



Report #76 -
Perjury and Other Official Falsification
Offenses

(Final Draft)

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Report #76—Perjury and Other Official Falsification Offenses (Final)

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.

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

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

Appendices to this report are:

- Appendix A – Black Letter Text of Draft Revised Statutes. (No commentary.)
- Appendix B – Redlined Text Comparing Draft Revised Statutes with Current D.C. Code Statutes. (No commentary.)
- Appendix C – Disposition of Comments on Report #76 – Perjury and Falsification Offenses. (First Draft)

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

Report #76 – Perjury and Other Official Falsification Offenses

Draft RCC Text and Commentary

Corresponding D.C. Code statutes in { }

- § 22A-4203. Perjury. {D.C. Code § 22-2402}
- § 22A-4204. Perjury by false certification. {D.C. Code § 22-2402}
- § 22A-4205. Solicitation of perjury. {D.C. Code § 22-2403}
- § 22A-4206. False swearing. {D.C. Code § 22-2404}
- § 22A-4207. False statements. {D.C. Code § 22-2405}
- § 22A-4208. Impersonation of another before a tribunal, officer, or person. {D.C. Code § 22-1403}

§ 22A-4203. Perjury.

- (a) *Offense.* An actor commits perjury when the actor either:
 - (1) Knowingly makes a false statement in an official proceeding and, in fact:
 - (A) The actor makes the false statement while testifying, orally or in writing, under oath or affirmation attesting to the truth of the statement;
 - (B) The oath or affirmation is administered:
 - (i) Before a competent tribunal, officer, or person; and
 - (ii) In a case or matter in which the law authorizes the taking of such an oath or affirmation; and
 - (C) The false statement is material to the course or outcome of the official proceeding; or
 - (2) Knowingly makes a false statement in a sworn declaration or unsworn declaration and, in fact, the statement is:
 - (A) In a writing with a statement indicating that the declaration is made under penalty of perjury;
 - (B) Delivered in a case or matter where the law requires or permits the statement to be made in a sworn declaration; and
 - (C) Material to the case or matter in which the declaration is delivered.
- (b) *Requirement of Corroboration.* In a prosecution under this section, proof of falsity of a statement may not be established solely by the uncorroborated testimony of a single witness.
- (c) *Defenses.*
 - (1) It is a defense to liability under paragraph (a)(1) that, in fact:
 - (A) The actor retracted the false statement during the course of the official proceeding;
 - (B) The retraction occurred before the falsity of the statement was exposed; and
 - (C) The retraction occurred before the false statement substantially affected the proceeding.
 - (2) It is a defense to liability under paragraph (a)(2) that, in fact:
 - (A) The actor retracted the false statement before the statement was delivered in the case or matter; and
 - (B) The retraction occurred before the falsity of the statement was exposed.
- (d) *Penalty.* Perjury is a Class 8 felony.
- (e) *Definitions.* In this section, the term:
 - (1) “Competent” means having jurisdiction over the actor and case or matter;
 - (2) “Tribunal” means any District of Columbia court, regulatory agency, commission, or other body or person authorized by law to render a decision of a judicial or quasi-judicial nature;
 - (3) “Official proceeding” has the meaning specified in § 22A-101;
 - (4) “Officer” has the meaning specified in D.C. Code § 1-301.45.

- (5) “Sworn declaration” means a signed record given under oath or affirmation attesting to its truth including a sworn statement, verification, certificate, or affidavit.
- (6) “Unsworn declaration” means a declaration in a signed record that is not given under oath but is given under penalty of perjury in the form specified in D.C. Code § 16-5306 or 28 U.S.C. §1746(2).

Explanatory Note. *The revised perjury offense prohibits two forms of perjury—giving false testimony or the equivalent in an official proceeding and making false declarations made under penalty of perjury. The revised offense includes a requirement of corroboration and a statutory defense of retraction. There are no penalty gradations. The revised offense, in conjunction with a new offense of perjury by false certification¹, replaces the current perjury statute in D.C. Code § 22-2402.*

Subsection (a) specifies two forms of perjury. Paragraph (a)(1) specifies that an actor commits perjury if the actor “knowingly” makes a false statement in an official proceeding. “Knowingly” is defined term in RCCA § 22A-206, which here, requires the actor must be practically certain that the statements the actor made were false and that the statements were made in an official proceeding. “Official proceeding” is a defined term in RCCA § 22A-701.²

Paragraph (a)(1) also establishes strict liability for the three circumstances elements in subparagraphs (a)(1)(A)-(a)(1)(C) by using the term “in fact” at the end of the paragraph. Per the rule of interpretation in § 22A-207, the phrase “in fact” “indicates there is no culpable mental state requirement for the subsequent elements in subparagraphs (a)(1)(A)-(a)(2)(C).

Subparagraph (a)(1)(A) requires that the actor make the false statement while testifying pursuant to an oath or affirmation³ that attests to the truth of the statement. The actor’s testimony can be given orally or in writing. Per the rule of interpretation in § 22A-207, the phrase “in fact” in paragraph (a)(1) applies here, indicating there is no culpable

¹ See RCC § 22A-4204.

² “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 for the District of Columbia or an agency or department of the District of Columbia government, excluding criminal investigations. “Court of the District of Columbia” is a defined term in RCCA § 22A-101 that means the Superior Court of the District of Columbia or the District of Columbia Court of Appeals and does not include other federal courts. The requirement that the testimony occur in an official proceeding in a court of the District of Columbia or before a District of Columbia agency or department is consistent with *In re Loney* which held that exclusive jurisdiction for perjury prosecutions stemming from testimony before a federal tribunal lies with the United States. *In re Loney*, 134 U.S. 372, 375 (1890) (stating “[a] witness who gives his testimony, pursuant to the constitution and laws of the United States, in a case pending in a court or other judicial tribunal of the United States, whether he testifies in the presence of that tribunal, or before any magistrate or officer (either of the nation or of the state) designated by act of congress for the purpose, is accountable for the truth of his testimony to the United States only”); see also *Arizona v. United States*, 567 U.S. 387, 402 (2012) (citing *In re Loney*, 134 U.S. 372, 375-76 (1890)).

³ Under District law an affirmation in lieu of oath has the same effect as an oath. See D.C. Code § 14-101 (b) (“Where an application, statement, or declaration is required to be supported or verified by an oath, the affirmation is the equivalent of an oath.”).

mental state requirement as to whether the statement is made during testimony given under oath or affirmation.

Subparagraph (a)(1)(B) specifies requirements for the administration of an oath or affirmation in two sub-subparagraphs. First, sub-subparagraph (a)(1)(B)(i) requires that the oath or affirmation be administered before a competent tribunal, officer, or person. “Competent” is a defined term in paragraph (e)(1) that means having jurisdiction over the actor and case or matter.⁴ To satisfy this element, the government must prove that the tribunal, officer, or person had jurisdiction over both the actor and the case or matter. If an oath is taken before a tribunal, officer, or person that has not been properly convened or is acting without the requisite jurisdiction, this element is not satisfied.⁵ “Tribunal” and “officer”⁶ are defined terms in subparagraphs (e)(2) and (e)(4) respectively. The term “tribunal” includes any District of Columbia court, regulatory agency, commission, or other body or person authorized by law to render a decision of a judicial or quasi-judicial nature.⁷

Sub-subparagraph (a)(1)(B)(ii) requires that the oath or affirmation be administered in a case or matter in which the law authorizes the taking of such an oath or affirmation. If the oath or affirmation is not administered in a case or matter where the law authorizes the

⁴ Compare Committee of the Judiciary, *Report on Bill 4-133, “Theft and White Collar Crimes Act of 1982,”* at 87 (July 20, 1982) (“Competency basically refers to jurisdiction. As under current law, it must be demonstrated that the tribunal, officer, or person had jurisdiction over the defendant and subject matter jurisdiction or authority to consider the issues before it. This requires a showing that the tribunal, officer, or person was properly convened.”) (citing *Christoffel v. United States*, 338 U.S. 84 (1949)).

⁵ *E.g.*, The Council has the power to conduct hearings and compel testimony relating to the affairs of the District. See D.C. Code Ann. § 1-204.13(a). When the Council, or any committee or person authorized by it, acts pursuant to this power for a legitimate purpose, it acts with the requisite jurisdiction to establish competency. If, however, the Council or a person authorized by it exceeds its authority or acts for illegitimate purpose not authorized by law, the Council would not have the requisite jurisdiction to satisfy this element merely because Councilmembers are “officers”. See *e.g.*, *Christoffel v. United States*, 338 U.S. 84, 88-90 (1949) (where House committee failed to maintain a quorum under committee rules, perjury conviction was not by “competent tribunal,” and thus worked a denial of a fundamental right); compare Committee of the Judiciary, *Report on Bill 4-133, “Theft and White Collar Crimes Act of 1982,”* at 87 (July 20, 1982) (stating competency “requires a showing that the tribunal, officer, or person was properly convened”).

⁶ The term “officer” in District law means “any person authorized by law to perform the duties of the office” and is not intended to refer specifically to police or law enforcement officers. See D.C. Code § 1-301.45. Members of the police force take a statutorily required oath of office and would therefore qualify as officers under this definition but would not necessarily have the requisite personal and subject matter jurisdiction to be “competent” under the statute.

⁷ Consistent with prior law, the term “tribunal” does not encompass officers who are not acting with authorization to render a judicial or quasi-judicial decision such as councilmembers presiding over legislative hearings where witnesses may be sworn. In such instances, a councilmember administering the oath is deemed a competent “officer” rather than a tribunal and the testimony is subject to prosecution for perjury by virtue of the fact that it was given before a competent officer. See Committee of the Judiciary, *Report on Bill 4-133, “Theft and White Collar Crimes Act of 1982,”* at 87 (July 20, 1982) (“[T]he term ‘tribunal’ means an officer or body having authority to adjudicate matters. Tribunals include, for example, trial courts, grand juries, and certain administrative bodies. As under current law, the provision is not limited to false testimony given before tribunals. The provision is intended to apply as well to false testimony given before other competent bodies and persons.”); *United States v. Meyers*, 75 F. Supp. 486, 487 (D.D.C.) (expressing doubt that the term “tribunal” applied to Congressional committees because committees lack the authority to adjudicate matters but finding that the perjury statute nonetheless applied because the Committee chairman was an officer authorized to administer oaths).

taking of an oath or affirmation, the fact that the oath or affirmation was administered before a competent tribunal, officer, or person is not sufficient to satisfy this element.⁸ Per the rule of interpretation in § 22A-207, the phrase “in fact” in paragraph (a)(1) applies here, indicating there is no culpable mental state requirement as to whether the oath or affirmation be administered before a competent tribunal, officer, or person in a case or matter in which the law authorizes the taking of such an oath.

Subparagraph (a)(1)(C) requires that the false statement made by the actor be material to the course or outcome of the official proceeding. Per the rule of interpretation in § 22A-207, the phrase “in fact” in paragraph (a)(1) applies here, indicating there is no culpable mental state requirement as to whether the statement be material to the course or outcome of the official proceeding. Applied here that means the government need not prove that the actor knew or should have known the false statement was material.

Paragraph (a)(2) specifies as an alternative to (a)(1) that an actor commits perjury if the actor “knowingly” makes a false statement in a sworn declaration or unsworn declaration. “Knowingly” is a defined term in RCCA § 22A-206. Applied here, “knowingly” means that the actor must be practically certain that the statements the actor made were false and that the statements were made in a sworn declaration or an unsworn declaration. “Sworn declaration” and “unsworn declaration” are defined terms in subsection (e).⁹

Paragraph (a)(2) also establishes strict liability for the three circumstances elements in subparagraphs (a)(2)(A)-(a)(2)(C) by using the phrase “in fact, the statement is” at the end of the paragraph. Per the rule of interpretation in § 22A-207, the phrase “in fact” “indicates there is no culpable mental state requirement for the subsequent elements in subparagraphs (a)(2)(A)-(a)(2)(C).

Subparagraph (a)(2)(A) specifies that the false statement made by the actor must be in writing and must include a statement indicating that the declaration is made under penalty of perjury. The government need not prove that the actor put the statement in

⁸ A tribunal, officer, or person with jurisdiction over an actor in a particular matter where the administration of an oath or affirmation is authorized may place the actor under oath or affirmation in that particular matter. However, the fact that the tribunal, officer, or person has authority to administer an oath or affirmation with respect to a particular matter does not mean they may administer an oath or affirmation in another matter where the tribunal, officer, or person lacks authority to administer an oath or affirmation. *See also Shelton v. United States*, 165 F.2d 241, 83 (D.C. Cir. 1947) (holding that an oath to portion of application for duplicate certificate of title for a motor vehicle, requiring a statement of reason for the application, was not “authorized by law” within meaning of perjury statute); *Nelson v. United States*, 288 F.2d 376 (D.C. Cir. 1961) (holding that a perjury indictment could not be grounded upon a knowingly false answer to a question placed by the superintendent of insurance, in an application for a license to act as an insurance solicitor, when Congress has not authorized him to make a false answer to a question felonious). For example, a judge presiding over a criminal trial places a witness under oath to provide testimony relevant to the criminal trial. At the conclusion of the witness’s testimony, the judge asks the witness probing questions about a dispute in another jurisdiction wholly unrelated to the trial. The witness could be subject to perjury charges for false statements made in relation to the trial. However, any false statements related to the dispute in another jurisdiction would not be subject to prosecution for perjury because the judge had no jurisdiction over that matter.

⁹ “Sworn declaration” means a signed record, in fact, given under oath or affirmation attesting to its truth including a sworn statement, verification, certificate, or affidavit. “Unsworn declaration” means a declaration in a signed record that is not given under oath, but is, in fact, given under penalty of perjury as specified in D.C. Code § 16-5306 or 28 U.S.C. § 1746(2).

writing themselves. It is sufficient to prove that the actor attested to the truth of the writing through an acknowledgement.¹⁰ Per the rule of interpretation in § 22A-207, the phrase “in fact” in paragraph (a)(2) applies here, indicating there is no culpable mental state requirement as to whether the false statement is in writing and includes a statement indicating that the declaration is made under penalty of perjury.

Subparagraph (a)(2)(B) specifies that the false statement must be delivered in a case or matter where the law requires or permits the statement be made by sworn declaration. The requirement that the statement be delivered means it is insufficient for the government to establish that a false statement was made.¹¹ Rather, the government must prove that the statement was actually delivered to the case or matter where it was required or permitted. Additionally, this subparagraph requires that the government prove that the law required or permitted the false statement be made in a sworn¹² declaration. This means the government must prove that the case or matter where the false statement was delivered is a case or matter that permits or requires the statement be made under oath or affirmation. It is not sufficient that the signed statement indicates the statement is being made under penalty of perjury if the law does not otherwise authorize or so require. Per the rule of interpretation in § 22A-207, the phrase “in fact” in paragraph (a)(2) applies here, indicating there is no culpable mental state requirement as to whether the false statement is delivered in a case or matter where the law requires or permits the statement be made by sworn declaration.

Subparagraph (a)(2)(C) specifies that the false statement must be material to the case or matter in which is delivered. Per the rule of interpretation in § 22A-207, the phrase “in fact” in paragraph (a)(2) applies here, indicating there is no culpable mental state requirement as to whether the statement is material to the case or matter in which the declaration is delivered.

Subsection (b) specifies that proof of falsity may not be established solely by the uncorroborated testimony of a single witness. The form of corroboration is not specified and can include either additional witnesses or additional evidence.

Subsection (c) specifies that retraction is a defense to the revised perjury offense if the conditions specified in paragraphs (c)(1) or (c)(2) are met.

Paragraph (c)(1) applies to conduct constituting the offense under paragraph (a)(1). Subparagraph (c)(1)(A) specifies that the actor must retract the false statement during the course of the official proceeding. The phrase “during the course of the official proceeding”

¹⁰ See D.C. Code § 1-1231.01 (West) (“Acknowledgment” means a declaration by an individual that states the individual has signed a record for the purposes stated in the record, and if the record is executed in a representative capacity, that the person signed the record with proper authority and signed it as the act of the individual or entity identified in the record.)

¹¹ *E.g.*, If an actor makes a false statement in an unsworn declaration under penalty of perjury but places the writing in a drawer and does not deliver the written statement to any party that might rely on it, the actor would not be guilty of perjury.

¹² Pursuant to D.C. Code § 16-5306 and 28 U.S.C. § 1746(2), any statement required to be made or permitted to be made by sworn declaration may also be made by an unsworn declaration that satisfies the statute. Thus, the requirement that the statement be delivered in a case or matter where the requires or permits the statement be made by sworn declaration does not change the applicability of the statute to unsworn declarations that satisfy statutory requirements.

is not limited to the time of the actor’s participation.¹³ Subparagraph (c)(1)(B) specifies that the actor must retract the false statement before the falsity is exposed.¹⁴ Subparagraph (c)(1)(C) specifies that the actor must retract the false statement before the falsity substantially affects the course of the proceeding. Pursuant to this paragraph, the defense is available even if the proceedings are affected by the false statement, as long as they are not substantially affected.¹⁵ Per RCCA § 22A-201(b)(2), if there is any evidence of the retraction defense at trial, the government must prove the absence of at least one of the conditions specified in (c)(1)(A)-(c)(1)(C) beyond a reasonable doubt.

Paragraph (c)(2) applies to conduct constituting the offense under paragraph (a)(2). Subparagraph (c)(2)(A) specifies that the actor must retract the false statement before it is delivered in the case or matter. Paragraph (c)(2)(B) specifies that the actor must retract the false statement before the falsity is exposed. Per RCCA § 22A-201(b)(2), if there is any evidence of the retraction defense at trial, the government must prove the absence of at least one of the conditions specified in (c)(1)(A)-(c)(1)(B) beyond a reasonable doubt.

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

Subsection (e) cross-references applicable definitions located elsewhere in the code and defines the terms “competent”, “tribunal”, “official proceeding,” “officer,” “sworn declaration” and “unsworn declaration”.

Relation to Current District Law. *The revised perjury statute changes District law in two main ways.*

First, the revised perjury offense does not address falsification of an acknowledgment or a material matter in an acknowledgement by a notary public or other officer. Current D.C. Code §22-2402(a)(2) specifies that a person commits perjury when the actor “[a]s a notary public or other officer authorized to take proof of certification, wilfully certifies falsely that an instrument was acknowledged by any party thereto or wilfully certifies falsely as to another material matter in an acknowledgement.” In contrast, the revised perjury offense removes this enumeration from the perjury statute and creates a new offense of perjury by false certification to address that conduct.¹⁶ This change improves the organization of the revised statutes.

¹³ *E.g.*, If an actor makes a false statement while testifying on Day 1 of a trial but retracts the statement on Day 3 of the trial after the actor has been excused as a witness, the retraction would have occurred during the course of the proceedings even though the witness was done testifying. If, on the other hand, the actor retracted the false statement after the conclusion of the trial, the retraction would not have occurred during the course of the official proceeding.

¹⁴ *E.g.*, If an actor retracts a false statement only after being confronted with clear evidence that their statement was false, the retraction defense would not be available.

¹⁵ *E.g.*, An actor makes a false statement about the authenticity of a piece of important evidence that a party is seeking to introduce which results in the evidence being excluded at trial. If the actor retracts the statement in time for the party to introduce the evidence without any prejudice to the party, the actor’s false statement would not have substantially affected the proceeding. If, however, the actor retracted the statement after the case was sent to the jury without the evidence, the false statement would have already had a substantial effect on the proceedings and the retraction defense would not be available.

¹⁶ *See* RCCA § 22A-4204

Second, the revised perjury statute specifies a retraction defense for false statements made during an official proceeding. Current District law does not provide a retraction defense in the statute or in case law.¹⁷ Thus, once an actor makes a false statement the actor cannot correct the false statement without incriminating themselves in the commission of perjury. This creates an incentive to persist in the falsity rather than come forward with the truth. In contrast, the revised perjury statute contains a retraction defense that applies when a person retracts the false statement during the course of the official proceeding as long as the retraction occurred before the falsity is exposed, and before the false statement affects the proceeding or before the statement is delivered. The inclusion of this defense, which is found in the Model Penal Code and numerous other jurisdictions,¹⁸ encourages actors to correct false testimony before it is relied upon in an official proceeding.¹⁹ To prevent abuse of the defense, the retraction defense is only available if the retraction occurs during the official proceeding, before the falsity is exposed, and before it affects the proceeding or before the statement is delivered. This change encourages the discovery of the truth and improves the proportionality of District law.

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

First, the revised perjury statute specifies a culpable mental state of “knowingly” regarding the making of a false statement in an official proceeding. Current D.C. Code § 22-2402(a) requires that an actor “. . . wilfully and contrary to an oath or affirmation state[] or subscribe[] any material matter which he or she does not believe to be true and which in fact is not true”²⁰ or “wilfully state[] or subscribe[] as true any material matter that the person does not believe to be true and that in fact is not true.”²¹ Although the statute uses the term “willfully,” the committee report indicates that “the term ‘willfully’ in this context is intended to mean knowingly and intentionally.”²² Additionally, the language of the perjury statute has previously been interpreted to have the same meaning as “knowingly and intentionally” and to require that an actor knows or believes that the statement they are

¹⁷ *Meyers v. United States*, 171 F.2d 800, 805 (D.C. Cir. 1948) (“The criminal nature of perjury is not removed, the Supreme Court has said, by the fact that the perjurer later in the proceeding states the truth.”). Pursuant to its internal policy, the DCCA will only overrule decisions rendered by the United States Court of Appeals prior to February 1, 1971 when the court acts *en banc*. *M. A. P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971). To date, *Meyers* has not been overruled by the DCCA.

¹⁸ See e.g., MODEL PENAL CODE § 241.1(4); ALA. CODE. § 13A-10-107; ALASKA STAT. § 11.56.235; ARK. CODE ANN. § 5-53-104; DEL. CODE ANN. § 1231; FLA. STAT. 837.07; HAW. § 710-1064; IOWA CODE § 720.2; KY. REV. STAT. § 523.090; ME. REV. STAT. § 451(1)(B)(3); MO. REV. STAT. § 575.040(4); N.J. REV. STAT. § 2C:28-1; N.D. § 12.1-11-04; OR. REV. STAT. § 162.105; PA. STA. § 18-4902(d); R.I. CODE § 11-33-1; TENN. CODE § 39-16-704; TEX. CODE CRIM. § 37.05.

¹⁹ See *State v. Hawkins*, 620 N.W.2d 256, 260 (Iowa 2000) (“The essential purpose of a retraction or recantation defense is to encourage a perjurer to set the record straight, that is, to reveal the truth.”).

²⁰ Applies when the actor has taken an oath or affirmation before a competent tribunal, officer, or person, in a case in which the law authorized such oath or affirmation to be administered. D.C. Code §22-2402(a)(1).

²¹ Applies to statements in any declaration, certificate, verification, or a statement made under penalty of perjury in the form specified in §16-5306 or 28 U.S.C. §1746(2).

²² Committee of the Judiciary, *Report on Bill 4-133, “Theft and White Collar Crimes Act of 1982,”* at 90 (July 20, 1982).

making is false.²³ Thus, it seems clear that current District law requires a knowing mental state *with respect to the falsity of the statement*. At the same time, the law is silent as to a culpable mental state regarding whether the false statement was made in an official proceeding or declaration and there is no case law indicating a mental state with respect to whether the statement was material. In contrast, the revised perjury statute requires a knowingly mental state with respect to both the falsity of the statement and the fact that the statement is made in an official proceeding or declaration but does not require a culpable mental state with respect to the materiality of the statement. Applying a knowing culpable mental state requirement to statute elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.²⁴ Requiring that the actor be practically certain that they are making a false statement in an official proceeding or declaration is thus appropriate. However, it is not necessary to apply the knowing mental state to the materiality of the false statement under these circumstances as the actor might not be in a position to assess materiality but will be in a position to understand the importance of providing truthful statements while under oath or in sworn or unsworn declaration irrespective of the actor’s assessment of whether the statement is material. This change improves the clarity and consistency of the revised statutes.

Second, the revised perjury statute uses the terms “sworn declaration” and “unsworn declaration” and provides definitions for each term. Current D.C. Code §22-2402(a)(3) applies to “any declaration, certificate, verification, or statement made under penalty of perjury in the form specified in § 16-5306 or 28 U.S.C. § 1746(2).” In the context of perjury, the terms declaration, certificate, and verification can have legal significance beyond their ordinary meaning, but the current statute does not attempt to define the terms. District case law also does not provide clear guidance as to the scope of these terms. In contrast, the revised perjury statute uses the terms “sworn declaration” and “unsworn declaration” and provides definitions for each term. The term “sworn declaration” means a signed record given under oath or affirmation attesting to its truth including a sworn statement, verification, certificate, or affidavit.²⁵ The term “unsworn declaration” means a declaration in a signed record that is not given under oath, but is given under penalty of perjury in the form specified in D.C. Code § 16-5306 or 28 U.S.C. §1746(2).²⁶ By specifying that the statute applies to signed records given under oath or affirmation or given under penalty of perjury in the form specified by statute, the revised perjury offense makes clear when the statute applies to a declaration, certificate, verification, or statement. This change improves the clarity of District law.

²³ See *Maragon v. United States*, 187 F.2d 79, 80 (D.C. Cir. 1950) (“While, as we have said before, ‘wilfully’ in a criminal statute may have any one of a number of meanings, we think it is clear that in the perjury statute it means ‘knowingly’ or ‘intentionally’.”).

²⁴ 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)”).

²⁵ This definition is substantially similar to the definition of “sworn declaration” in D.C. Code § 16-5302(6). The RCC definition inserts the term “affirmation” to reflect applicability to affirmations in lieu of oath.

²⁶ This definition is substantially similar to the definition of “unsworn declaration” in D.C. Code § 16-5302(7) but specifies, as current law does, that the declaration be given under penalty of perjury as specified in D.C. Code § 16-5306 or 28 U.S.C. §1746(2).

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

First, the revised perjury statute explicitly states that proof of falsity of a statement may not be established solely by the uncorroborated testimony of a single witness. Current D.C. Code § 22-2402 does not explicitly state that falsity cannot be proven on the uncorroborated testimony of a single witness. Nevertheless, the requirement of corroboration, often referred to as the “two-witness rule”²⁷ is firmly rooted in DCCA case law.²⁸ The revised statute codifies the well-established rule in the text of the statute. This change improves the clarity of the statute without changing current District law.

Second, the revised perjury offense provides definitions for the terms “competent”, “officer”, and “tribunal” in the text of the statute. The definitions are taken from current law²⁹ and legislative history from the current statute explaining the meaning of certain terms.³⁰ This change improves the clarity of the statute without changing current District law.

²⁷ The term “two-witness rule” is a misnomer. Under current law and the revised perjury statute, the government can prove falsity through a single witness and sufficient corroboration of the part of the witness’s testimony proving falsity. *See Wilson v. United States*, 194 A.3d 920, 922 (D.C. 2018) (“The requisite corroboration ‘need not be sufficient, by itself, to demonstrate guilt,’ but it must corroborate ‘the part of the primary witness’s testimony that proves the falsity of the defendant’s statement.’”); *Gaffney v. United States*, 980 A.2d 1190, 1194 (D.C. 2009) (“As explained in *Hsu*, the two-witness rule “is somewhat misnamed today, for while two witnesses will accomplish the task, one witness plus independent corroborative evidence will also suffice.’ In the latter case, ‘he independent, corroborative evidence need not be sufficient, by itself, to demonstrate guilt; rather, it need only tend to establish an accused’s guilt and be inconsistent with the innocence of the defendant when joined with the one direct witness’ testimony.’ What must be corroborated is the part of the primary witness’s testimony that falsifies the defendant’s statement. ‘Corroboration is required for the perjured fact as a whole,’ though, ‘and not for every detail or constituent part of it.’”) (internal citations omitted).

²⁸ *See e.g., Gaffney v. United States*, 980 A.2d 1190, 1193–94 (D.C. 2009) (“According to the venerable ‘two-witness’ rule, ‘the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury.’ The two-witness rule thus ‘imposes an evidentiary minimum’ that the government must meet to satisfy its burden of proving falsity.”) (internal citations omitted); *Hsu v. United States*, 392 A.2d 972, 980–81 (D.C. 1978) (Today, it is “(t)he general rule (that) in prosecutions for perjury . . . the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury.”); *Wilson v. United States*, 194 A.3d 920, 922 (D.C. 2018) (quoting *Hsu v. United States*, 392 A.2d 972, 980–81 (D.C. 1978)).

²⁹ *See* D.C. Code § 1-301.45 (defining “officer”); D.C. Code § 16-5302(6)-(7) (defining “sworn declaration” and “unsworn declaration”).

³⁰ *See* Committee of the Judiciary, *Report on Bill 4-133, “Theft and White Collar Crimes Act of 1982,”* at 87 (July 20, 1982) (explaining the meaning of “tribunal” and “competent”).

§ 22A-4204. Perjury by false certification.

- (a) *Offense.* An actor commits perjury by false certification when the actor:
 - (1) Knowingly makes a false certification of:
 - (A) Acknowledgement; or
 - (B) Another material matter in an acknowledgment; and
 - (2) In fact, the actor is a notarial official or other officer authorized to take proof or certification.
- (b) *Penalty.* Perjury by false certification is a Class 8 felony.
- (c) *Definitions.* The terms “acknowledgement” and “notarial officer” have the same meanings specified in D.C. Code § 1-1231.01 and the term “officer” has the meaning specified in D.C. Code § 1-301.45.

Explanatory Note. The revised perjury by false certification offense prohibits the making of a false certification of acknowledgement or other material matters by a notarial official or other authorized officer. The revised perjury by false certification offense is a new offense that replaces the provision of the current perjury statute dealing with false certification by notary publics and other officers in current D.C. Code §22-402(a)(2).

Subsection (a) specifies the prohibited conduct for perjury by false certification. Paragraph (a)(1) and subparagraphs (a)(1)(A) and (a)(1)(B) specify that an actor commits perjury by false certification if the actor “knowingly” makes a false certification³¹ of acknowledgement or of another material matter in an acknowledgement. The specified culpable mental state is “knowingly.” “Knowingly” is defined term in RCCA § 22A-206, which here requires that the actor must be practically certain that the certification of acknowledgement or other material matter in an acknowledgement was false. “Acknowledgment” is a defined term that means “a declaration by an individual that states the individual has signed a record for the purposes stated in the record, and if the record is executed in a representative capacity, that the person signed the record with proper authority and signed it as the act of the individual or entity identified in the record.”³²

Paragraph (a)(2) specifies that the actor must be a “notarial official” or other officer authorized to take proof or certification. “Notarial officer” is a defined term in D.C. Code §1-1231.01 that means “a notary public or other individual authorized to perform a notarial act.”³³ “Officer” is a defined term that includes any person authorized by law to perform the duties of office.³⁴ Paragraph (a)(2) applies to officers that are authorized by District law to take proof or certification.

³¹ See D.C. Code §1-1231.14. Certificate of notarial act (specifying requirements for certification of notarial act).

³² D.C. Code § 1-1231.01(1).

³³ The definition in D.C. Code §1-1231.01 applies to both “notarial officials” and “officers.” This definition is found in Chapter 12A, which enacts the Revised Uniform Law on Notarial Acts. The RCCA uses the term “officer”, defined in §1-301.45, to encompass “officers” who may potentially be authorized by a law outside of Chapter 12A to take proof or certification.

³⁴ See D.C. Code § 1-301.45.

Subsection (b) specifies the penalty classification for perjury by false certification. [See RCCA §§ 22A-603 and 22A-604 for the imprisonment terms and fines for each penalty class.]

Subsection (c) cross-references applicable definitions located elsewhere in District law.

Relation to Current District Law. *The revised perjury by false certification statute changes District law in one main way.*

The perjury by false certification offense is a new, separate offense, specifically addressing false certifications of acknowledgements or material matters in an acknowledgement by public notaries or other authorized persons. The current perjury statute, D.C. Code § 22-2402, addresses multiple forms of perjury including the conduct prohibited by this statute. In contrast, the revised creates a new, separate offense, of perjury by false certification covering specific conduct by notarial officers performing notarial acts. This change improves the organization of the revised statutes.

Beyond this one change to Current District law, one other aspect of the revised statute may constitute a substantive change to District law.

The perjury by false certification statute specifies a culpable mental state of “knowingly” regarding the making of a false certification. Current D.C. Code § 22-2402(a) requires that a notary public or officer authorized to take proof of certification “wilfully certify[y] falsely that an instrument was acknowledged by any party thereto or wilfully certify[y] falsely as to another material matter”³⁵ Although the statute uses only the term “willfully,” the committee report indicates that “the term ‘willfully’ in this context is intended to mean knowingly and intentionally.”³⁶ Additionally, the language of the perjury statute has previously been interpreted to have the same meaning as “knowingly and intentionally” and to require that an actor know or believe that the statement they are making is false.³⁷ Thus, current District law likely requires a knowing mental state *with respect to the falsity of the certification*. At the same time, it is not clear whether there is a culpable mental state requirement with regard to the materiality requirement for matters other than the acknowledgment itself. The revised perjury by false certification statute requires a knowingly mental state with respect to both the falsity of the certification and the materiality of a matter in the acknowledgement by a party.³⁸ Applying a knowing culpable mental state requirement to statute elements that distinguish innocent from

³⁵ D.C. Code § 22-2402(a)(2).

³⁶ Committee of the Judiciary, *Report on Bill 4-133, “Theft and White Collar Crimes Act of 1982,”* at 90 (July 20, 1982).

³⁷ See *Maragon v. United States*, 187 F.2d 79, 80 (D.C. Cir. 1950) (“While, as we have said before, ‘wilfully’ in a criminal statute may have any one of a number of meanings, we think it is clear that in the perjury statute it means ‘knowingly’ or ‘intentionally’.”).

³⁸ Materiality is not specified with respect to acknowledgement by a party because the acknowledgment of a party is inherently material to an affidavit or similar document.

criminal behavior is a well-established practice in American jurisprudence.³⁹ Requiring that the actor be practically certain that they are making a false certification is thus appropriate. Additionally, it is appropriate to require that the actor be practically certain that the false certification applies to a material matter given how much non-material information may be included in an affidavit.⁴⁰ This change improves the clarity and consistency of the revised statutes.

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

The revised perjury by false certification offense uses the term “notarial officer” instead of notary public. Current D.C. Code § 22-2402(a)(2) proscribes false certification by a “notary public or other officer authorized to take proof of certification.” In 2018, the District codified the Revised Uniform Law on Notarial Acts which includes definitions for the terms “notary public” and “notarial officer”. Pursuant to the new law, “notarial officer” or “officer” “means a notary public or other individual authorized to perform a notarial act.”⁴¹ The revised perjury by false certification statute uses the terms “notarial officer” and “officer” to reach acts by notary publics and any other officer authorized to take proof of certification. The terms are defined in the text of the statute. This change improves the clarity of the statute without changing District law.

³⁹ 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)”).

⁴⁰ *E.g.*, if an actor, for expediency purposes, knowingly certifies an acknowledgment that contains errant information that does not appear to be material to the document, it would be inappropriate to hold the actor liable for the felony offense of perjury by false certification.

⁴¹ D.C. Code § 1-1231.01.

§ 22A-4205. Solicitation of perjury.

- (a) *Offense.* An actor commits solicitation of perjury when the actor:
- (1) Knowingly commands, requests, or tries to persuade another person to engage in conduct, which, if carried out, in fact, will constitute either the offense of perjury or perjury by false certification under District of Columbia law;
 - (2) Acts with the culpability required for the offense of perjury or the offense of perjury by false certification; and
 - (3) The other person engages in conduct which constitutes either the offense of perjury or the offense of perjury by false certification under District of Columbia law.
- (b) *Penalty.* Solicitation of perjury is a Class 8 felony.

Explanatory Note. The revised solicitation of perjury offense prohibits solicitation of perjury that results in another person committing the offense of perjury. The revised solicitation of perjury offense replaces the subornation of perjury statute in D.C. Code § 22-2403 and covers certain conduct formerly covered by the obstruction of justice statute, D.C. Code § 22-721.

Subsection (a) specifies the prohibited conduct for solicitation of perjury. Paragraph (a)(1) provides that an actor commits solicitation of perjury when the actor “knowingly commands, requests, or tries to persuade⁴² another person to engage in conduct that, in fact, constitutes either the offense of perjury or the offense of perjury by false certification under District of Columbia law.” The specified culpable mental state here is “knowingly”. “Knowingly” is defined term in RCCA § 22A-206, and applied here means that the actor must be practically certain that they are commanding, requesting, or trying to persuade another person to engage in specific conduct. The term “command” implies an order or direction, commonly by one with some authority over the other. The term “request” applies when one person explicitly asks another person to engage in specified conduct. Both these terms are direct. The phrase “tries to persuade” covers both direct and indirect attempts⁴³ to persuade another person and includes coercion. Paragraph (a)(1) further requires that the conduct, if carried out, “in fact” will constitute perjury or perjury

⁴² These varying forms of influence may be communicated directly or by an intermediary, through words or gestures, via threats or promises, and occur either before or at the actual time the crime is being committed. It is therefore, immaterial, for purposes of solicitation liability, whether the rational or emotional support is communicated orally, in writing, or through other means of expression. *See e.g.*, WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.1 (3d ed. Westlaw 2019) (stating it is well-established that “solicitation c[an] be committed by speech, writing, or nonverbal conduct); *State v. Johnson*, 202 Or. App. 478, 483-84 (2005) (rejecting “the proposition that the state must produce the actual words used by the solicitor (or, for that matter, that words must be used)”). Nor is proof of a “quid pro quo” between the solicitor and the party solicited necessary; *Id.* at 483-84 (2005) (rejecting “the proposition that the state must prove that the solicitor offered the solicitee a quid pro quo”).

⁴³ *E.g.*, the actor sends a note to another person with a list of reasons why the other person should testify falsely at trial without expressly requesting or commanding the person to testify falsely. Assuming the actor sent the note aware or believing that sending the note could cause another person to testify falsely, this indirect attempt to persuade the other person would satisfy this element.

by false certification. “In fact,” is a defined term in RCCA § 22A-207 that indicates there is no culpable mental state requirement as to the fact that the conduct, if carried out, will constitute perjury or perjury by false certification.

Paragraph (a)(2) states that solicitation of perjury incorporates “the culpability required⁴⁴ for the offense of perjury or the offense of perjury by false certification.” Pursuant to this principle, an actor may not be convicted of solicitation of perjury absent proof that the actor had the culpability required to establish perjury or perjury by certification.⁴⁵ Per the rule of interpretation in RCCA § 22E-207, the “in fact” specified in paragraph (a)(1) applies to the elements in paragraph (a)(2) and there is no (additional) culpable mental state required for the fact that the actor acts with the culpability required for the offense.

Paragraph (a)(3) requires that the person who the actor commands, requests, or tries to persuade to engage in conduct constituting perjury or perjury by certification must actually commit the offense of perjury or perjury by false certification under District law.⁴⁶ Per the rule of interpretation in RCCA § 22E-207, the “in fact” specified in paragraph (a)(1) applies to the elements in paragraph (a)(3) and there is no culpable mental state required for the fact that the person actually committed the offense of perjury or perjury by false certification under District law. To prove that another person committed the offense of perjury or perjury by certification, each element of the respective offense must be established beyond a reasonable doubt. However, there is no requirement that the other person be separately charged or convicted of perjury or perjury by certification.

Subsection (b) specifies the penalty classification for solicitation of perjury. [See RCCA §§ 22A-603 and 22A-604 for the imprisonment terms and fines for each penalty class.]

Relation to Current District Law. The revised solicitation of perjury statute changes District law in one main way.

The revised solicitation of perjury statute prohibits certain conduct previously specified in the obstruction of justice statute. Current D.C. Code § 22-722(a)(2) punishes a person who “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 witness or officer in any official proceeding, with intent to influence, delay, or prevent the truthful testimony of the person in an official proceeding.” The RCCA proposes a reorganization of the obstruction of justice statutes that includes, inter alia, a broad catch-all obstruction of justice offense and an independent

⁴⁴ “Culpability required” is a defined term in RCC § 22A-201(e).

⁴⁵ *E.g.*, An actor persuades a witness to provide testimony in a trial that the actor believes to be true but the witness knows is false. In that case, the actor knowingly persuaded another person to engage in conduct that would in fact be perjury. However, the actor would not have acted with the requisite culpability for the offense because the actor believed they were soliciting truthful testimony.

⁴⁶ If the elements in (a)(1) and (a)(2) are satisfied, but (a)(3) is not satisfied because the other person did not commit the offense of perjury or perjury by certification, an actor could be held liable for attempt solicitation of perjury.

tampering with a witness or informant offense.⁴⁷ These offenses, which also cover conduct designed to cause a witness to testify falsely, now require an attempt to bribe another person or the commission of some criminal offense before liability attaches. The obstruction of justice and tampering with a witness or informant statutes no longer expressly prohibit “corruptly persuading” another person to commit the offense of perjury and instead relies on the solicitation of perjury offense, as well as other statutes, to establish liability for attempts to knowingly persuade another person to testify falsely. By covering any command, request, or attempt to persuade another person to commit perjury or perjury by false certification, the solicitation of perjury statute addresses corruptly persuading another person to testify falsely. Thus, any person who commits the offense of solicitation of perjury or attempted solicitation of perjury could be held liable under either the revised obstruction of justice statute or the revised tampering with a witness or informant statutes. This change improves the clarity and organization of the revised statutes.

Beyond this one change to Current District law, three other aspects of the revised statute may constitute substantive changes to District law.

First, the revised solicitation of perjury statute specifies a culpable mental state of “knowingly” for the actor’s conduct in commanding, requesting, or trying to persuade another person to engage in conduct that would constitute perjury or perjury by certification. Current D.C. Code § 22-2403 requires that a person “wilfully procure[] another to commit perjury.” Although the statute only uses the term “willfully,” the legislative history indicates that the statute requires that “the person procuring the perjury must know or have reason to believe that the testimony given would be false.”⁴⁸ Thus, current District law likely requires a knowing mental state with respect to the falsity of the other person’s testimony and to acts that would procure such false testimony. In contrast, the revised solicitation statute clearly specifies a knowing mental state with respect to the actor commanding, requesting, or trying to persuade another person to engage in conduct that constitutes perjury or perjury by false certification. This change improves the clarity and consistency of the revised statutes.

Second, the revised solicitation of perjury statute requires as an additional element that the actor act with the culpability required for the underlying offense of perjury or perjury by false certification. Current D.C. Code § 22-2403 requires that a person “wilfully procure[] another to commit perjury.” The legislative history of the statute indicates that the statute requires that “the person procuring the perjury must know or have reason to believe that the testimony given would be false”⁴⁹ and knowledge that the testimony is false is the only apparent culpable mental state for the current perjury statute. The words “have reason to believe” could suggest that recklessness or negligence as to the falsity of the testimony suffices under current D.C. Code § 22-2403. If so, the current statute may

⁴⁷ See RCCA § 22A-4301, 4302.

⁴⁸ Committee of the Judiciary, *Report on Bill 4-133, “Theft and White Collar Crimes Act of 1982,”* at 91 (July 20, 1982).

⁴⁹ Committee of the Judiciary, *Report on Bill 4-133, “Theft and White Collar Crimes Act of 1982,”* at 91 (July 20, 1982).

impose a less stringent culpable mental state requirement as to the falsity of the testimony than that required under the current perjury offense. However, the phrase “reason to believe” appears only in legislative history and there is no DCCA case law adopting specifying what the term “wilfully” means under § 22-2403 or adopting the reason to believe language. In contrast, the revised statute explicitly states that an actor must act with the culpability required for the offense of perjury or perjury by false certification. Given the culpable mental state required for those offenses and the lack of additional culpability specified, this element may change the culpable mental state required as to the falsity of the testimony. This change improves the consistency and clarity of District law.

Third, the revised solicitation of perjury statute specifies as prohibited conduct that the actor command, request, or try to persuade another person to engage in conduct that would constitute perjury or perjury by false certification. Current D.C. Code § 22-2403 specifies as prohibited conduct the act of “procuring” another person to commit the offense of perjury. The term “procuring” is not defined by statute. However, the legislative history states that “the term is intended to be broadly interpreted to include instigating, persuading, or inducing another by any means to commit perjury.”⁵⁰ In contrast, the revised solicitation of perjury statute specifies that the actor must command, request, or try to persuade another person to engage in conduct that constitutes perjury or perjury by false solicitation. While both command and request are terms that require direct action, the phrase “tries to persuade” is meant to broadly encompass both direct and indirect attempts to persuade another person to commit perjury and includes attempts to persuade through coercion.⁵¹ Combined, these terms give the statute a broad scope while still being clear as to what conduct is prohibited. This change improves the clarity and proportionality of District law.

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

The revised solicitation of perjury statute requires as an element that the government prove another person engaged in conduct that constitutes either the offense of perjury or perjury by false certification under District law. Current D.C. Code § 22-2403 punishes an actor who willfully procures another to commit perjury. District case law holds that the other person must actually commit the offense of perjury and legislative history supports the requirement that another person must actually commit the offense and that each element of the offense be proven.⁵² The revised solicitation of perjury statute explicitly codifies this requirement. This change improves the clarity of the statute without substantively changing District law.

⁵⁰ Committee of the Judiciary, *Report on Bill 4-133, “Theft and White Collar Crimes Act of 1982,”* at 92 (July 20, 1982).

⁵¹ *E.g.*, An actor threatens a witness with bodily harm knowing that the threat would persuade the witness to commit perjury. Even though the actor did not try to persuade the witness to commit perjury through argument, the actor’s coercive threat of bodily harm would constitute an attempt to persuade the witness.

⁵² *See Riley v. United States*, 647 A.2d 1165, 1171 (D.C. 1994) (noting that the subornation of perjury charge had not been established because there was no actual perjury); Committee of the Judiciary, *Report on Bill 4-133, “Theft and White Collar Crimes Act of 1982,”* at 91 (July 20, 1982).

§ 22A-4206. False swearing.

- (a) *Offense.* An actor commits false swearing when the actor:
 - (1) Knowingly makes a false statement in a writing to a notarial officer or other person while under oath or affirmation attesting to the truth of the statement; and
 - (2) In fact:
 - (A) The oath or affirmation was administered by a notarial officer or other person authorized to administer oaths; and
 - (B) The statement is:
 - (i) Material to the case or matter in which it was delivered; and
 - (ii) Required by law to be sworn or affirmed before a notarial official or other person authorized to take and certify acknowledgment or proof.
- (b) *Penalty.*
 - (1) False swearing is a Class A misdemeanor.
 - (2) Penalty enhancement. The penalty classification of this offense is increased one class when the actor commits the offense negligent as to the fact that the statement is material to the arrest, detention, prosecution, conviction, sentence, search, or seizure of another person.
- (c) *Definitions.* The terms “acknowledgment” and “notarial officer” have the same meanings specified in D.C. Code § 1-1231.01.

***Explanatory Note.** The revised false swearing offense prohibits the making of false statements to a notarial official or other person in a document required by law to be sworn or affirmed. There are no penalty gradations but there is a penalty enhancement of one class for false statements that are material to the to the arrest, detention, prosecution, conviction, punishment, search, or seizure of another person. The revised false swearing offense replaces the false swearing statute in D.C. Code § 22-2404.*

Subsection (a) specifies the prohibited conduct for false swearing. Paragraph (a)(1) provides that an actor commits the offense of false swearing when the actor “knowingly makes a false statement in writing to a notarial officer or other person authorized to administer oaths while under oath of affirmation attesting to the truth of the statement.” “Knowingly” is a defined term in RCCA § 22A-206, which here requires that the actor be practically certain that the actor is making a false statement in writing to a person who the actor is practically certain is a notarial officer or other person authorized to administer oaths. Additionally, the “knowingly” mental state requires that the actor be practically certain that the actor is under oath or affirmation attesting to the truth of the statement. “Notarial officer” is a defined term in D.C. Code §1-1231.01 that includes any “notary public or other individual authorized to perform a notarial act.” The paragraph also applies

to statements made to any person authorized to administer oaths regardless of whether the person qualifies as a “notarial officer” under D.C. Code §1-123.01.⁵³

Paragraph (a)(2) specifies three circumstance elements that must exist when the actor makes a false statement in writing to a notarial officer or other person. Paragraph (a)(2) uses the phrase “in fact,” a defined term in revised RCCA § 22A-207 that indicates there is no culpable mental state requirement for the subsequent elements.

Subparagraph (a)(2)(A) requires that the oath or affirmation taken by the actor have been administered by a notarial officer or other person authorized to take oaths. The phrase “in fact” in paragraph (a)(2) indicates there is no culpable mental state requirement for the requirement that the oath or affirmation be administered by a notarial officer or other person authorized to administer oaths.

Sub-subparagraph (a)(2)(B)(i) specifies that the false statement made by the actor must be material to the case or matter in which it was delivered. The requirement that the statement be delivered means it is insufficient for the government to establish that a false statement was made.⁵⁴ Rather, the government must prove that the statement was actually delivered to a case or matter. Per the rule of interpretation in RCCA § 22A-207, phrase “in fact” in paragraph (a)(2) applies to this element, and indicates there is no culpable mental state requirement as to whether the statement be material to the case or matter in which the statement is delivered. Applied here that means the government need not prove that the actor knew or should have known that the false statement was material.

Sub-subparagraph (a)(2)(B)(ii) specifies that the statement must be one that is required by law to be sworn or affirmed before a notarial official or other person authorized to take and certify acknowledgment⁵⁵ or proof. Per the rule of interpretation in RCCA § 22A-207, the phrase “in fact” in subparagraph (a)(2) applies to this element, and indicate that there is no culpable mental state requirement as to whether the statement be one required by law to be sworn or affirmed before a notarial official or other person authorized to take and certify acknowledgment or proof.

Subsection (b) specifies the penalty classification for false swearing. Paragraph (b)(2) provides enhanced penalties for false swearing in cases where the false statements affect the liberty interests of another person. If the government proves the actor committed the offense negligent as to the fact that the statement is material to the arrest, detention, prosecution, conviction, sentence, search, or seizure of another person the penalty classification for false swearing may be increased in severity by one penalty class.

⁵³ If, for example, the DCCA interpreted D.C. Code § 1-1231.01 to define the term “notarial officer” only within that chapter, the false swearing statute would still cover false statements made to persons authorized to perform, take, and certify acknowledgment or proof by other sections of District law.

⁵⁴ *E.g.*, If an actor makes a false statement to a notary public in an affidavit but never delivers the affidavit to any party that might rely on it in a case or matter, the actor would not be guilty of false swearing.

⁵⁵ “Acknowledgment” is a defined term that means a declaration by an individual that states the individual has signed a record for the purposes stated in the record, and if the record is executed in a representative capacity, that the person signed the record with proper authority and signed it as the act of the individual or entity identified in the record. D.C. Code § 1-1231.01.

“Negligent” is a defined term meaning in RCCA § 22A-206(d).⁵⁶ Applied here, it means that an actor should have been aware of a substantial risk that their false statement would be material to the arrest, detention, prosecution, conviction, sentence, search, or seizure of another person and that the risk was of such a nature and degree that, considering the nature of and motivation for the actor’s statement and the circumstances the actor was aware of, failure to perceive the risk was a gross deviation from the standard of care a reasonable person in the actor’s situation would follow.⁵⁷ [See RCCA §§ 22A-603 and 22A-604 for the imprisonment terms and fines for each penalty class.]

Subsection (c) cross-references applicable definitions located elsewhere in District law.

Relation to Current District Law. The revised false swearing statute changes District law in one main way.

The revised false swearing statute includes a penalty enhancement in cases where the false statements affect the liberty of another person. Current D.C. Code § 22-2404 treats all instances of false swearing the same regardless of whether the false statements are relied upon in a case or matter affecting the liberty interests of another person. Thus, even in cases where the false swearing is as effective as perjured testimony and detrimental to another person’s most basic liberty interests, the current false swearing statute permits only a misdemeanor conviction.⁵⁸ To address this asymmetry, the revised statute includes a penalty enhancement of one class that raises the penalty classification for false swearing from a misdemeanor to a felony one class below perjury in instances where the false statement is material to the arrest, detention, prosecution, conviction, punishment, search, or seizure of another person. The inclusion of a penalty enhancement ensures that the penalty for false swearing reflects the seriousness of the offense in cases where the false swearing could result in obvious and irreparable harm.⁵⁹ This change improves the consistency and proportionality of District law.

⁵⁶ RCCA § 22A-206(d) (“A person acts negligently: (1) As to a result element, when: (A) The person should be aware of a substantial risk that the conduct will cause the result; and (B) The risk is of such a nature and degree that, considering the nature of and motivation for the person’s conduct and the circumstances the person is aware of, the person’s failure to perceive that risk is a gross deviation from the standard of care that a reasonable individual would follow in the person’s situation.”).

⁵⁷ *E.g.*, An actor who is an employee of the Department of Corrections submits an affidavit that falsely states a person released to a halfway house violated the standards of conduct for detention and requests that the person be remanded to the jail pursuant to D.C. Code § 23-1329(f)(2)-(5). In that case, it would be at least negligent for the actor to be unaware that their false statements would be material to continued release or detention of the person in the halfway house as the purpose of the affidavit is to support a request for remand to the jail.

⁵⁸ Although many instances of false swearing in cases affecting the liberty of another person may satisfy paragraph (a)(2) of the perjury statute, there may be instances where all of the elements are not met. *E.g.*, An actor submits an affidavit in support of a request that a judge remand a person released to a halfway house to the jail. The affidavit does not state the statements were made under penalty of perjury and therefore does not satisfy all of the requirements of the perjury statute. Nonetheless, the affidavit is accepted and relied upon by the judge in deciding whether to hold the person released to a halfway house in the jail instead.

⁵⁹ See *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (stating “[i]t has long been established that the loss of constitutional freedoms, ‘for even minimal periods of time, unquestionably constitutes irreparable injury’”).

Beyond this one change to Current District law, two other aspects of the revised statute may constitute substantive changes to District law.

First, the revised false swearing statute specifies a culpable mental state of “knowingly” regarding the making of a false statement in writing to a notarial officer or other person while under oath or affirmation attesting to the truth of the statement. Current D.C. Code § 22-2404 requires that an actor “wilfully make[] a false statement, in writing”⁶⁰ Although the statute uses the term “willfully,” the committee report indicates that “the term ‘willfully’ in this context is intended to mean knowingly and intentionally.”⁶¹ Additionally, the language of the perjury statute was previously been interpreted to have the same meaning as “knowingly and intentionally” and to require that an actor know or believe that the statement they are making is false.⁶² Thus, current District law likely requires a knowing mental state *with respect to making a false statement in writing*. At the same time, it is not clear whether there is a culpable mental state requirement with regard to whether the actor was under oath or affirmation. The revised false swearing statute requires a knowingly mental state with respect to both the falsity of the statement and the requirement that the statement be under oath or affirmation. Applying a knowing culpable mental state requirement to statute elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.⁶³ Requiring that the actor be practically certain that they are making a false statement and that they are under oath or affirmation ensures that the actor is aware of the solemnity of circumstances and the need to tell the truth. This change improves the clarity and consistency of the revised statutes.

Second, the revised false swearing statute requires that the false statements be *delivered* in a case or matter to which they are material. Current D.C. Code § 22-2404 requires that the false statement be material. Further, under current case law, a statement is deemed material if it has “a natural tendency to influence, or was capable of influencing, the decision of a tribunal in making a determination required to be made.”⁶⁴ Arguably, a false statement would need to be delivered before it had a tendency to influence or became

⁶⁰ D.C. Code § 22-2404(a).

⁶¹ Committee of the Judiciary, *Report on Bill 4-133, “Theft and White Collar Crimes Act of 1982,”* at 93 (July 20, 1982).

⁶² See *Maragon v. United States*, 187 F.2d 79, 80 (D.C. Cir. 1950) (“While, as we have said before, ‘wilfully’ in a criminal statute may have any one of a number of meanings, we think it is clear that in the perjury statute it means ‘knowingly’ or ‘intentionally.’”).

⁶³ 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)”).

⁶⁴ *Weinstock v. United States*, 231 F.2d 699, 701-01 (D.C. Cir. 1956); see also *Robinson v. United States*, 114 F.2d 475, 476–77 (D.C. Cir. 1940) (“The ultimate test in either case is whether such statements had a natural tendency to influence the clerk in his investigation of the facts, in the exercise of his official discretion, and in the administration of the law.”); Committee of the Judiciary, *Report on Bill 4-133, “Theft and White Collar Crimes Act of 1982,”* at 92 (July 20, 1982) (“It is intended that the materiality of the statement is to be determined by the general standards established in *Robinson v. United States*. Accordingly, the statement must be one which would have a natural tendency to influence a decision-maker.”).

capable of influence a decision.⁶⁵ Thus, the materiality requirement itself may presume that the false statement be delivered. However, there does not appear to be any case law specifically addressing the question of whether the statements must be delivered. The revised resolves any ambiguity by explicitly requiring that the statements actually be delivered in a case or matter in which the statements are material. This change improves the clarity and proportionality of District law.

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

First, the revised false swearing offense uses the term “notarial officer” instead of notary public. Current D.C. Code § 22-2404 requires that the statement be one that is required by law to be sworn or affirmed before a notary public or other person authorized to administer oaths. In 2018, the District codified the Revised Uniform Law on Notarial Acts which includes definitions for the terms “notary public” and “notarial officer”. Pursuant to the 2018 law, the term “notarial officer” includes notaries public.⁶⁶ The revised false swearing statute uses the terms “notarial officer” and “officer” to reach acts by notaries public and other persons authorized to take proof of certification under. The term “notarial officer” is defined in the text of the statute by cross reference to the applicable code provision. This change improves the clarity of the statute without changing District law.

Second, the revised false swearing statute explicitly states that any oath or affirmation be administered by a notarial officer or other person authorized to administer oaths. Current D.C. Code § 22-2404 specifies that a person must be “under oath or affirmation” and that the statement the person makes be “one which is required by law to be sworn or affirmed before a notary public or other person authorized to administer oaths.” The statute does not, however, explicitly state that the oath must be administered by a notarial officer or other person authorized to administer oaths. Because an actor cannot be duly sworn by a person not authorized to take oaths, the current statute’s requirement that the actor be under oath or affirmation necessarily presumes that an oath or affirmation was administered by a person authorized to administer oaths. The revised false swearing statute makes this explicit. This change improves the clarity of the statute without changing District law.

⁶⁵ *E.g.*, An actor is asked by a friend to provide an affidavit that will be used in a lawsuit involving the actor’s friend. The actor wanting to help the friend drafts an affidavit containing untrue statements to aid the actor’s friend. The actor takes it to a notary public and attests to the truth of the false statements in the affidavit. Before delivering the affidavit to his friend, however, the actor has a change of heart and rips up the false affidavit so that it is never delivered to the friend and used in the lawsuit. In that case, the affidavit could not have influenced the lawsuit because it was never delivered to anyone. However, the facts attested to might have been material to the case had they been delivered.

⁶⁶ D.C. Code § 1-1231.01.

§ 22A-4207. False statements.

- (a) *Offense.* An actor commits false statements when the actor:
- (1) Knowingly makes a false statement in writing, directly or indirectly, to any District of Columbia government agency, department, or instrumentality, including any court of the District of Columbia;
 - (2) Negligent as to the fact that the writing indicates the making of a false statement is punishable by criminal penalty; and
 - (3) In fact, the statement is:
 - (A) Made under circumstances in which the statement could reasonably be expected to be relied upon as true; and
 - (B) Material to the case or matter to which it was delivered or likely to be delivered.
- (b) *Penalty.*
- (1) False statements is a Class B misdemeanor.
 - (2) *Penalty enhancement.* The penalty classification of this offense is increased two classes when the actor commits the offense negligent as to the fact that the statement is material to the arrest, detention, prosecution, conviction, sentence, search, or seizure of another person.

***Explanatory Note.** The revised false statements offense prohibits the making of false statements to a District government agency, department, or instrumentality. There are no penalty gradations but there is a penalty enhancement of one class for false statements that are material to the to the arrest, detention, prosecution, conviction, punishment, search, or seizure of another person. The revised false statements offense replaces the false statements statute in D.C. Code § 22-2405.*

Subsection (a) specifies the prohibited conduct for false statements. Paragraph (a)(1) provides that an actor commits the offense of false statements when the actor “knowingly makes a false statement, directly or indirectly, to any District government agency, department, or instrumentality, including any court of the District of Columbia.” “Knowingly” is defined term in RCCA § 22A-206, and applied here requires that the actor be practically certain that the statement the actor is making is false and that the statement is being made in writing, directly or indirectly, to a District government agency, department, or instrumentality.

Paragraph (a)(2) specifies that the writing must indicate that a false statement is subject to criminal penalty and that the actor must have a negligent culpable mental state with respect to that indication. The writing need not indicate a specific criminal penalty or statute as long as it specifies that the false statements are subject to criminal penalty.⁶⁷

⁶⁷ *E.g.*, If a sworn affidavit indicates that the statement is made under penalty of perjury, the actor could be subject to liability under either the perjury statute or the false statements statute because the penalty for perjury is a criminal penalty. Similarly, a statement that indicating that false statements are subject to this statute does not preclude prosecution under another statute addressing false statements. For example, *Gerstein* affidavits submitted by members of the Metropolitan Police Department in support of probable cause are often signed with a statement indicating that “the statement was made under penalty and

Negligent is defined term in § 22A-206, which here requires that the actor should have been aware of a substantial risk that the writing indicates that false statements are subject to criminal punishment and that the risk is of such a nature and degree that, considering the nature of and motivation for the person’s conduct and the circumstances the person is aware of, the person’s failure to perceive the risk is a gross deviation from the standard of care that a reasonable individual would follow in the situation.⁶⁸

Paragraph (a)(3) specifies two circumstance elements that must exist when the actor makes a false statement, directly or indirectly, to a District government agency, department, or instrumentality. Paragraph (a)(3) uses the phrase “in fact,” a defined term in revised § 22A-207 that indicates there is no culpable mental state requirement for the subsequent elements.

Subparagraph (a)(3)(A) specifies that the statement must be made under circumstances in which the statement could reasonably be expected to be relied upon as true.⁶⁹ Reasonableness is an objective standard. The phrase “in fact” in subparagraph (a)(2) indicates there is no culpable mental state requirement for the requirement that the statement be made under circumstances in which the statement could reasonably be expected to be relied upon as true.

Subparagraph (a)(3)(B) specifies that the statement must be material to the case or matter to which it was delivered or likely to be delivered. The phrase “in fact” in subparagraph (a)(2) indicates there is no culpable mental state requirement for the requirement that the statement be material to the case or matter in which the statement is delivered or likely delivered.

Subsection (b) specifies the penalty classification for false statements. Paragraph (b)(2) provides enhanced penalties for false statements in cases where the false statements affect the liberty of another person. If the government proves the actor committed the offense negligent as to the fact that the statement was material to the arrest, detention, prosecution, conviction, sentence, search, or seizure of another person the penalty

punishment for false statements pursuant to D.C. Code § 22-2405.” However, *Gerstein* affidavits necessarily must be sworn before they can be proffered to the court and therefore fall within both the false swearing and false statements (and potentially perjury) statute irrespective of the indication that they are subject to the lesser penalty under the false statements statute. *See* D.C. Super. Ct. Crim. R. 5(e)(1).

⁶⁸ *E.g.*, An actor filing out a driver’s license application would be expected to be aware of a substantial risk that the application contained a statement indicating that false statements were made under penalty of perjury. In contrast, an actor filling out a long opinion survey for the Department of Public Works would not be expected to be aware that the survey contained a statement indicating that false statements were subject to criminal penalty as opinion surveys are not of the nature where such formality is expected.

⁶⁹ *E.g.*, If an actor who is a resident of Vermont submitted an application to a government agency with a box checked stating that the actor was a resident of the District of Columbia and provided a District of Columbia address, the circumstances are such that a District agency might reasonably rely on the false statement indicating that the person was a District resident. If, however, the same actor submitted an application to a government agency with a box checked stating that the actor was a resident of the District of Columbia but provided their Vermont address and made no other suggestion that they were a District resident, the circumstances would not be such that it would be reasonable for an agency to rely on the statement that actor was a resident of the District rather than a resident of Vermont.

classification for false statements may be increased in severity by two penalty classes.⁷⁰ “Negligent” is a defined term meaning in § 22A-206(d).⁷¹ Applied here, it means that an actor should have been aware of a substantial risk that their false statement would be material to the arrest, detention, sentence, conviction, punishment, search, or seizure of another person and that the risk was of such a nature and degree that, considering the nature of and motivation for the actor’s statement and the circumstances the actor was aware of, failure to perceive the risk was a gross deviation from the standard of care a reasonable person in the actor’s situation would follow. [See RCCA §§ 22A-603 and 22A-604 for the imprisonment terms and fines for each penalty class.]

Relation to Current District Law. The revised false statements statute changes District law in one main way.

The revised false statements statute includes a penalty enhancement in cases where the false statements affect the liberty of another person. Current D.C. Code § 22-2405 treats all instances of false statements the same regardless of whether the statement affects the liberty interests of another person. Thus, even in cases where the false statement is as effective as perjured testimony and detrimental to another person’s most basic liberty interests, the current false statements statute permits only a maximum 180 day sentence.⁷² To address this asymmetry, the RCCA includes a penalty enhancement of two classes that raises the penalty classification for false statements from a Class B to a Class 9 crime in instances where the false statement is material to the arrest, detention, prosecution, conviction, punishment, search, or seizure of another person. The inclusion of a penalty enhancement is appropriate given the seriousness of the offense in cases where the false statement could result in obvious and irreparable harm.⁷³ This change improves the consistency and proportionality of District law.

⁷⁰ *E.g.*, A police officer actor investigating a criminal complaint by private citizen drafts and signs a narrative report containing statements the officer knows to be false that would support an arrest warrant. The narrative report states that the statements are made subject to criminal penalty. The report is submitted to a detective who uses statements from the report in an application for an arrest warrant. In that case, the penalty enhancement would apply because the officer would clearly have known that the narrative report could be used by the detective in obtaining an arrest warrant and would thus be material to the arrest of another person.

⁷¹ RCC § 22A-206(d) (“A person acts negligently: (1) As to a result element, when: (A) The person should be aware of a substantial risk that the conduct will cause the result; and (B) The risk is of such a nature and degree that, considering the nature of and motivation for the person’s conduct and the circumstances the person is aware of, the person’s failure to perceive that risk is a gross deviation from the standard of care that a reasonable individual would follow in the person’s situation.”).

⁷² *E.g.*, An actor submits an unsworn proffer in support of a request that a judge remand a person released to a halfway house to the jail. The unsworn proffer does not state the statements were made under penalty of perjury and therefore does not satisfy all of the requirements of the perjury statute. Nonetheless, the unsworn proffer is accepted as the required affidavit in D.C. Code § 23-1329(f)(3) and relied upon by the judge in deciding whether to remand the person released to a halfway house.

⁷³ See *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (stating “[i]t has long been established that the loss of constitutional freedoms, ‘for even minimal periods of time, unquestionably constitutes irreparable injury’”).

Beyond this one change to Current District law, three other aspects of the revised statute may constitute substantive changes to District law.

First, the revised false statements statute specifies a culpable mental state of “knowingly” regarding the making of a false statement in writing to any District of Columbia government agency, department, or instrumentality. Current D.C. Code § 22-2405 requires that an actor “wilfully make[] a false statement, in writing that is in fact material, in writing, directly or indirectly to any instrumentality of the District of Columbia government.” Although the statute uses the term “willfully,” the committee report indicates that “the term ‘willfully’ in this context is intended to mean knowingly and intentionally.”⁷⁴ Additionally, the language of the perjury statute has previously been interpreted to have the same meaning as “knowingly and intentionally” and to require that an actor know or believe that the statement they are making is false.⁷⁵ Thus, current District law requires a knowing mental state *with respect to making a false statement*. At the same time, it is not clear whether there is a culpable mental state requirement with regard to whether the statement is made to an instrumentality of the District of Columbia government. The revised false statements statute requires a knowingly mental state with respect to both the falsity of the statement and the requirement that the statement be made to an instrumentality of the District government. Applying a knowing culpable mental state requirement to statute elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.⁷⁶ Requiring that the actor be practically certain that they are making a false statement to an instrumentality of the government ensures that the actor is aware of the solemnity of circumstances and the need to tell the truth. This change improves the clarity and consistency of the revised statutes.

Second, the revised false statements statute requires that the false statements be *delivered or be likely to be delivered* in a case or matter to which they are material. Current D.C. Code § 22-2405 requires that the false statement be material. Pursuant to case law, a statement is deemed material if it has “a natural tendency to influence, or was capable of influencing, the decision of a tribunal in making a determination required to be made.”⁷⁷ Arguably, a false statement would need to be delivered or likely to be delivered before it

⁷⁴ Committee of the Judiciary, *Report on Bill 4-133, “Theft and White Collar Crimes Act of 1982,”* at 94 (July 20, 1982).

⁷⁵ See *Maragon v. United States*, 187 F.2d 79, 80 (D.C. Cir. 1950) (“While, as we have said before, ‘wilfully’ in a criminal statute may have any one of a number of meanings, we think it is clear that in the perjury statute it means ‘knowingly’ or ‘intentionally.’”).

⁷⁶ 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)”).

⁷⁷ *Weinstock v. United States*, 231 F.2d 699, 701-01 (D.C. Cir. 1956); see also *Robinson v. United States*, 114 F.2d 475, 476–77 (D.C. Cir. 1940) (“The ultimate test in either case is whether such statements had a natural tendency to influence the clerk in his investigation of the facts, in the exercise of his official discretion, and in the administration of the law.”); Committee of the Judiciary, *Report on Bill 4-133, “Theft and White Collar Crimes Act of 1982,”* at 92 (July 20, 1982) (“It is intended that the materiality of the statement is to be determined by the general standards established in *Robinson v. United States*. Accordingly, the statement must be one which would have a natural tendency to influence a decision-maker.”).

had a tendency to influence or became capable of influence a decision.⁷⁸ Thus, the materiality requirement itself may presume that the false statement be delivered or likely to be delivered. However, there does not appear to be any case law specifically addressing the question of whether the statements must be delivered or likely to be delivered. The RCCA resolves any ambiguity by explicitly requiring that the statements be actually delivered or likely to be delivered in a case or matter in which the statements are material. This change improves the clarity and proportionality of District law.

Third, the revised false statements statute specifies a “negligent” mental state with respect to whether the writing indicated that false statements were subject to penalty of perjury. Current D.C. Code § 22-2405 requires that the writing in which false statements are made indicate that the making of a false statement is punishable by criminal penalties. Further, the legislative history indicates that the writing should “clearly indicate” that criminal penalties attach for a false statement and place the person on notice that they are subject to liability. However, the statute does not specify that the actor was aware, or should have been aware, the signed writing contain such a warning about criminal penalty and there is no case law addressing whether the required mental state for the written notice. Consequently, an actor could potentially be held liable based on a warning of criminal penalty in small print on one page of a voluminous document even if actor had no reason to think that the statement was being made subject to criminal penalty for false statements. In contrast, the revised false statements statute includes a negligent mental state with respect to the requirement that the writing notify the actor that the statement is made under threat of criminal penalty. The negligent mental state is appropriate as in most instances where an actor is submitting a statement in writing to an agency, department, or instrumentality that indicates the statement is made under penalty of perjury, a reasonable person would have been aware of a substantial risk that making a false statement is subject to criminal penalty. This change improves the consistency and proportionality of District law.

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

The revised false statements statute does not make specific reference to declarations under §1-1061.13 or entity filings under Title 29. Current D.C. Code § 22-2405 specifies application to the signing of an entity filing or other document under Title 20 and to declarations under § 1-1-611.13 which deals with ballots by members of the military and overseas votes. D.C Code § 29-102.09 already provides that signing an entity filing constitutes an affirmation under the penalties for making false statements and entity filings for the Department of Consumer and Regulatory Affairs include a warning indicating that

⁷⁸ *E.g.*, An actor is asked by a friend to provide an affidavit that will be used in a lawsuit involving the actor’s friend. The actor, wanting to help the friend, drafts an affidavit containing untrue statements to aid the actor’s friend. The actor takes it to a notary when the actor attests to the truth of the false statements in the affidavit. Before delivering the affidavit to his friend, however, the actor has a change of heart and rips up the false affidavit so that it is never delivered to the friend and used in the lawsuit. In that case, the affidavit could not have influenced the lawsuit because it was never delivered to anyone. However, the facts attested to might have been material to the case had they been delivered.

filings are subject to criminal penalty. Similarly, D.C. Code § 1-1061.13 already specifies that a military or overseas ballot must be accompanied by “a declaration signed by the voter that a material misstatement of fact in completing the ballot may be grounds for a conviction of making a false statement under the laws of the District.” Thus, the explicit mention of entity and other filings under Title 29 and overseas ballots under § 1-1061.13 is not necessary to encompass false statements in those contexts. Accordingly, the revised false statements statute relies on the general language and does not specifically enumerate these types of false statements. This change improves the clarity and organization of District law without substantively changing District law.

§ 22A-4208. Impersonation of another before a tribunal, officer, or person.

- (a) *Offense.* An actor commits impersonation of another before a tribunal, officer, or person when the actor:
 - (1) Knowingly provides personal identifying information belonging to another person to a competent tribunal, officer, or person;
 - (2) With intent to deceive the tribunal, officer, or person as to the actor’s identity; and
 - (3) In fact, the personally identifying information was given under circumstances in which the information could reasonably be expected to be relied upon as true.
- (b) *Prosecutorial authority.* The Attorney General for the District of Columbia shall prosecute violations of this section.
- (c) *Penalties.* Impersonation of another before a tribunal, officer, or person is a Class C misdemeanor.
- (d) *Definitions.*
 - (1) The term “personal identifying information” has the meaning specified in D.C. Code § 22A-101 and the term "officer" has the meaning specified in D.C. Code § 1-301.45; and
 - (2) In this section, the term;
 - (A) “Competent” means having jurisdiction over the actor and case or matter; and
 - (B) “Tribunal” means any District of Columbia court, regulatory agency, commission, or other body or person authorized by law to render a decision of a judicial or quasi-judicial nature.

Explanatory Note. This section establishes the impersonation of another before a tribunal, officer, or person offense in the Revised Criminal Code Act (RCCA). The revised impersonation of another before a tribunal, officer, or person offense prohibits impersonating another person before a competent tribunal, officer, or person. There are no penalty gradations. The revised false impersonation of another before a tribunal, officer, or person offense replaces the false personation of another before court, officers, and notaries offense in D.C. Code § 22-1403.

Subsection (a) specifies the prohibited conduct for impersonation of another before a tribunal, officer, or person. Paragraph (a)(1) provides that an actor commits the offense of impersonation of another before a tribunal, officer, or person when the actor “knowingly provides personal identifying information of another to a competent tribunal, officer, or person.” “Knowingly” is defined term in RCCA § 22A-206, which here requires that the actor be practically certain that they are providing the personal identifying information of another to a competent tribunal, officer, or person. “Personal identifying information” is a defined term in RCCA § 22A-101.⁷⁹ “Competent” is a defined term in this section that

⁷⁹ “Personal identifying information” means: (A) Name, address, telephone number, date of birth, or mother’s maiden name; (B) Driver’s license or driver’s license number, or non-driver’s license or nondriver’s license number; (C) Savings, checking, or other financial account number; (D) Social security number or tax

means having jurisdiction over the actor and case or matter.⁸⁰ “Officer” is a defined term in D.C. Code § 1-301.45.⁸¹ The term “tribunal” is a defined term in subparagraph (d)(2)(B) and includes any District of Columbia court, regulatory agency, commission, or other body or person authorized by law to render a decision of a judicial or quasi-judicial nature.⁸² To satisfy this element, the government must prove that the actor believed or was practically certain that they were giving personally identifying information of another to a competent tribunal, officer, or person had jurisdiction over both the actor and the case or matter.

Paragraph (a)(2) requires that the actor give the personal identifying information with intent to deceive the tribunal, officer, or person as to the actor’s identity. “Intent” is a defined term in RCCA § 22A-206 that here means the actor was practically certain that the actor would deceive a tribunal, officer, or person as to the actor’s identity. Per RCCA § 22A-205, the object of the phrase “with intent to” is not an objective element that requires separate proof—only the actor’s culpable mental state must be proven regarding the object of this phrase. Thus, it is not necessary to prove that the actor actually deceived a tribunal, officer, or person, only that the actor believed to a practical certainty that providing the personally identifying information of another would do so.

Paragraph (a)(3) requires the personal identifying information, in fact, be given under circumstances in which the information could reasonably be expected to be relied upon as true.⁸³ The phrase “in fact,” a defined term in § 22A-207 that indicates there is no

identification number; (E) Passport or passport number; (F) Citizenship status, visa, or alien registration card or number; (G) Birth certificate or a facsimile of a birth certificate; (H) Credit or debit card, or credit or debit card number; (I) Credit history or credit rating; (J) Signature; (K) Personal identification number, electronic identification number, password, access code or device, electronic address, electronic identification number, routing information or code, digital signature, or telecommunication identifying information; (L) Biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation; (M) Place of employment, employment history, or employee identification number; and (N) Any other numbers or information that can be used to access a person’s financial resources, access medical information, obtain identification, serve as identification, or obtain property. § 22A-101.

⁸⁰ Compare Committee of the Judiciary, *Report on Bill 4-133, “Theft and White Collar Crimes Act of 1982,”* at 87 (July 20, 1982) (“The term ‘competent’ is found in the current perjury statute and, as used in the provision, is intended to have the same meaning as in current law. Competency basically refers to jurisdiction. As under current law, it must be demonstrated that the tribunal, officer, or person had jurisdiction over the defendant and subject matter jurisdiction or authority to consider the issues before it. This requires a showing that the tribunal, officer, or person was properly convened.”) (citing *Christoffel v. United States*, 338 U.S. 84 (1949)).

⁸¹ The term “officer” in District law means “any person authorized by law to perform the duties of the office” and is not intended to refer specifically to police or law enforcement officers. See D.C. Code § 1-301.45. Members of the police force take a statutorily required oath of office and would ordinarily qualify as officers under this definition but would not necessarily have the requisite personal and subject matter jurisdiction to be “competent” under the statute.

⁸² Compare Committee of the Judiciary, *Report on Bill 4-133, “Theft and White Collar Crimes Act of 1982,”* at 87 (July 20, 1982) (“[T]he term ‘tribunal’ means an officer or body having authority to adjudicate matters. Tribunals include, for example, trial courts, grand juries, and certain administrative bodies. As under current law, the provision is not limited to false testimony given before tribunals. The provision is intended to apply as well to false testimony given before other competent bodies and persons.”).

⁸³ E.g., If an actor in court is asked to state their name and date of birth for the record and the actor states that the actor’s name is Abraham Lincoln and the actor was born on February 12, 1809, the circumstances would not be such where the information could reasonably be expected to be relied upon as true even if the actor

culpable mental state requirement for the subsequent elements. Reasonableness is an objective standard.

Subsection (b) specifies that prosecutions of impersonation of another before a tribunal, officer, or person shall be conducted by the Office of the Attorney General for the District.

Subsection (c) specifies the penalty classification for impersonation of another before a tribunal, officer, or person. [See RCCA §§ 22A-603 and 22A-604 for the imprisonment terms and fines for each penalty class.]

Subsection (d) provides definitions for the terms “competent” and “tribunal” and cross-references applicable definitions located elsewhere in the code.

Relation to Current District Law. *The revised impersonation of another before a tribunal, officer, or person statute changes District law in three main ways.*

First, the revised impersonation of another before a tribunal, officer, or person statute requires that the personal identifying information of another be given under circumstances in which the information could reasonably be expected to be relied upon as true. Current D.C. Code § 22-1403 does not require proof that the personal identifying information be provided under circumstances in which the information could reasonably be expected to be relied upon as true. Consequently, a person could be held liable under this statute for providing personal identifying information of another irrespective of whether a reasonable person might have relied upon the information.⁸⁴ In contrast and consistent with the purpose of the statute, the impersonation of another before a tribunal, officer, or person statute specifies that the report or information must, in fact, be given under circumstances in which the report of information could reasonably be expected to be relied upon as true. This ensures that persons are not held liable for providing the personal identifying information of another under circumstances where there was little risk of someone relying on the false information. This change improves the consistency and proportionality of District law.

Second, the revised impersonation of another before a tribunal, officer, or person offense applies to actors impersonating another before a competent tribunals, officers or person. Current D.C. Code § 22-1403 applies when an actor falsely personates another before “any court of record or judge thereof, or clerk of court, or any officer in the District authorized to administer oaths or take the acknowledgment of deeds or other instruments or to grant marriage licenses or accepts domestic partnership registrations.” In contrast, the revised impersonation of another before court of officer statute requires that the actor impersonate another before tribunal, officer, or person with jurisdiction over the actor and case or matter. Consequently, the revised impersonation of another before a tribunal,

provided the personal identifying information of Abraham Lincoln with intent to deceive the court as to his identity.

⁸⁴ *E.g.*, An actor is arrested and brought before the court for an initial person. The court asks the actor to state their name and the actor states their name is Barack Obama and that they are the President of the United States. Even if the actor intended to deceive the court as to the actor’s identify, the circumstances would not be such that a reasonable person would rely on the actor’s statement that they were Barack Obama and the actor would not be liable for impersonation of another before a tribunal, officer, or person.

officer, or person statute does not expressly apply to officials with authority to take acknowledgement of deeds or other instruments or officials with authority to grant marriage license or accept domestic partnership registrations as does the current law. Liability for such conduct under this statute is not necessary, however, as providing the personal identifying information of another to such officials with intent to deceive as to one's identity would necessarily fall within the revised false swearing and/or false statements statutes. This change improves the clarity, consistency, organization and proportionality of District law.

Third, the revised impersonation of another before a tribunal, officer, or person statute addresses some conduct covered under the current identity theft statute in D.C. Code § 22-3227.02(3) but not specifically addressed in the revised identity theft statute § 22A-3305. The current identity theft statute includes using identifying information to avoid detection, apprehension or prosecution for a crime and punishes such conduct “when another person is falsely accused of, or arrested for, committing a crime because of the use, without permission, of that person's personal identifying information.”⁸⁵ The revised identity theft statute did not include this conduct because most such conduct is covered by other offenses such as false statements and false reports.⁸⁶ In contrast with current District law's punishment of such conduct as identity theft, the revised impersonation of another before a tribunal, officer, or person statute specifically addresses the use of personal identifying information of another before a tribunal, officer, or person covers misuse of another's identity to avoid detection, apprehension or prosecution for a crime.⁸⁷ This change eliminates unnecessary overlap, and improves the proportionality of the revised statute.

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

First, the revised impersonation of another before a tribunal, officer, or person statute requires the actor to knowingly engage in specified conduct designed to impersonate another person before a competent tribunal, officer, or person. Current D.C. Code § 22-1403 punishes a person for falsely personating another person but does not specify what conduct constitutes falsely personating another. In contrast, the revised impersonation of another before a tribunal, officer, or person statute specifies that the conduct that establishes the act of impersonating is knowingly providing “personal identifying information” of another to a competent tribunal, officer, or person. Because the definition of “personal identifying information”⁸⁸ is broad and comprehensive, this phrasing covers all manners of impersonating another person before a tribunal, officer, or person while

⁸⁵ See D.C. Code § 22-3227.03(b). While the current identity theft statute purports to criminalize use of another's personal identifying information without consent to identify himself at arrest, conceal a crime, etc., current D.C. Code § 22-3227.03(b) only provides a penalty for such conduct in the limited circumstance where it results in a false accusation or arrest of another person.

⁸⁶ See Commentary to RCCA § 22A-3305.

⁸⁷ Other statutes cover the use of another person's personal identifying information indirectly. *E.g.*, the false swearing, false statements, and false reports statutes all would cover falsely using the personal identifying information of another in certain circumstances.

⁸⁸ See § 22A-101.

giving clear guidance as to the conduct necessary to establish the offense. This change improves the clarity and consistency of District law.

Second, the revised impersonation of another before a tribunal, officer, or person statute uses the RCCA definition of “intent.” Current D.C. Code § 22-1403 punishes a person for falsely impersonating another person with intent to defraud. The statute specifies that the actor must have an intent to defraud. The term “intent” as used in the current statute is not defined, and there is no relevant DCCA case law. In contrast, the revised impersonation of another before a tribunal, officer, or person statute specifies that a person must act “with intent” to deceive the tribunal, officer, or person as to the actor’s identity. In the RCCA, “intent” is a defined term under § 22A-206 that here means an actor must be practically certain that their conduct will deceive a tribunal, officer, or person as to their identity. This change improves the clarity and consistency of District law.

Third, the revised impersonation of another before a tribunal, officer, or person statute specifies a culpable mental state of “knowingly” regarding providing personal identifying information of another to a competent tribunal, officer, or person. Current D.C. Code § 22-1403 specifies that a person commits the offense when they “falsely personate” another “with intent to defraud” but does not otherwise specify a mental state. Although the DCCA might read a knowing or reckless mental state into this statute based on both the statutory requirement that that a person falsely personate with intent to defraud as well as the long-standing principle that “a defendant generally must ‘know the facts that make his conduct fit the definition of the offense,’”⁸⁹ there is currently no case directly on point. In contrast, the revised impersonation of another before a tribunal, officer, or person statute specifies that the actor must know they are providing personal identifying information of another to a competent tribunal, officer, or person. Requiring that the actor be practically certain they are giving the personal identifying information of another to a competent tribunal, officer, or person is appropriate to ensure the actor knows the facts that make the actor’s conduct an offense. This change improves the clarity and proportionality of District law.

Fourth, the Office of the Attorney General has prosecutorial authority for the revised false impersonation of another before a tribunal, officer, or person offense. Current D.C. Code § 22-1403 does not specify which prosecutorial authority is responsible for prosecuting false impersonation of another before a tribunal, officer, or person. However, D.C. Code § 23-110 specifies that prosecutions for all police or municipal ordinances or regulations and for violations of all penal statutes in the nature of police or municipal regulations where the maximum punishment is, a fine only, or imprisonment not exceeding one year, shall be conducted in the name of the District of Columbia by the Officer of Attorney General. The revised impersonation of another before a tribunal, officer, or person penalizes providing the personal identifying information of another to instrumentalities of the District government with intent to deceive as to the actor’s identity. Thus, the offense, similar to false statements, is in the nature of a police or municipal

⁸⁹ *Elonis v. United States*, 575 U.S. 723, 735 (2015); see also *Carrell v. United States*, 165 A.3d 314, 321 (D.C. 2017).

regulation and the Office of the Attorney General is the appropriate prosecutorial authority. This change improves the clarity of the statute without changing District law.

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

Appendix A – Black Letter Text of Draft Revised Statutes

§ 22A-4203. Perjury.

- (a) *Offense.* An actor commits perjury when the actor either:
- (1) Knowingly makes a false statement in an official proceeding and, in fact:
 - (A) The actor makes the false statement while testifying, orally or in writing, under oath or affirmation attesting to the truth of the statement;
 - (B) The oath or affirmation is administered:
 - (i) Before a competent tribunal, officer, or person; and
 - (ii) In a case or matter in which the law authorizes the taking of such an oath or affirmation; and
 - (C) The false statement is material to the course or outcome of the official proceeding; or
 - (2) Knowingly makes a false statement in a sworn declaration or unsworn declaration and, in fact, the statement is:
 - (A) In a writing with a statement indicating that the declaration is made under penalty of perjury;
 - (B) Delivered in a case or matter where the law requires or permits the statement to be made in a sworn declaration; and
 - (C) Material to the case or matter in which the declaration is delivered.
- (b) *Requirement of Corroboration.* In a prosecution under this section, proof of falsity of a statement may not be established solely by the uncorroborated testimony of a single witness.
- (c) *Defenses.*
- (1) It is a defense to liability under paragraph (a)(1) that, in fact:
 - (A) The actor retracted the false statement during the course of the official proceeding;
 - (B) The retraction occurred before the falsity of the statement was exposed; and
 - (C) The retraction occurred before the false statement substantially affected the proceeding.
 - (2) It is a defense to liability under paragraph (a)(2) that, in fact:
 - (A) The actor retracted the false statement before the statement was delivered in the case or matter; and
 - (B) The retraction occurred before the falsity of the statement was exposed.
- (d) *Penalty.* Perjury is a Class 8 felony.
- (e) *Definitions.* In this section, the term:
- (1) “Competent” means having jurisdiction over the actor and case or matter;
 - (2) “Tribunal” means any District of Columbia court, regulatory agency, commission, or other body or person authorized by law to render a decision of a judicial or quasi-judicial nature;

- (3) “Official proceeding” has the meaning specified in § 22A-101;
- (4) “Officer” has the meaning specified in D.C. Code § 1-301.45.
- (5) “Sworn declaration” means a signed record given under oath or affirmation attesting to its truth including a sworn statement, verification, certificate, or affidavit.
- (6) “Unsworn declaration” means a declaration in a signed record that is not given under oath but is given under penalty of perjury in the form specified in D.C. Code § 16-5306 or 28 U.S.C. §1746(2).

§ 22A-4204. Perjury by false certification.

- (a) *Offense.* An actor commits perjury by false certification when the actor:
 - (1) Knowingly makes a false certification of:
 - (A) Acknowledgement; or
 - (B) Another material matter in an acknowledgment; and
 - (2) In fact, the actor is a notarial official or other officer authorized to take proof or certification.
- (b) *Penalty.* Perjury by false certification is a Class 8 felony.
- (c) *Definitions.* The terms “acknowledgement” and “notarial officer” have the same meanings specified in D.C. Code § 1-1231.01 and the term “officer” has the meaning specified in D.C. Code § 1-301.45.

§ 22A-4205. Solicitation of perjury.

- (a) *Offense.* An actor commits solicitation of perjury when the actor:
 - (1) Knowingly commands, requests, or tries to persuade another person to engage in conduct, which, if carried out, in fact, will constitute either the offense of perjury or perjury by false certification under District of Columbia law;
 - (2) Acts with the culpability required for the offense of perjury or the offense of perjury by false certification; and
 - (3) The other person engages in conduct which constitutes either the offense of perjury or the offense of perjury by false certification under District of Columbia law.
- (b) *Penalty.* Solicitation of perjury is a Class 8 felony.

§ 22A-4206. False swearing.

- (a) *Offense.* An actor commits false swearing when the actor:
 - (1) Knowingly makes a false statement in a writing to a notarial officer or other person while under oath or affirmation attesting to the truth of the statement; and
 - (2) In fact:
 - (A) The oath or affirmation was administered by a notarial officer or other person authorized to administer oaths; and
 - (B) The statement is:

- (i) Material to the case or matter in which it was delivered; and
 - (ii) Required by law to be sworn or affirmed before a notarial official or other person authorized to take and certify acknowledgment or proof.
- (b) *Penalty.*
 - (1) False swearing is a Class A misdemeanor.
 - (2) *Penalty enhancement.* The penalty classification of this offense is increased one class when the actor commits the offense negligent as to the fact that the statement is material to the arrest, detention, prosecution, conviction, sentence, search, or seizure of another person.
- (c) *Definitions.* The terms “acknowledgment” and “notarial officer” have the same meanings specified in D.C. Code § 1-1231.01.

§ 22A-4207. False statements.

- (a) *Offense.* An actor commits false statements when the actor:
 - (1) Knowingly makes a false statement in writing, directly or indirectly, to any District of Columbia government agency, department, or instrumentality, including any court of the District of Columbia;
 - (2) Negligent as to the fact that the writing indicates the making of a false statement is punishable by criminal penalty; and
 - (3) In fact, the statement is:
 - (A) Made under circumstances in which the statement could reasonably be expected to be relied upon as true; and
 - (B) Material to the case or matter to which it was delivered or likely to be delivered.
- (b) *Prosecutorial authority.* The Attorney General for the District of Columbia shall prosecute violations of this section.
- (c) *Penalty.*
 - (1) False statements is a Class B misdemeanor.
 - (2) *Penalty enhancement.* The penalty classification of this offense is increased two classes when the actor commits the offense negligent as to the fact that the statement is material to the arrest, detention, prosecution, conviction, sentence, search, or seizure of another person.

§ 22A-4208. Impersonation of another before a tribunal, officer, or person.

- (a) *Offense.* An actor commits impersonation of another before a tribunal, officer, or person when the actor:
 - (1) Knowingly provides personal identifying information belonging to another person to a competent tribunal, officer, or person;
 - (2) With intent to deceive the tribunal, officer, or person as to the actor’s identity; and

- (3) In fact, the personally identifying information was given under circumstances in which the information could reasonably be expected to be relied upon as true.
- (b) *Prosecutorial authority.* The Attorney General for the District of Columbia shall prosecute violations of this section.
- (c) *Penalties.* Impersonation of another before a tribunal, officer, or person is a Class C misdemeanor.
- (d) *Definitions.*
- (1) The term “personal identifying information” has the meaning specified in D.C. Code § 22A-101 and the term "officer" has the meaning specified in D.C. Code § 1-301.45; and
 - (2) In this section, the term;
 - (A) “Competent” means having jurisdiction over the actor and case or matter; and
 - (B) “Tribunal” means any District of Columbia court, regulatory agency, commission, or other body or person authorized by law to render a decision of a judicial or quasi-judicial nature.

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

§ 22A-4203. Perjury.

- (a) *Offense.* An actor ~~a person~~ commits ~~the offense of~~ perjury when the actor either ~~if~~:
- (1) Knowingly makes a false statement in an official proceeding ~~wilfully and contrary to an oath or affirmation states or subscribes any material matter which he or she does not believe to be true and which in fact is not true~~ and, in fact:
 - (A) The actor makes the false statement while testifying, orally or in writing, ~~having taken an under oath or affirmation attesting to the truth of the statement that he or she will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by that person subscribed is true or that any written testimony, declaration, deposition, or certificate by that person subscribed is true;~~
 - (B) The oath or affirmation is administered:
 - (i) Before a competent tribunal, officer, or person;
 - (ii) In a case or matter in which the law authorizes the taking of such an oath or affirmation ~~to be administered;~~ and
 - (C) The false statement is material to the course or outcome of the official proceeding; or
 - (2) Knowingly makes a false statement ~~wilfully states or subscribes as true any material matter that the person does not believe to be true and that in fact is not true~~ in a sworn declaration or unsworn declaration ~~in any declaration, certificate, verification, or statement made under penalty of perjury in the form specified in § 16-5306 or 28 U.S.C. § 1746(2) and,~~ in fact, the statement is:
 - (A) In a writing with a statement indicating that the declaration is made under penalty of perjury;
 - (B) Delivered in a case or matter where the law requires or permits the statement be made in a sworn declaration; and
 - (C) Material to the case or matter in which the declaration is delivered.
- (b) *Requirement of Corroboration.* In a prosecution under this section, proof of falsity of a statement may not be established solely by the uncorroborated testimony of a single witness.
- (c) *Defenses.*
- (1) It is a defense to liability under paragraph (a)(1) that, in fact:
 - (A) The actor retracted the false statement during the course of the official proceeding;
 - (B) The retraction occurred before the falsity of the statement was exposed; and
 - (C) The retraction occurred before the false statement substantially affected the proceeding.

- (2) It is a defense to liability under paragraph (a)(2) that, in fact:
 - (A) The actor retracted the false statement before the statement was delivered in the case or matter; and
 - (B) The retraction occurred before the falsity of the statement was exposed.
- (d) *Penalty.* Perjury is a Class 8 felony.
- (e) *Definitions.* In this section, the term:
 - (1) “Competent” means having jurisdiction over the actor and case or matter;
 - (2) “Tribunal” means any District of Columbia court, regulatory agency, commission, or other body or person authorized by law to render a decision of a judicial or quasi-judicial nature;
 - (3) “Official proceeding” has the meaning specified in § 22A-101;
 - (4) “Officer” has the meaning specified in D.C. Code § 1-301.45.
 - (5) “Sworn declaration” means a signed record given under oath or affirmation attesting to its truth including a sworn statement, verification, certificate, or affidavit.
 - (6) “Unsworn declaration” means a declaration in a signed record that is not given under oath but is given under penalty of perjury in the form specified in D.C. Code § 16-5306 or 28 U.S.C. § 1746(2).

~~(2) As a notary public or other officer authorized to take proof of certification, wilfully certifies falsely that an instrument was acknowledged by any party thereto or wilfully certifies falsely as to another material matter in an acknowledgement; or~~

~~(b) Any person convicted of perjury shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 10 years, or both.~~

§ 22A-4204. Perjury by false certification.

- (a) *Offense.* An actor ~~a person~~ commits ~~the offense of~~ perjury by false certification when the actor if:
 - (1) Knowingly makes a false certification of:
 - (A) ~~Acknowledgement wilfully certifies falsely that an instrument was acknowledged; or~~
 - (B) ~~wilfully certifies falsely as to~~ Another material matter in an acknowledgement; and
 - (2) In fact, the actor is a notarial official or other officer ~~as a notary public or other officer~~ authorized to take proof or certification.
- (b) *Penalty.* Perjury by false certification is a Class 8 felony.
- (c) *Definitions.* The terms “acknowledgement” and “notarial officer” have the same meanings specified in D.C. Code § 1-1231.01 and the term “officer” has the meaning specified in D.C. Code § 1-301.45.

§ 22A-4205. Solicitation of perjury.

- (a) *Offense.* An actor ~~a person~~ commits ~~solicitation the offense of subornation~~ of perjury when the actor ~~if~~:
- (1) Knowingly ~~wilfully~~ commands, requests, or tries to persuade ~~procures~~ another person to engage in conduct, which, if carried out, in fact, will constitute either the offense of perjury or perjury by false certification under District of Columbia law ~~commit perjury~~;
 - (2) Acts with the culpability required for the offense of perjury or the offense of perjury by false certification; and
 - (3) The other person engages in conduct which constitutes either the offense of perjury or the offense of perjury by false certification under District of Columbia law.
- (b) *Penalty.* Solicitation of perjury is a Class 8 felony.

~~A person commits the offense of subornation of perjury if that person wilfully procures another to commit perjury. Any person convicted of subornation of perjury shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 10 years, or both.~~

§ 22A-4206. False swearing.

- (a) *Offense.* An actor ~~a person~~ commits ~~the offense of~~ false swearing when the actor ~~if~~:
- (1) Knowingly ~~wilfully~~ makes a false statement in a writing to a notarial officer or other person while under oath or affirmation attesting to the truth of the statement; and
 - (2) ~~That is~~ In fact:
 - (A) The oath or affirmation was administered by a notarial officer or other person authorized to administer oaths; and
 - (B) The statement is:
 - (i) Material to the case or matter in which it was delivered; and
 - (ii) Required by law to be sworn or affirmed before a notarial official ~~public~~ or other person authorized to take and certify acknowledgment or proof ~~administer oaths~~.
- (b) *Penalty.*
- (1) False swearing is a Class A misdemeanor.
 - (2) Penalty enhancement. The penalty classification of this offense is increased one class when the actor commits the offense negligent as to the fact that the statement is material to the arrest, detention, prosecution, conviction, sentence, search, or seizure of another person.
- (c) *Definitions.* The terms “acknowledgment” and “notarial officer” have the same meanings specified in D.C. Code § 1-1231.01.

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

§ 22A-4207. False statements.

(a) ~~Offense.~~ An actor ~~a person~~ commits ~~the offense of~~ false statements when the actor if:

- (1) Knowingly ~~wilfully~~ makes a false statement ~~that is in fact material~~ in writing, directly or indirectly, to any District of Columbia government agency, department, or instrumentality ~~instrumentality of the District of Columbia government~~, including any court of the District of Columbia;
- (2) Negligent as to the fact that ~~provided that~~ the writing indicates the making of a false statement is punishable by criminal penalty~~ies or if that person makes an affirmation by signing an entity filing or other document under Title 29 of the District of Columbia Official Code, knowing that the facts stated in the filing are not true in any material respect or if that person makes an affirmation by signing a declaration under § 1-1061.13, knowing that the facts stated in the filing are not true in any material respect;~~ and
- (3) In fact, the statement is:
 - (A) Made under circumstances in which the statement could reasonably be expected to be relied upon as true; and
 - (B) Material to the case or matter to which it was delivered or likely to be delivered.

(b) ~~Prosecutorial authority.~~ The Attorney General for the District of Columbia shall prosecute violations of this section.

(c) ~~Penalty.~~

- (1) False statements is a Class B misdemeanor.
- (2) ~~Penalty enhancement.~~ The penalty classification of this offense is increased two classes when the actor commits the offense negligent as to the fact that the statement is material to the arrest, detention, prosecution, conviction, sentence, search, or seizure of another person.

~~(b) Any person convicted of making false statements shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 180 days, or both. A violation of this section shall be prosecuted by the Attorney General for the District of Columbia or one of the Attorney General's assistants.~~

§ 22A-4208. Impersonation of another before a tribunal, officer, or person.

(a) ~~Offense.~~ An actor commits impersonation of another before a tribunal, officer, or person when the actor:

- (1) Knowingly provides personal identifying information belonging to another person to a competent tribunal, officer, or person;
- (2) With intent to deceive the tribunal, officer, or person as to the actor's identity; and

- (3) In fact, the personally identifying information was given under circumstances in which the information could reasonably be expected to be relied upon as true.
- (b) *Prosecutorial authority.* The Attorney General for the District of Columbia shall prosecute violations of this section.
- (c) *Penalties.* Impersonation of another before a tribunal, officer, or person is a Class C misdemeanor.
- (d) *Definitions.*
- (1) The term “personal identifying information” has the meaning specified in D.C. Code § 22A-101 and the term "officer" has the meaning specified in D.C. Code § 1-301.45; and
 - (2) In this section, the term;
 - (A) “Competent” means having jurisdiction over the actor and case or matter; and
 - (B) “Tribunal” means any District of Columbia court, regulatory agency, commission, or other body or person authorized by law to render a decision of a judicial or quasi-judicial nature.

~~(a) Whoever falsely personates another person before any court of record or judge thereof, or clerk of court, or any officer in the District authorized to administer oaths or take the acknowledgment of deeds or other instruments or to grant marriage licenses or accepts domestic partnership registrations, with intent to defraud, shall be imprisoned for not less than 1 year nor more than 5 years.~~

~~(a-1) In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.~~

~~(b) For the purposes of this section, the term “domestic partnership” shall have the same meaning as provided in § 32-701(4).~~

Appendix C – Disposition of Comments on Report #76 – Perjury and Falsification Offenses (First Draft)

OAG written comments received March 1, 2022:

1. OAG, on page 2-3, recommends shortening sub-subparagraph (a)(1)(A)(ii)(I) to say “competent tribunal” rather than “competent tribunal, officer, or person” and amending (e)(2) to say “officer” rather than “person.” OAG states that the term “person” is not necessary because it is already included in the term “tribunal” and that persons authorized to administer oaths and affirmations would be “officers” for the purposes of the statute.
 - The revised statute has not been changed because the proposed changes would be substantive and create an unintended gap in liability. The definition of tribunal applies only to bodies or persons authorized by law to render judicial or quasi-judicial decisions. “Officers” and “persons” empowered to administer oaths and exercise jurisdiction over a matter and person are not necessarily authorized to administer decisions of a judicial or quasi-judicial nature. For example, a Councilmember convening a hearing for a legislative purpose who administers oaths to witnesses testifying before the Council is acting within their authority as an “officer” in a legitimate legislative capacity but is not acting as a judicial or quasi-judicial body. If the language of the statute were changed to say “competent tribunal” rather than “competent tribunal, officer, or person,” the scope of the statute would no longer encompass sworn witnesses testifying before the Council or other officers or bodies that may be authorized to take sworn testimony but not render a judicial or quasi-judicial decision on a particular matter. Likewise, the CCRC recommends against deleting the term “person” and relying on the term “officer.” While it is true that most persons authorized to administer oaths will be officers within the meaning of D.C. Code § 1-301.45, there may be instances where a person is given authority to administer an oath or affirmation but is not deemed an officer. For example, a court may appoint non-officer to conduct a deposition in a civil case and authorize them to administer an oath pursuant to D.C. Super. Ct. Civ. R. 28(a)(1)(B). Although the rule deems such a person an officer for the purposes of the rule, it is not clear that such person would qualify as an “officer” under D.C. Code § 1-301.45 given that the person is not otherwise an officer. To avoid a gap in liability and confusion in such situations, the CCRC recommends leaving the term “person” in the revised statute.
2. OAG, on page 3, recommends amending the retraction defense in the perjury statute to address situations where a person repudiates a false statement in a declaration before it is delivered in a case or matter.

- The revised perjury statute has been amended to include a retraction defense where a person retracts false statements made in a declaration before the declaration is delivered.
3. OAG, on page 3, recommends changing the definition of “sworn declaration” to read “a signed record given under oath or affirmation attesting to its truth, *which includes* a sworn statement, verification, certificate, or affidavit.”
 - The revised perjury statute has not been changed because the current phrasing is consistent with RCCA usage in other statutes and not necessary.
 4. OAG, on page 3, recommends changing the language in (e)(6) of the perjury statute defining “unsworn declaration” to say “in the form specified in D.C. Code § 16-5306 or 28 U.S. C. § 1746(2)” to match the current statute rather than “as specified in D.C. Code § 16-5306 or 28 U.S.C. § 1746(2).”
 - The revised statute has been changed to say “in the form specified” rather than “as specified.” This is not a substantive change but improves the clarity of the statute.
 5. OAG, on page 4, recommends breaking paragraph (a)(1) in the perjury by false certification statute into two sub paragraphs for clarity purposes.
 - The revised perjury by false certification statute has been changed to add subparagraphs (a)(1)(i) and (a)(1)(ii). This change does not substantively change the statute but improves the clarity of the statute.
 6. OAG, on page 5, states that it believes the commentary in footnote 44 (now footnote 43) for the revised solicitation of perjury statute incorrectly states that an actor must be aware or practically certain that sending the described note would lead another person to testify false because under the statute “trying would be sufficient.”
 - The commentary in footnote 44 has been changed to read: “Assuming the actor sent the note aware or believing that sending the note *could* cause another person to testify falsely, this indirect attempt to persuade the other person would satisfy this element.” OAG is correct that the actor need only be practically certain that they are trying to persuade another by their actions and need not be certain they will be successful. In order for the actor knowingly try to persuade, however, an actor must at least be aware or believe that the note could achieve the intended goal. If the actor did not believe the note would be persuasive, it would not be a knowing attempt to persuade. Consequently, the commentary still requires the belief that the note could persuade the other person.
 7. OAG, on page 5, recommends changing the term “punishment” in the penalty enhancements in the revised false swearing and false statements offenses to “sentence.”
 - The CCRC adopts the recommendation and has changed the word “punishment” to “sentence” in § 22A-4206(b)(2) and §22A-4207(c)(2). This change does not substantively change the revised statutes.
 8. OAG, on page 5, states that the commentary regarding the penalty enhancements in the revised false swearing and false statement offenses is misleading as it states

the enhancement applies in cases when another person could be subjected to immediate and obvious reparable harm.

- The commentary has been edited to state that the enhancement applies in situations where the false statements could result in immediate and obvious irreparable harm.
9. OAG, on page 6, recommends deleting the phrase “likely to be delivered” from subparagraph (a)(1)(B) of the revised false statements statute, § 22A-4207. OAG states that it is unclear how a statement that is made directly or indirectly to the District government can also be likely to be delivered.
- The revised false statements statute has not been changed. Paragraph (a)(1) requires that a statement be made, directly or indirectly, to any District of Columbia government agency, department, or instrumentality including any court of the District of Columbia. Subparagraph (a)(3)(B) requires that the statement be material to the case or matter to which it was delivered or likely to be delivered. A statement can be made to an entity of the District government without being delivered to a matter in which it was material. The inclusion of the phrase “likely to be delivered” prevents a gap in liability where a false statement is made in writing under criminal penalty but does not become material solely because it was not delivered to the relevant case or matter.
10. OAG, on page 6, states that there is a credible jurisdiction issue with respect to the prosecutorial authority for the offense of false statements, § 22A-4207, and that OAG may lack jurisdiction to prosecute the offense under D.C. Code § 23-101(c) and *In re Crawley*, 978 A.2d 608, 620 (D.C. 2009). OAG states that the prosecutorial authority may rest with USAO despite the fact that the Council specified under current law that OAG had prosecutorial authority under § 22-2405(b).
- The CCRC has deleted assignment of prosecutorial authority from the statute in light of OAG questions about prosecutorial jurisdiction. The deletion of assignment of prosecutorial authority does not necessarily mean that prosecutorial authority rests with the USAO. Pursuant to D.C. Code § 23-101(f), the DCCA is the ultimate arbiter of prosecutorial jurisdiction if a question arises as to whether the prosecution should be conducted by OAG or USAO under § 23-101. Consequently, the deletion does not change the assignment of prosecutorial authority but leaves the determination of jurisdiction to the DCCA as provided in current law. In addition to deleting the assignment of prosecutorial authority, the CCRC has increased the proposed penalty enhancement to a two-class enhancement. The rationale for having only a one class penalty enhancement was that a two class penalty enhancement, while appropriate, would raise jurisdictional questions under § 23-101(a) by increasing the maximum penalty beyond one year. Because the assignment of prosecutorial authority has been

deleted, the CCRC changed the penalty enhancement to a two class penalty enhancement to improve the proportionality of the revised statutes.

11. OAG, on page 6, states that the commentary incorrectly states that the penalty enhancement in the revised false statement statute applies where the false statements affect the liberty interests of another person because a search does not implicate a person's liberty interests.
 - The commentary has not been changed. Although the term “liberty” can refer to freedom from restraint, it also refers to the rights, privileges, and immunities extended to persons under the constitution including the right to privacy and the right to be free from unreasonable searches. Thus, the search of a person's property would directly affect the liberty interests of that person even if the person was not seized under the Fourth Amendment.

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

1. The CCRC renumbered parts of the perjury statute by moving the phrase “in fact” from (a)(1)(A) to (a)(1) and the phrase “in fact, the statement is” from (a)(2)(A) to (a)(2). The original version of the statute recommended by CCRC contained only one subparagraph for paragraphs (a) and (b). Moving the phrases “in fact” and “in fact, the statement is” to the end of (a)(1) and (a)(2) respectively allows for three subparagraphs for both paragraphs. Per the rules of interpretation in RCCA 22A-207 (a), the strict liability created by the term “in fact” applies in the same manner as it would if it remained in subparagraph (a)(1)(A) or (a)(2)(A). These changes improve the organization of the revised statute and do not substantively change any elements of the offense.
2. The CCRC has changed the term “was” to “is” in the penalty enhancement sections of the revised false swearing and false statements statutes. The statutes now read: “The penalty classification of this offense is increased one class when the actor commits the offense negligent as to the fact that the statement *is* material to the arrest, detention, prosecution, conviction, punishment, search, or seizure of another person.” The change in tense is appropriate because the actor's conduct will occur before the arrest, detention, prosecution, conviction, punishment, search, or seizure of another person to which the false statement is material. This correction does not substantively change application of the penalty enhancement as described in the commentary.
3. The CCRC has removed the revised false reports statute from Report #76. The comments submitted by OAG with respect to the revised false statements statute raised questions about the assignment of prosecutorial authority under the proposed false reports statute which was derived from current D.C. Code § 5-117.05. Additionally, the proposed statute may overlap with another statute targeted for revision, D.C. Code § 22-1319, which addresses false alarms, false reports, and

hoax weapons. The CCRC will make further recommendations with respect to both these statutes addressing false reports to law enforcement in a forthcoming report.⁹⁰

⁹⁰ Comments made by OAG, on pages 7-8, regarding the revised false reports offense will be reviewed and considered prior to the forthcoming report.