GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: November 16, 2021

SUBJECT: First Draft of Report #71 – Terrorism Offenses

The Office of the Attorney General for the District of Columbia (OAG) and the other former members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #71, Terrorism.[1]

COMMENTS ON THE DRAFT REPORT

Definitional Section

The phrase "toxic or poisonous chemical" is defined in RCC § 22E-701. It states, "'Toxic or poisonous chemical' means any chemical which, through its chemical action on life processes, can cause death, permanent incapacitation, or permanent harm to *another* living organism." [emphasis added] OAG recommends that the term "another" be deleted from this definition and replaced with either the term "a" or the term "any."

It is unclear who or what the "another" is meant to distinguish from. Assuming that the CCRC meant someone other than the actor, that fact is laid out in the substantive offenses that utilize this definition. The term "another" should not be contained in the definition itself. For example, something is a toxic or poisonous chemical even if it only causes death to an actor. However, that fact alone is insufficient for an actor to be charged with a terrorist offense. Their actions must also meet the elements of those offenses. Paragraph (a) of RCC § 22E-1703, Manufacture or Possession of a Weapon of Mass Destruction states:

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

(a) *Offense.* An actor commits manufacture or possession of a weapon of mass destruction when the actor:
    (1) Either:
        (A) Knowingly manufactures or possesses a weapon of mass destruction; or
        (B) With intent that it will be used to cause death or serious bodily injury to multiple persons, other than as part of a lawful medical procedure, knowingly manufactures or possesses an item that is [:] (i) A toxic or poisonous chemical.

The phrase "weapon of mass destruction" is defined in RCC § 22E-701. It states:

"Weapon of mass destruction" means:

(A) An explosive, incendiary, or poison gas weapon that is designed, planned for use, or otherwise used to cause death or serious bodily injury to a person, or property damage, including a:
    (i) Bomb;
    (ii) Grenade;
    (iii) Rocket having a propellant charge of more than four ounces;
    (iv) Missile having an explosive or incendiary charge of more than one-quarter ounce;
    (v) Mine; or
    (vi) Device similar to any of the devices described in the preceding sub-sub-paragraphs (i)-(vi);
(B) Any type of weapon other than a shotgun which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter;
(C) Any combination of parts designed or planned for conversion into a device described in subparagraphs (A) and (B) of this paragraph and from which such a device may be readily assembled;
(D) A weapon that is designed, planned for use, or otherwise used to cause death or serious bodily injury to a person through the release, dissemination, or impact of a toxic or poisonous chemical or its precursors;
(E) A weapon, including a vector, that is designed, planned for use, or otherwise used to cause death or serious bodily injury to a person through the release, dissemination, or impact of a biological agent or toxin; or
(F) A weapon that is designed, planned for use, or otherwise used to cause death or serious bodily injury to a person through the release, dissemination, or impact of radiation or radioactivity, or that contains nuclear material.

OAG has two recommendations concerning the language contained in paragraph (A)(vi). The first is to clarify in what way the device has to be similar to any of the other devices described in that section. The sentence can be read to mean similar in appearance or similar in function. OAG believes that the CCRC meant the latter. Therefore, OAG recommends that that sentence be redrafted accordingly. The second recommendation is redrafting the sentence to remove the term "preceding" and instead end the sentence with "of this paragraph." We believe that this

rephrasing is clearer to the reader. Combining the recommendations above, OAG suggests that that sentence be redrafted to state, "Device similar in function to any of the devices described in sub-sub-paragraphs (i)-(v) of this paragraph…"[2]

Paragraph (F) of that same definition states, "A weapon that is designed, planned for use, or otherwise used to cause death or serious bodily injury to a person through the release, dissemination, or impact of radiation *or radioactivity*, or that contains nuclear material." [emphasis added] Because radioactivity is a property of a substance, not something that can be "released" or "disseminated," it is unclear what is meant by the inclusion of that term or what it would include that is already included within the preceding term "radiation."

RCC § 22E-1702, Material Support for an Act of Terrorism

The definition of "material support or resources" is contained in three subsubparagraphs in (d)(2). Subsubparagraph (B) includes within that definition

> Currency, financial securities or other monetary instruments, financial services, lodging, training, false documentation or identification, equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets

To be clearer as to what falls under each umbrella category, OAG recommends that the various groupings be broken down using semicolons as follows:

> Currency, financial securities or other monetary instruments; financial services; lodging; training; false documentation or identification; equipment; facilities; weapons; lethal substances; explosives; personnel; transportation; and other physical assets

RCC § 22E-1703, Manufacture or Possession of a Weapon of Mass Destruction

In addition to the language stated above, RCC § 22E-1703 also includes:

> (b) *Exclusions from liability*. An actor does not commit an offense under paragraph (a)(1)(A) of this section when, in fact, the actor is:
> (1) An employee of the District or federal government, who is on duty and acting within the scope of those duties;
> (2) Lawfully engaging in the business of manufacturing, repairing, or dealing the weapon involved in the offense;
> (3) Lawfully engaging in the business of shipping or delivering the weapon involved in the offense;

[2] Note that the proposed language refers to sub-sub-paragraph (v) and not (vi). Because that reference is contained in sub-sub-paragraph (vi), we believe that the reference to (vi) in that sentence was a typo and CCRC meant to refer to (v) instead.

(4) Acting within the scope of authority granted by the Chief of the Metropolitan Police Department or a competent court; or
(5) A university, research institution, private company, individual, or hospital engaged in scientific or public health research and, as required, registered with the Centers for Disease Control and Prevention (CDC) pursuant to Part 121 (commencing with Section 121.1) of Subchapter E of Chapter 1 of Title 9 or pursuant to Part 73 (commencing with Section 73.1) of Subchapter F of Chapter 1 of Title 42 of the Code of Federal Regulations, or any successor provisions.

The first issue is why the phrase "other than as part of a lawful medical procedure" is contained within (a)(1)(B) and not as an exclusion listed in paragraph (b). OAG would note that the Commentary refers to this provision as an exclusion.[3] To keep the structure of this offense consistent, to make paragraph (a)(1)(B) more understandable, and to avoid arguments concerning whether the placement of the exclusion in (a) and not in (b) has legal significance, OAG recommends that the phrase be moved to a new (b)(6). This same phrasing is used in RCC 22E-1704 (b)(1)(A) and needs to be amended there as well.

The second issue concerns the language contained in subparagraph (b)(4). It excludes from liability an actor who is "Acting within the scope of authority granted by the Chief of the Metropolitan Police Department …" The Commentary does not cite to any authority for the proposition that the MPD Chief has authority to authorize someone to manufacture or possess a weapon of mass destruction.[4]

Finally, subparagraph (b)(5) excludes from liability "A university, research institution, private company, individual, or hospital engaged in scientific or public health research and, *as required*, registered with the Centers for Disease Control and Prevention (CDC) pursuant to Part 121 (commencing with Section 121.1) of Subchapter E of Chapter 1 of Title 9 or pursuant to Part 73 (commencing with Section 73.1) of Subchapter F of Chapter 1 of Title 42 of the Code of Federal Regulations, or any successor provisions." [emphasis added] It is unclear from the text if the phrase "as required" means "as required by federal law" or if it was intended to have the same meaning as "to the extent required." The Commentary does not address this point. If the intent was the former, then the phrase can be struck as superfluous. However, if it was intended to mean the latter than either the sentence has to be clearer or the Commentary must explain the use of the phrase.[5]

[3] See page 26 of the Report where it states, "Consequently, sub-paragraph (a)(1)(A) *excludes* from the provision those whose intent is to perform a lawful medical procedure while being practically certain that the procedure entails a serious bodily injury." See also page 28, last full sentence.
[4] The same wording is used in RCC § 22E-1704(c)(2) and needs to be addressed in that subparagraph as well.
[5] The same wording is used in RCC § 22E-1704(c)(3) and needs to be addressed in that subparagraph as well.

RCC § 22E-1704, Use, Dissemination, or Detonation of a Weapon of Mass Destruction

The second degree version of this offense states, in relevant part

(a) An actor commits second degree use, dissemination, or detonation of a weapon of mass destruction when the actor:
    (1) With intent to cause:
        (A) Bodily injury to multiple persons, other than as part of a lawful medical procedure; or
        (B) *Massive damage to property,* including plants and animals on land owned by a government, government agency, or government-owned corporation; [emphasis added][6]

The text of subparagraph (a)(1)(B) does define the phrase "massive damage." However, subparagraph (a)(3) requires that "In fact, the weapon of mass destruction or other item is capable of causing multiple deaths, serious bodily injuries to multiple persons, or *$500,000 or more in damage to property*." [emphasis added] Given the requirements of subparagraph (a)(3), it is unclear what the term "massive" adds to the requirement that the person intend to cause damage to property. As a result, OAG recommends deleting the word massive.

[6] OAG believes that there should be a comma after the word "animals" in this sentence such that it should read "Damage to property, including plants and animals, on land owned by a government, government agency, or government-owned corporation."

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: November 16, 2021

SUBJECT: First Draft of Report #72 - Obstruction of Justice Offenses

The Office of the Attorney General for the District of Columbia (OAG) and the other former members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Report #72, Obstruction of Justice Offenses.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22E-3302, Tampering with a Witness or Informant

The use of the phrase "that official proceeding" in paragraph (a)(2)(E)(i) and (ii) is imprecise and should be replaced with "an official proceeding." Paragraph (a) states:

> (a) *First Degree.* An actor commits first degree tampering with a witness or informant when the actor:
> (1) In fact, commits a crime of violence;
> (2) With the purpose of causing a person to:
> (A) Testify or inform falsely in an official proceeding or criminal investigation that has been or is likely to be initiated;
> (B) Withhold any material testimony or information from an official proceeding or criminal investigation that has been or is likely to be initiated;

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

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

Subparagraph (a)(1) does not refer to an "official proceeding." That phrase is only used in subparagraphs (a)(2)(A) through (D). However, subparagraph (a)(2)(E) is an alternative to those subparagraphs. Therefore, the term "that" in the phrase "that official proceeding" in subparagraphs (E)(i) and (ii) does not refer back to any other provision. As such, OAG recommends that paragraph (E) be redrafted as follows:

(E) Destroy, conceal, remove, or alter a document, record, image, audiovisual recording, or other object so as to either:
(iii) Impair its value as evidence in an official proceeding that has been or is likely to be initiated; or
(iv) Prevent its production or use in an official proceeding that has been or is likely to be initiated.[2]

RCC-§ 22E-3303, Tampering with a Juror or Court Official

The Commentary, on pages 31 and 32, refers in numerous places to (a)(2)(E). There is no (a)(2)(E) in the text of the offense. Similarly, the Commentary, in the third complete paragraph on page 34, makes reference to subparagraph (c)(2)(E). However, there is no subparagraph (c)(2)(E) in the text of the offense.

RCC § 22E-3304, Retaliation against a witness, informant, juror, or court official.

In the Commentary, at the top of page 44, it states, "In contrast, the RCC retaliation with a witness, informant, juror, or court official offense focuses on the actor's purpose in committing a crime of violence or predicate offense and *does not require that any person, in fact, have participated in an official proceeding or criminal investigation as a witness, juror, court official, or informant.*" [emphasis added] OAG questions whether this is a correct statement concerning the proposed statute. The first degree version of this offense requires that the actor do something "With the purpose of harming another person because of the person's *prior*" appearance, provision of information, or performance in specified official duties. [emphasis added] See

[2] By changing the term "that" to "an" as recommended above, the elements of the first degree offense would be parallel to that of the second and third degree offense. See RCC § 22E-3302(b)(2)(E)(i) and (ii) and (c)(2)(E)(i) and (ii) which use the phrase "an official proceeding."

paragraph (a)(1).[3] By using the term "prior," the statute implies that the person did, in fact, previously participate in some official proceeding or criminal investigation.

RCC § 22E-3305, Tampering with Physical Evidence

OAG suggests that the term "physical" be deleted from the title of this offense and from the other places that the title is incorporated into the language of the operative and penalty provisions of this provision. Its inclusion is misleading.

Paragraph (a)(1) states the first element of the first degree version of this offense. It states as an element that the actor "Knowingly destroys, conceals, removes, or alters a document, record, image, audiovisual recording, or other object, *regardless of medium*, with the purpose of…" [emphasis added][4] The phrase "regardless of medium" must mean that the evidence does not have to be physical in nature, but can include data, computer code, and other nonphysical ways that information can be stored. The Commentary, on page 48, supports this view. In explaining this paragraph it states, "The medium of the object, e.g., a record on a computer hard disk, is irrelevant."

OAG would also note one change that needs to be made to the Commentary. The Commentary for subparagraph (a)(2)(A) is found in the first full paragraph on page 49 of the Report. It states, "Subparagraph (a)(2)(A) specifies that one prohibited purpose is impairing the physical evidence's value as evidence in an official proceeding for a 'predicate felony.'" However, subparagraph (a)(2)(A) does not contain the phrase "impairing its value as evidence in an official proceeding that has been or is likely to be initiated for a predicate felony." That phrase is contained in subparagraph (a)(1)(A).

[3] The second degree version of this offense also uses the term "prior." See paragraph (b)(1). However, the language in paragraph (b)(1) varies from paragraph (a)(1). Paragraph (b)(1) states, "With the purpose, *in whole or part*, of harming another person because of the person's prior…" [emphasis added] It is unclear to OAG why (b)(1) contains the phrase "in whole or part" and (a)(1) does not. OAG recommends that (a)(1) be amended to include that phrase from paragraph (b)(1).

[4] Paragraph (a)(2) also includes the phrase "regardless of medium," as does the second degree version of this offense. See paragraph (b)(1) and (2).

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: November 16, 2021

SUBJECT: First Draft of Report #73 - Bigamy

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #73, Bigamy.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22E-4602. Bigamy

OAG would note at the onset that the Commission consider renaming this offense as the title of "bigamy" would no longer be accurate. The statute would not prohibit a person from marrying someone when they are already married to someone else - which is what bigamy is. Instead, it prohibits lying about it. This is evidenced by paragraph (f), which provides for this offense to merge with the offense of false statements.[2]

Under District law, there are two ways that a person can become married. The first is begun by obtaining a marriage license. The second is through a common law marriage, which, as its name

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[2] See the Commentary, at page 5, where it states, "the revised bigamy statute merges with the revised false statements offense. Both the current D.C. Code false statements offense and the revised false statements offense criminalize making material false statements in writing to the District of Columbia government, but only when the document specifically notes that a false statement is subject to a criminal penalty." [internal footnotes omitted]

implies, does not require a marriage license. As the court noted in *Gill v. Van Nostrand*, 206 A.3d 869, 874 (DC 2019) "[T]he District of Columbia has long recognized common law marriages." *Mesa v. United States*, 875 A.2d 79, 83 (D.C. 2005) (internal quotation marks omitted); see also *Nat'l Union Fire Ins. Co. v. Britton*, 187 F. Supp. 359, 363 (D.D.C. 1960) (stating that common-law marriages and ceremonial marriages "are equally lawful, solemn, and binding"), aff'd, 289 F.2d 454, 110 U.S. App. D.C. 77 (D.C. Cir. 1961) (per curiam). The elements of common law marriage in the District are cohabitation as husband and wife, following an express mutual agreement, which must be in words of the present tense. *East v. East*, 536 A.2d 1103, 1105 (D.C. 1988).

So, while this provision would continue to make it an offense for someone who was already married to misrepresent their marriage status on a marriage license application, *see* paragraph (a)(1), it would not be an offense for a person who was already married to enter into a common law marriage. Therefore, if the CCRC intends on retaining a bigamy provision whose elements are similar to the false statement offense, then OAG suggests that the RCC also contain a provision that specifically states that a purported common law marriage involving at least one married person is invalid.

Paragraph (b) establishes an exclusion from liability. It states:

> It is an exclusion to liability under this section that the actor, in fact, for 5 successive years or more, immediately prior to the application or declaration:
>
> (1) Has had no contact with the spouse or domestic partner; and
>
> (2) Is not aware that the spouse or domestic partner is living.

It is unclear what the parameters of the exclusion is. It could be read either to mean that for 5 years the person had been unaware their spouse was alive or that at the time the person applies for a marriage license the person is currently unaware if their spouse is alive.[3]

In discussing paragraph (b) in the Commentary, at page 4, it states:

> Per the rules of interpretation in RCC § 22E-207, "in fact" applies to all three requirements of the exclusion from liability: that the actor (1) for 5 or more years immediately prior to the application or declaration, (2) had no contact with the spouse or domestic partner, and (3) is not aware that the spouse or domestic partner is living.

[3] To highlight this point, consider the following two hypos. Person A marries person B. After cohabitating, person B moves out and person A does not hear from that person for over 5 years and so has no idea whether person B is alive when A applies for a marriage license with C. Contrast that with the hypo where person A has no contact with person B for 5 years but is aware that person B has been alive for the first 4 of those years and then loses contact with person B. After a year goes by, person A does not know if person B is alive. A then applies for a marriage license with C.

OAG recommends that the Commentary be redrafted to say that the exclusion from liability only carries 2 requirements. This is because, unlike the Report, the "for 5 years" phrase in the lead-in language to (b) isn't a "requirement"; it is a phrase that modifies the actual 2 requirements that follow (i.e., no contact and no awareness).

Finally, paragraph (b) is titled "Exclusion from liability" while paragraph (c) is entitled "Affirmative defense." If paragraph (b) is not an affirmative defense, then OAG is unsure whose burden it is to prove or disprove the exclusion. The text and the Commentary should make this clear.[4]

[4] OAG suggests that in addition to any amendments to paragraph (b) that the Commentary include an example of how an exclusion would be litigated.

Memorandum

Matthew M. Graves
United States Attorney
District of Columbia

Subject: Comments to D.C. Criminal Code Reform Commission for First Draft of Report #70-74	Date: November 16, 2021

To: Richard Schmechel, Executive Director,
D.C. Criminal Code Reform Commission

From: U.S. Attorney's Office
for the District of Columbia

The U.S. Attorney's Office for the District of Columbia (USAO) and other members of the Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the CCRC's First Draft of Reports #70-74. USAO reviewed these documents and makes the recommendations noted below.[1]

First Draft of Report #72—Obstruction of Justice Offenses

A. General Comments

1. USAO recommends eliminating, as a predicate to liability for Obstruction of Justice, Tampering with a Witness or Informant, and Tampering with a Juror or Court Official, the requirement that the actor commit a separate criminal offense.

The offenses of Obstruction of Justice, Tampering with a Witness or Informant, and Tampering with a Juror or Court Official each require, as a predicate to *any* liability under the statute, that the actor commit a separate criminal offense. *See* RCC § 22E-3301(b)(3) (Second Degree Obstruction of Justice); RCC § 22E-3302(c)(1) (Third Degree Tampering with a Witness or Informant); RCC § 22E-3303(c)(1) (Third Degree Tampering with a Juror or Court Official). Although it can certainly be more serious when an actor commits obstruction by committing another crime—especially a crime of violence—there should be no requirement that an actor commit a separate crime to be liable for these offenses.

Current law contains several ways by which obstruction can be committed: (1) when a person "uses intimidation or physical force, threatens or corruptly persuades another person, or by threatening letter or communication, endeavors to influence, intimidate or impede…" (D.C. Code § 22-722(a)(1), (a)(2)); (2) when a person "[h]arasses another person with the intent to hinder, delay, prevent or dissuade…" (D.C. Code § 22-722(a)(3)); (3) when a person "[i]njures or threatens to injure any person or his or her property…" (D.C. Code § 22-722(a)(4), (a)(5)); or

[1] This review was conducted under the understanding that the structure of the code reform process allows the members of the CCRC Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

(4) when a person "[c]orruptly, or by threats of force…" (D.C. Code § 22-722(a)(6)). Although current law recognizes that obstruction can be committed by assault, threats, or similar conduct, current law also recognizes that other conduct should constitute obstruction, even where it may not rise to the level of a criminal offense. This includes conduct such as "intimidation," "harass[ment]," "corruptly persuad[ing] another person," and acting "corruptly." *See* D.C. Code § 22-722(a). The RCC proposes eliminating liability under the obstruction statutes for such conduct. In support of this proposal, the Commentary notes: "The statute does not define the term 'corruptly' and efforts to define the term have not cleared up confusion. DCCA case law has repeatedly sought to address the meaning of the term, following similar Supreme Court jurisprudence, and interpreted the word to mean something akin to an 'intent to undermine the integrity of the pending investigation.'" (Report #72 at 11 (footnotes omitted).) The RCC accordingly proposes eliminating liability for obstructive acts committed corruptly, where there is no proof of a separate criminal offense. Rather than eliminating this basis of liability, however, the RCC should address any ambiguity and codify the common law definition of "corruptly"—that is, acting "with an intent to undermine the integrity" of the official proceeding or criminal investigation. Consistent with current law, the RCC should also codify obstructive acts based on intimidation or harassment. The Redbook Jury Instructions provide a definition of "harass": " 'Harass' means to threaten, intimidate, or use physical force against a person or to use any words or actions that have a reasonable tendency to badger, disturb, or pester the ordinary person (meaning seriously alarm, frighten, annoy, or torment)." *See* Criminal Jury Instructions for DC Instruction 6.101 (Obstructing Justice).

There are obstructive acts done "corruptly" that should be criminalized under the obstruction statutes but that would not constitute a separate criminal offense. Further, when an actor successfully obstructs justice or tampers with a witness, the fact that the actor successfully obstructed justice may impede the prosecution's ability to prove that *any* separate offense was ever committed. The purpose of the obstruction statute is to criminalize conduct that attempts to undermine the criminal justice process, which may constitute a separate criminal offense or which may not. For example, an actor may try to appeal to a sense of love and dedication in persuading a victim not to testify—but never resort to threats or assault. This could be the case in a domestic violence situation, where an abuser convinces a victim not to appear at trial by sending her flowers, telling her how much he loves her, etc. The actor is both acting with the intent to undermine the integrity of the official proceeding and acting with the purpose of obstructing that criminal investigation, but has not committed a separate criminal offense. Removing liability for this type of obstructive conduct would create a gap in criminal law, such that this conduct would not be deemed criminal. To ensure that this conduct is criminalized, USAO recommends eliminating the requirement that an actor commit a separate offense to be held accountable for these offenses.

2. <u>USAO opposes decreasing the penalties for these offenses.</u>

USAO opposes the proposal to decrease the penalties for these offenses, which would result in common forms of obstruction of justice being codified as low-level felonies or misdemeanors (such as Third Degree Tampering with a Witness or Informant or Third Degree Tampering with a Juror or Court Official). As drafted, Third Degree Tampering with a Witness or Informant or Third Degree Tampering with a Juror or Court Official would both apply when

the actor commits the obstructive offense by means of committing any criminal offense (other than a crime of violence or what is essentially bribery, both of which represent higher gradations). Both Third Degree Tampering with a Witness or Informant and Third Degree Tampering with a Juror or Court Official are proposed as Class A misdemeanors, with a maximum penalty of 1 year incarceration. This is a significant decrease from the maximum penalty under current law for this conduct. Although current law does not create gradations of obstructive conduct—making it impossible to ascertain from general statistics what type of conduct underpinned the obstruction—it is likely that many or most types of obstruction involved conduct that would not rise to the level of a crime of violence or bribery. Based on the Superior Court data collected by the CCRC in Appendix D, for the offense of Obstruction of Justice under D.C. Code § 22-722, the total months sentenced to confinement 0.05 quantile ranges from 6 months to 84 months, depending on the subsection charged; the total months sentenced to confinement 0.5 quantile ranges from 36 months to 84 months, depending on the subsection charged; and the total months sentenced to confinement 0.95 quantile ranges from 36 months to 105.6 months, depending on the subsection charged. This is mostly consistent with the D.C. Sentencing Guidelines, which categorize Obstruction of Justice as a Group 5 offense: a guideline-compliant sentence for a person with the lowest criminal score would be 36-84 months (3-7 years), and a guideline-compliant sentence for a person with the highest criminal history score would be a minimum of 84 months (7 years). Under the RCC's proposal, much of the conduct prohibited under D.C. Code § 22-722 would likely only be prosecutable as Third Degree Tampering with a Witness or Informant or Third Degree Tampering with a Juror or Court Official—a 1 year misdemeanor—which would represent a significant decrease in penalty.

In support of lowering the maximum penalties for many of these offenses, the RCC notes that the maximum penalty for obstruction of justice under D.C. Code § 22-722(b) is thirty years, regardless of the nature of the obstruction. Under the RCC's proposal, however, the most serious forms of obstruction of justice—which require proof of the commission of an underlying crime of violence—are classified as Class 7 felonies, which carry a maximum term of 8 years' imprisonment (comparable to a maximum term of 10 years' incarceration under current law, due to the RCC's proposed changes to D.C. Code § 24-403.01(b)(6)). Many of the gradations are classified either as lower felonies or even as misdemeanors. The RCC notes that "for all of these obstruction of justice-type offenses, the penalties are *in addition* to the penalties applicable for the underlying criminal harm (e.g., threat or assault) that the person engages in," (Report #72 at 85 (emphasis in original)), and that the convictions for the underlying offense would not merge with the obstruction convictions. But where the underlying conduct is a misdemeanor offense—such as threats or low-level assault—the underlying offense would not significantly increase the maximum sentence.

However, even though the underlying conduct may constitute misdemeanor conduct (or, as discussed above, conduct that does not rise to the level of a criminal offense), the act of obstruction is far more serious than the underlying conduct. It is the threat to the system of justice—rather than simply the underlying conduct—that is at the heart of the obstruction statute and that the statute criminalizes. The maximum penalties should be proportionate to that harm—not just to the conduct underlying the obstruction offense. Accordingly, USAO recommends increasing the proposed penalties for these offenses.

3. USAO recommends amending the language "likely to be initiated" to "may be initiated."

Where the language "likely to be initiated" or similar language appears, USAO recommends amending it with the words "may be initiated." For example, with USAO's changes, RCC § 22E-3302 (a)(2)(A) would provide:

> "Testify or inform falsely in an official proceeding or criminal investigation that has been or may ~~is likely to~~ be initiated"

The fact that a defendant is tampering with a witness or evidence may result in the official proceeding or criminal investigation being, in fact, quite *unlikely* to be initiated. That is typically the purpose of tampering with a witness or with evidence—to evade prosecution and act to ensure that a person is *not* prosecuted. Nor does this only apply to prosecutions—it could apply to investigations as well. If, for example, an actor enshrines such fear in a victim or witness that the victim or witness is terrified to notify the police, it may be likely that there will never be a criminal investigation initiated into the underlying conduct. Or if, for example, an actor shreds all documents that would prove their culpability for an offense, there may never be a criminal investigation into the underlying conduct. But this should not constitute an escape from liability under this statute.

It could also take years for a criminal investigation to be initiated, during which time the actor could believe—and may even reasonably believe—that a criminal investigation is *not* likely to be initiated. This may be the case for child sexual abuse, where an actor may successfully convince a child victim to keep the abuse secret for years before notifying law enforcement. The actor would certainly be aware that a criminal investigation may, at some point, be initiated into their abuse of the child, but could take steps to ensure that the child was not willing to tell any other person about the abuse, let alone law enforcement. This could be through commission of a new offense (such as threats), but could also be committed by grooming a child (such as providing gifts), isolating the child, telling the child that their parent would be upset with them if the parent knew about the sexual conduct, etc. Liability should therefore attach where the official proceeding or criminal investigation *may* be initiated, not just where it is *likely* to be initiated.

B. RCC § 22E-701. Generally Applicable Definitions

1. USAO recommends clarifying that the definition of "official proceeding" includes all grand jury investigations, even where other court proceedings have not yet begun.

The RCC proposes defining "Official Proceeding" as, in relevant part: "Any trial, hearing, grand jury proceeding, or other proceeding in a court of the District of Columbia" (Report #72 at 5). Under current law, "official proceeding" is defined as "any trial, hearing, investigation, or other proceeding in a court of the District of Columbia . . or a grand jury proceeding." D.C. Code § 22-721(4). The wording of the current law, therefore, does not technically include a "grand jury proceeding" as a "proceeding in a court of the District of Columbia." Grand jury proceedings may take place either in conjunction with a criminal case, or before a criminal case has begun in Superior Court (in the form of a Grand Jury Original).

Although there is no indication that the RCC's definition was intended to be a substantive change to current law, USAO recommends clarifying that the RCC definition of "official proceeding" includes all grand jury investigations, even where other court proceedings have not yet begun.

C. RCC § 22E-3301. Obstruction of Justice.

1. USAO recommends modifying subsections (a)(1) and (b)(1), to clarify that no mental state should apply to the nature of the underlying offense.

   With USAO's changes, subsections (a)(1) and (b)(1) would provide:

   "Knowing that an official proceeding or criminal investigation has been initiated for what is, in fact, [a predicate felony] [any crime]."

There should not be any mental state attached to the fact of the underlying offense that is being obstructed. The actor's belief as to what offense is being investigated may not be accurate and may not reflect the severity of the actor's conduct. An actor may not always recognize the difference between felony and misdemeanor conduct—particularly when the actor has not yet been charged and there is no prosecution pending. Thus, it may be impossible to prove the actor's knowledge as to whether the actor's conduct constituted a felony—let alone a "predicate felony"—or a misdemeanor. Likewise, if an actor believes that a felony prosecution is pending, but is mistaken and there is, in fact, only a misdemeanor prosecution pending, the defendant's conduct should be penalized proportionately. It is sufficient that the actor know that an official proceeding or criminal investigation has been initiated, and that the actor acts with the purpose of obstructing or impeding that criminal investigation. Gradations of this offense may then be based on the level of offense that the actor, in fact, obstructed. This also appears to be consistent with the Commentary, which provides: "The sole difference between first and second degree obstruction of justice is that second degree obstruction of justice requires knowledge that an official proceeding or criminal investigation has been initiated or is likely to be initiated for any crime but does not require any knowledge about the nature or severity of the offense(s) underlying the criminal investigation or official proceeding." (Report #72 at 8.)

D. RCC § 22E-3302. Tampering with a Witness or Informant.

1. USAO recommends removing the materiality requirement in subsections (a)(2)(B), (b)(2)(B), and (c)(2)(B).

Subsections (a)(2)(B), (b)(2)(B), and (c)(2)(B) provide for liability for this offense where an actor acts "with the purpose of causing a person to . . . withhold any *material* testimony or information from an official proceeding or criminal investigation that has been or is likely to be initiated" (emphasis added). The Commentary states that "[t]his subparagraph requires proof that the actor consciously desired to cause a person to withhold testimony or information *that the actor believed to be material* from an official proceeding or criminal investigation" (Report #72 at 19) (emphasis added). The Commentary also states that introducing a materiality requirement would constitute a change of law (Report #72 at 25). USAO recommends, consistent with current

law, removing the materiality requirement. Materiality is a legal concept, and most lay people would not have an understanding of what "materiality" means, let alone what testimony or information would constitute material testimony or information. It would be a high bar to require a criminal defendant to have an understanding of materiality—let alone to require the prosecution to prove both the defendant's sufficient understanding of materiality and the defendant's actual belief that the information was material.

E. RCC § 22E-3303. Tampering with a Juror or Court Official.

1. USAO recommends clarifying that a "juror" includes a petit juror, grand juror, or a person selected or summoned as a prospective juror in the District of Columbia.

The Redbook Jury Instructions include several examples of jurors in the elements of obstruction of justice by threatening, intimidating, or corruptly persuading a juror: grand juror, petit juror, or a person selected or summoned as a prospective juror in the District of Columbia. *See* Criminal Jury Instructions for DC Instruction 6.101 (Obstructing Justice). The RCC does not define the word "juror." To ensure that all of these categories of jurors are included in this offense, USAO recommends clarifying the term "juror."