course or outcome of an official proceeding that has been or is likely to be initiated.
- (c) *Penalties.*
 - (1) First degree tampering with physical evidence is a Class 9 felony, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
 - (2) Second degree tampering with physical evidence is a Class B misdemeanor, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
 - (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 RCC § 22E-214.
- (d) *Definitions.*

- (1) The terms “knowing” and “purpose” have the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; the terms “actor,” “audiovisual recording,” “bodily injury,” “criminal investigation,” “image,” “official proceeding,” “record,” “sexual act,” and “sexual contact” have the meanings specified in RCC § 22E-701; and
- (2) 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 criminal 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 criminal bodily injury, sexual act, sexual contact, confinement or death.

RCC § 22E-3306. 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, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
 - (2) Second degree hindering apprehension or prosecution is a Class A misdemeanor, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

- (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 RCC § 22E-214.

(d) *Definitions.*

- (1) The terms “knowingly” and “purpose” have the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; the terms “actor,” “bodily injury,” “sexual act,” and “sexual contact” have the meanings specified in RCC § 22E-701; and
- (2) 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 criminal 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 criminal 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.~~

“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.~~

RCC § 22E-3301. 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, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
 - (2) Second degree obstruction of justice is a Class A misdemeanor subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
 - (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 RCC § 22E-214.
- (d) Definitions.
- (1) The terms “knowing” and “purpose” have the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; the terms “actor,” “bodily injury,” “criminal investigation,” “official proceeding,” “sexual act,” and “sexual contact” have the meanings specified in RCC § 22E-701; and
 - (2) 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 criminal 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 criminal 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.~~

RCC § 22E-3302. 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) With the purpose of causing a person to:~~

~~(A) Testify or inform falsely in an official proceeding or criminal investigation that has been or is likely to be initiated;~~

~~(B) Withhold any material testimony or information from an official proceeding or criminal investigation that has been or is likely to be initiated;~~

- (C) Elude legal process summoning the person to testify or supply evidence in an official proceeding that has been or is likely to be initiated;
 - (D) Be absent from any official proceeding that has been or is likely to be initiated 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 that official proceeding that has been or is likely to be initiated; or
 - (ii) Prevent its production or use in that official proceeding that has been or is likely to be initiated.
- (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 under District of Columbia law;
 - (ii) With intent to cause a person to fear for the person's safety or the safety of another person;
 - (2) With the purpose of causing a person to:
 - (A) Testify or inform falsely in an official proceeding or criminal investigation that has been or is likely to be initiated;
 - (B) Withhold any material testimony or information from an official proceeding or criminal investigation that has been or is likely to be initiated;
 - (C) Elude legal process summoning the person to testify or supply evidence in an official proceeding that has been or is likely to be initiated;
 - (D) Be absent from an official proceeding that has been or is likely to be initiated 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) Impairing its value as evidence in an official proceeding that has been or is likely to be initiated; or
 - (ii) Preventing its production or use in an official proceeding that has been or is likely to be initiated.
- (c) *Third Degree.* An actor commits third degree tampering with a witness or informant when the actor:
- (1) In fact, commits any criminal offense under District of Columbia law;
 - (2) With the purpose of causing a person to:
 - (A) Testify or inform falsely in an official proceeding or criminal investigation that has been or is likely to be initiated;

- (B) Withhold any material testimony or information from an official proceeding or criminal investigation that has been or is likely to be initiated;
- (C) Elude legal process summoning the person to testify or supply evidence in an official proceeding that has been or is likely to be initiated;
- (D) Be absent from an official proceeding that has been or is likely to be initiated 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) Impairing its value as evidence in an official proceeding that has been or is likely to be initiated; or
 - (ii) Preventing its production or use in an official proceeding that has been or is likely to be initiated.

(d) *Penalties.*

- (1) First degree tampering with a witness or informant is a Class 7 felony, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (2) Second degree tampering with a witness or informant is a Class 9 felony, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (3) Third degree tampering with a witness or informant is a Class A misdemeanor, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(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 RCC § 22E-214.

- (e) *Definitions.* The terms “intent,” “knowing,” and “purpose,” have the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; and the terms “actor,” “Court of the District of Columbia,” “crime of violence,” “official proceeding,” have the meanings specified in RCC § 22E-701.

~~(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.~~

RCC-§ 22E-3303. 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) With the purpose of:

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

(B) Influencing the opinion, decisions, or other official action of a court official in an official proceeding that has been or is likely to be initiated;

(C) Causing a juror to withhold material testimony or information in an official proceeding that has been initiated; 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 under District of Columbia law;
 - (ii) With intent to cause a person to fear for the person's safety or the safety of another person;
 - (2) With the purpose of:
 - (A) Influencing the vote, opinion, decision, deliberation, or other official action of a juror in an official proceeding that has been initiated;
 - (B) Influencing the opinion, decisions, or other official action of a court official in an official proceeding that has been instituted or is likely to be initiated;
 - (C) Causing a juror to withhold material testimony or information in an official proceeding that has been initiated; 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 under District of Columbia law;
 - (2) With the purpose of:
 - (A) Influencing the vote, opinion, decision, deliberation, testimony, or other official action of a juror in an official proceeding that has been initiated;
 - (B) Influencing the opinion, decisions, testimony, or other official action of a court official in an official proceeding that has been initiated or is likely to be initiated;
 - (C) Causing a juror to withhold material testimony or information in an official proceeding that has been initiated; 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, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
 - (2) Second degree tampering with a juror or court official is a Class 9 felony, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

- (3) Third degree tampering with a juror or court official is a Class A misdemeanor, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (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 excepted 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 RCC § 22E-214.
- (e) *Definitions.* The terms “intent,” “knowing,” and “purpose,” have the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; and the terms “actor,” “court official,” “Court of the District of Columbia,” “crime of violence,” and “official proceeding” have the meanings specified in RCC § 22E-701.

~~(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.~~

RCC § 22E-3304. 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, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree retaliation against a witness, informant, juror, or court official is a Class B misdemeanor, subject to a maximum term of imprisonment of [X], a maximum fine of [X] or both.

(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 RCC § 22E-214.

(d) *Definitions.*

(1) The term “knowing” has the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; the terms “actor,” “bodily injury,” “building,” “court official,” “crime of violence,” “dwelling,” “law enforcement officer,” “property of another,” “sexual act,” and “sexual contact” have the meanings specified in RCC § 22E-701; and

(2) In this section, the term “predicate offense” means:

(A) Any crime under this title that includes as an element in a criminal 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 criminal 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.~~

RCC § 22E-3305. Tampering with Physical Evidence.

- (a) *First Degree.* An actor commits tampering with physical 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, with the purpose of:
 - (A) Impairing its value as evidence in an official proceeding that has been or is likely to be initiated for a predicate felony; or
 - (B) Preventing its production or use in an official proceeding that has been or is likely to be initiated for a predicate felony;
 - (2) Knowingly makes, presents, or uses any document, record, image, audiovisual recording, or other object, regardless of medium, with the purpose of:
 - (A) Deceiving another person as to its veracity; and
 - (B) Affecting the course or outcome of an official proceeding that has been or is likely to be initiated for a predicate felony.
- (b) *Second Degree.* An actor commits tampering with physical 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, with the purpose of:
 - (A) Impairing its value as evidence in an official proceeding that has been or is likely to be initiated; or
 - (B) Preventing its production or use in an official proceeding that 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, with the purpose of:
 - (A) Deceiving another person as to its veracity; and
 - (B) Affecting the course or outcome of an official proceeding that has been or is likely to be initiated.
- (c) *Penalties.*
 - (1) First degree tampering with physical evidence is a Class 9 felony, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
 - (2) Second degree tampering with physical evidence is a Class B misdemeanor, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
 - (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 RCC § 22E-214.

(d) *Definitions.*

- (1) The terms “knowing” and “purpose” have the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; the terms “actor,” “audiovisual recording,” “bodily injury,” “criminal investigation,” “image,” “official proceeding,” “record,” “sexual act,” and “sexual contact” have the meanings specified in RCC § 22E-701; and
- (2) 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 criminal 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 criminal bodily injury, sexual act, sexual contact, confinement or death.

~~(a) A person commits the offense of tampering with physical 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 physical evidence shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 3 years, or both.~~

RCC § 22E-3306. 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, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (2) Second degree hindering apprehension or prosecution is a Class A misdemeanor, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (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 RCC § 22E-214.

(d) *Definitions.*

- (1) The terms “knowingly” and “purpose” have the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; the terms “actor,” “bodily injury,” “sexual act,” and “sexual contact” have the meanings specified in RCC § 22E-701; and
- (2) 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 criminal 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 criminal 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 & RCC Obstruction of Justice Related Offenses¹³⁴

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 RCC 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 RCC provides for multiple gradations. The RCC establishes two or three grades based on the seriousness of the underlying criminal conduct for the new tampering and retaliation offenses. The RCC also provides for two grades based primarily on the seriousness of the subject offense¹³⁵ 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 RCC 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 RCC 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 requirement

¹³⁴ New related offenses for the purposes of this memo are: RCC § 22E-3302. Tampering with a witness or informant; RCC § 22E-3303. Tampering with a juror or court official, RCC § 22E-3304. Retaliation against a witness, informant, juror, or court official.

¹³⁵ Subject offense refers to the offense that is the subject of a criminal investigation or official proceeding.

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 RCC 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 District¹³⁶ and the RCC 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 RCC 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).¹³⁷ It also ensures that the penalty ranges are not grossly disproportionate to the harm caused to persons, criminal investigations, or official proceedings.¹³⁸

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.¹³⁹ Penalty ranges for these offenses vary widely in other jurisdictions with maximum penalties as high as 99 years¹⁴⁰ and as low as 2.5-3.75 years for the most serious tampering

¹³⁶ See Committee on the Judiciary, *Report on Bill 9-385, "Law Enforcement Witness Protection Amendment Act of 1992"* (May 20, 1992).

¹³⁷ 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 of what charges the grand jury considers or indicts on.

¹³⁸ The RCC tampering offenses 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 RCC grading scheme imposes twice the maximum liability of the misdemeanor offense. If the RCC 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.

¹³⁹ 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.

¹⁴⁰ 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.¹⁴¹ More common maximums are 5¹⁴² and 10¹⁴³ years for the most serious tampering or retaliation conduct.

The RCC 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 of another, the RCC penalties are lower than the 5-year maximum in a lot of states. However, the RCC differs from most jurisdictions in that it places crimes of violence in a different category than offenses such as criminal threats. The RCC 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 RCC'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 RCC'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 RCC'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.¹⁴⁴

The RCC 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 RCC 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 RCC, provide a lower penalty for retaliation.¹⁴⁵

Notably, some conduct that constitutes third degree tampering will constitute felony offenses under the RCC. While the RCC'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 investigation or official proceeding. This catchall offense significantly overlaps with the tampering with a

¹⁴¹ See ARIZ. REV. STAT. ANN. §§ 13-2802 (Influencing a witness); ARIZ. REV. STAT. ANN. §§ 13-2805 (Influencing a juror).

¹⁴² 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.

¹⁴³ 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.

¹⁴⁴ 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.

¹⁴⁵ See e.g., ARK. CODE ANN. §§ 5-53-109, 112.

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 RCC offense of criminal graffiti¹⁴⁶, 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 RCC 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 2019.¹⁴⁷ 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 RCC 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 RCC penalties might have.

¹⁴⁶ *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.

¹⁴⁷ See D.C. CRIM. CODE REFORM COMM., REVISED CRIMINAL CODE COMPILATION, App. G. (March 31, 2021) (Comparison of RCC Offense Penalties and District Charging and Conviction Data).