SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION - FELONY BRANCH

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	CRIMINAL NOS. 2008-CF1-27068
	)	2008-CF1-26997
v.	)	2008-CF1-26996
	)	
JOSEPH PRICE	)	JUDGE FREDERICK H. WEISBERG
VICTOR ZABORSKY	)	
DYLAN WARD	)	STATUS HEARING DATE: 1/15/10

GOVERNMENT'S OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS COUNTS ONE AND TWO OF THE INDICTMENT

The United States of America, by its counsel, the United States Attorney for the District of Columbia, respectfully opposes Defendants' Joint Motion to Dismiss Counts One and Two of the Indictment (the "Motion"). As grounds for its opposition, the United States relies on the following points and authorities and such other points and authorities as may be cited at a hearing on the Motion:

I. BACKGROUND

1. On August 2, 2006, Robert Wone was murdered while inside 1509 Swann Street, N.W., Washington, D.C. The known occupants of the residence at the time of the murder were Joe Price, Victor Zaborsky, and Dylan Ward.

2. On or around October 27, 2008, Metropolitan Police Department Detective Bryan Waid applied for and obtained an arrest warrant for defendant Ward for obstruction of justice in connection with the investigation into the murder of Mr. Wone. The Affidavit in Support of an Arrest Warrant (the "Affidavit") consisted of thirteen (13), single-spaced pages of text, as well as numerous exhibit attachments. The Affidavit spelled out in great detail the facts of the case, including the various ways in which the defendants, individually and collectively, conspired to

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obstruct the investigation into the murder of Mr. Wone. Defendant Ward was subsequently arrested on the warrant.

3. On November 19, 2008, the grand jury returned a one-count indictment, charging the defendants with Obstruction of Justice. On that same date, Detective Waid applied for and obtained arrest warrants for defendants Price and Zaborsky for obstruction of justice in connection with the investigation into the murder of Mr. Wone.

4. On January 15, 2009, the grand jury returned a three-count superceding indictment, charging the defendants with Conspiracy, Obstruction, and Tampering with Evidence. In relevant part, the superceding indictment charges that:

FIRST COUNT

CONSPIRACY

Between on or about August 2, 2006, and on or about November 21, 2008, defendants Joseph Price, Dylan Ward, and Victor Zaborsky, did unlawfully combine, conspire, confederate, and agree to obstruct justice in connection with the homicide of Robert Wone by altering and orchestrating the crime scene, disposing of, altering, and planting evidence, and lying to law enforcement authorities and others about the true circumstances surrounding the homicide of Robert Wone, in violation of 22 D.C. Code 722 (2001 ed.).

THE OBJECT OF THE CONSPIRACY

It was the primary object of the conspiracy for the defendants to conceal from the authorities and others the true circumstances surrounding the homicide of Robert Wone, which occurred on or about August 2, 2006, at 1509 Swann Street, Northwest, Washington, D.C.

BACKGROUND

Prior to August 2, 2006, Robert Wone, a college friend of Joseph Price, had arranged with defendant Price to spend the night at defendant Price's house located at 1509 Swann Street, Northwest, Washington, D.C. During the evening hours of August 2, 2006, Robert Wone arrived at 1509 Swann Street and entered

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the residence. Some time after Robert Wone entered the residence, Robert Wone was killed inside the residence.

OVERT ACTS OF THE CONSPIRACY

During the course of and in furtherance of the conspiracy and to effect the object thereof, defendants Price, Ward, and Zaborsky, individually and in combination, did commit the following overt acts, among others, within the District of Columbia:

1. The defendants, individually or in combination, cleaned the crime scene as well as the body of Robert Wone.

2. The defendants, individually or in combination, made up the bed in the guestroom located on the second floor in the front portion of the residence.

3. Thereafter, the defendants, individually or in combination, placed the body of Robert Wone on the bed in the guestroom.

4. In an effort to avoid detection and misdirect law enforcement authorities and others, the defendants endeavored to orchestrate the crime scene to make it appear as if an intruder had entered through the back door of the residence, retrieved a knife from the kitchen of the residence, traveled to the second floor of the residence, stabbed Robert Wone, and then fled the residence.

5. The defendants, individually or in combination, retrieved a knife from a knife set located on the kitchen counter of the residence.

6. The defendants, individually or in combination, used a white, cotton towel to place Robert Wone's blood on the knife that had been retrieved from the kitchen.

7. The defendants, individually or in combination then carefully placed the bloody knife on the night stand located beside the bed in the guestroom.

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8. The defendants constructed and coordinated the fabricated story they would tell the law enforcement authorities about an intruder killing Robert Wone.

9. At approximately 11:49 p.m., on August 2, 2006, which was a considerable period of time after the fatal wounds had been inflicted on Robert Wone, defendant Zaborsky then placed a call to 9-1-1 and related, in part, the story that the defendants had fabricated and agreed to tell to law enforcement authorities.

10. While speaking with the 9-1-1 operator, defendant Zaborsky communicated that his partner, defendant Price, was using a towel to apply pressure to Robert Wone's wounds.

11. At approximately 11:54 p.m. on August 2, 2006, emergency medical personnel arrived and entered the residence at 1509 Swann Street. As the first paramedic reached the second floor he encountered defendant Ward, who was coming from the area of the second floor bathroom. The paramedic asked defendant Ward what was going on. Ward did not answer the paramedic but instead turned and walked into his bedroom.

12. The paramedic then approached the guestroom in which Robert Wone was located. Defendant Price was seated on the bed and was not applying pressure to Robert Wone's wounds. The paramedic asked defendant Price what was going on, to which defendant Price replied, "I heard a scream." Defendant Price then got up and moved away from the bed.

13. On December 3, 2006, defendant Price made statements to law enforcement authorities that were false in material respects and intended to misdirect and mislead law enforcement authorities into believing that an unknown intruder had, in fact, killed Robert Wone.

14. On or about December 3, 2006, defendant Price concealed from law enforcement authorities that his brother, Michael Price, had keys to the residence at 1509 Swann Street.

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15. On December 3, 2006, defendant Ward made statements to law enforcement authorities that were false in material respects and intended to misdirect and mislead law enforcement authorities into believing that an unknown intruder had, in fact, killed Robert Wone.

16. On December 3, 2006, defendant Zaborsky made statements to law enforcement authorities that were false in material respects and intended to misdirect and mislead law enforcement authorities into believing that an unknown intruder had, in fact, killed Robert Wone.

17. In or about November, 2007, defendant Price falsely told Robert Wone's widow, Katherine Wone, that he had in fact given law enforcement authorities the names of workers and/or contractors who had keys to the residence at 1509 Swann Street. However, defendant Price declined to tell Katherine Wone that his brother Michael Price possessed keys to the residence at 1509 Swann Street.

(Conspiracy, in violation of 22 D.C. Code Section 1805a (2001 ed.)).

SECOND COUNT:

From on or about August 2, 2006 through on or about November 21, 2008, within the District of Columbia, Joseph Price, Dylan Ward, and Victor Zaborsky, corruptly obstructed and impeded, and endeavored to obstruct and impede, the due administration of justice in an official proceeding, namely the criminal investigation into the murder of Robert Wone.

(Obstructing Justice, in violation of 22 D.C. Code, Section 722(a)(6))

5. On January 16, 2009, the Court arraigned the defendants on the superceding indictment.

6. On or around February 27, 2009, and March 17, 2009, defendants Ward and Zaborsky and defendant Price, respectfully, each filed a Motion for Bill of Particulars.

7. On May 22, 2009, the parties appeared before the Court for a status hearing, at which time the Court heard argument in furtherance of considering the defendants' Motions for

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Bill of Particulars. At the conclusion of the hearing, the Court denied the defendants' Motions for Bill of Particulars.

8. On November 5, 2009, the defendants filed the instant Motion, seeking to have the Court dismiss Counts I (Conspiracy to Obstruct Justice) and II (Obstructing Justice) of the superceding indictment.

9. The parties are scheduled to appear before the Court for a status hearing on January 15, 2010.

II. ARGUMENT

As a general proposition, a defendant cannot challenge an indictment on the grounds that the evidence underlying the indictment was incompetent or insufficient. Bank of Nova Scotia v. United States, 487 U.S. 250, 260-61 (1988) ("an indictment valid on its face is not subject to . . . a challenge" regarding the "reliability or competence of the evidence presented to the grand jury"); see also Costello v. United States, 350 U.S. 359, 363-64 (1956) (rejecting petitioner's position that the Court should "permit [] defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence"); see also Holt v. United States, 218 U.S. 245, 247-48 (1910) (to the same effect). Indeed, in Chambers v. United States, 564 A.2d 26 (D.C. 1989), the District of Columbia Court of Appeals ("DCCA") faced a claim that the evidence before the grand jury was "insufficient to support the indictment." Id. at 29. The court, following the above precedents, rejected the argument without reference to any of the evidence–competent, incompetent, or otherwise–actually submitted to the grand jury, on the ground that a facially valid indictment is not subject to such a challenge. Id.

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When challenged, the sufficiency of an indictment is to be measured by two criteria: (1) "[w]hether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and (2) whether the record adequately shows that the defendant may plead a former acquittal or conviction in the event any other proceedings are initiated against him later for a similar offense." Nichols v. U. S., 343 A.2d 336,340 (D.C. 1975) (citing Russell v. United States, 369 U.S. 749, 763-64 (1962) (citations and internal quotes omitted)). Moreover, under the modern criminal pleading standards of this jurisdiction, an indictment need only contain "a plain, concise and definite written statement of the essential facts constituting the offense charged." Id. at 342 (citing District of Columbia v. Jordan, 232 A.2d. 298, 299). Here, Counts I and II of the indictment properly set forth the elements of the charges of conspiracy under 22 D.C. Code 22-1805a and obstruction of justice under 22 D.C. Code 722(a)(6), respectively, and sufficiently apprise the defendants of what they must be prepared to meet. See Nichols, 343 A.2d at 340.[1]

In relevant part, 22 D.C. Code 22-1805a provides that:

> (a) If 2 or more persons conspire . . . to commit a criminal offense . . . each shall be fined not more than $10,000 or imprisoned not more than 5 years, or both . . . .
>
> (b) No person may be convicted of conspiracy unless an overt act is alleged and proved to have been committed by 1 of the conspirators pursuant to the conspiracy and to effect its purpose. . . .

22 D.C. Code 22-1855a. The elements of the offense of conspiracy are that: (1) an agreement existed between two or more people to commit a criminal offense; (2) the defendant knowingly

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[1] The defendants do not argue (nor could they) that the existing record inadequately prevents them from pleading "a former acquittal or conviction" in the event of later proceedings for the same offenses charged in the indictment, and this opposition does not further address this criteria.

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and voluntarily participated in the agreement, intending to commit a criminal objective; and (3) in furtherance of and during the conspiracy, a co-conspirator committed at least one overt act. McCoy v. United States, 890 A.2d 204, 213-14 (D.C.2006) (citing McCullough v. United States, 827 A.2d 48, 58 (D.C.2003)). Here, Count I of the indictment adequately informs the defendants that they are accused of conspiring to obstruct the investigation into the murder of Mr. Wone.

In relevant part, 22 D.C. Code 722(a)(6) provides that:

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

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

22 D.C. Code 722(a)(6). Count II of the indictment effectively mirrors the language of 22 D.C. Code 722(a)(6),[2] and, in conjunction with the delineated overt acts in Count I, adequately informs the defendants of their alleged obstruction of the investigation into the murder of Mr. Wone. That is all that is required.

In their Motion, however, the defendants contend that Counts I and II of the indictment fail to allege "actionable" obstruction of justice or conspiracy to obstruct justice, and therefore should be dismissed (Defs' Mot. at 5). In particular, defendants argue that the alleged acts of obstruction occurring before Mr. Zaborsky's 911 call are not actionable because the obstruction

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[2] The government is aware of no DCCA case articulating the elements of D.C. Code 22-722(a)(6). Instruction 6.101.F. of the Criminal Jury Instructions for the District of Columbia provides that the elements of the offense of obstruction are that: 1. The defendant obstructed or impeded the due administration of justice in a pending [official proceeding]; and 2. The defendant did so with the intent to undermine the integrity of the pending [proceeding]. See D.C. Crim. Jury Instr. 6.101.F. (5th ed. 2009). Although Instruction 6.101.F. references a "pending" official proceeding in both elements, there is no case cite to support the insertion of that word into the instruction. The word "pending" does not appear in the statutory language itself, and the government is aware of no DCCA suggesting the same. See discussion infra Part II.B.

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statute only proscribes acts of obstruction that occur during a pending "official proceeding," and no official proceeding (i.e., the police investigation into Mr. Wone's murder) existed in this case until after Mr. Zaborsky placed the 911 call to report his death (Defs' Mot. at 6-10). Defendants further argue that the alleged acts of obstruction occurring after Mr. Zaborsky's 911 call are not actionable because the obstruction statute does not criminalize "false statements to the police" conducting a murder investigation and the alleged false statements could not have had the "natural and probable" effect of impeding the investigation (Defs' Mot. at 10-15). The defendants also claim that defendant Price's alleged misrepresentation to Ms. Wone about who had access to the defendants' residence is not actionable obstruction because it has no nexus to the government's investigation into her husband's murder (Defs' Mot. at 15-16). Finally, the defendants argue that without actionable obstruction, there can be no conspiracy to obstruct (Defs' Mot. at 16-17).

As a preliminary matter, by virtue of how the defendants have presented the arguments in their Motion, they have invited the Court to turn the legal analysis of the sufficiency of the instant indictment on its head. Contrary to the defendant's contorted analysis, if this Court determines that any one of the alleged acts of obstruction of justice by one or more of the defendants (whether it occurred before or after Mr. Zaborsky initiated the 911 call) constitutes actionable obstruction under the applicable statute, then Count II must survive as a matter of law. Therefore, if, for example, this Court were to conclude that the indictment sets forth an actionable allegation of obstruction when it charges that each of the defendants "made statements to law enforcement authorities that were false in material respects and intended to misdirect and mislead law enforcement authorities into believing that an unknown intruder had, in fact, killed

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Robert Wone," then the obstruction count (Count II) survives. And, if the Court then determines that any one of the seventeen (17) alleged overt acts by the defendants, either individually or collectively, constitutes actionable conspiracy to obstruct justice on its face, then the conspiracy count (Count I) survives as well. For that reason, the government will address the defendants' arguments our of order, starting with those acts of obstruction occurring after Mr. Zaborksy initiated the 911 call (including the call itself).

A. The alleged acts of obstruction occurring after Mr. Zaborsky initiated the 911 call plainly constitute actionable obstruction of justice under 22 D.C. Code 722(a)(6).

The defendants categorically contend that the alleged acts of obstruction occurring "after [Mr. Zaborsky's] 911 call" are not actionable. Notably, however, they do not challenge the legal sufficiency of their alleged obstruction in placing the fabricated 911 call itself, the very vehicle by which the defendants first communicated, in part, their contrived "intruder" story. Again, because the obstruction count of the indictment need only be based on a single act of obstruction, left unchallenged, the fabricated 911 call in itself constitutes actionable obstruction and Count II (and by extension Count I) necessarily survives the defendants' instant challenge. Notwithstanding this, the government maintains that each of the overt acts alleged to have taken place after Mr. Zaborsky initiated the 911 call to police independently qualifies as actionable obstruction of justice under 22 D.C. Code 722(a)(6).

1. The 911 call placed by Mr. Zaborsky, which relayed, in part, the defendants' fabricated story that an unidentified intruder had murdered Robert Wone, constitutes actionable obstruction of justice.

In essence, overt act 9 alleges that the defendants, via Mr. Zaborsky's 911 call to the police, relayed a portion of their fabricated story to the police in furtherance of obstructing and

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impeding the police's investigation into the murder of Mr. Wone. More specifically, Mr. Zaborksy is alleged to have falsely reported that an unidentified intruder (as opposed to a person known to the defendants) had entered their residence at 1509 Swann Street, N.W. without forcing entry, stabbed Mr. Wone, and escaped without being seen or heard.

It goes without saying that, among other things, actionable obstruction of justice necessarily includes conduct whereby a person is alleged to have made a false report to the police in the course of a pending criminal investigation, intending to mislead and misdirect the police in the process.[3] See, e.g., United States v. Hunt, 526 F.3d 739, 745 (11th Cir. 2008) (affirming conviction for false reporting pursuant to 18 U.S.C. §§ 1519 where defendant communicated false information in a written police report in advance of a federal criminal investigation into alleged excessive use of force by the defendant); U.S. v. Price, 951 F.2d 1028, 1032 (9th Cir. 1991) (affirming conviction for obstruction of proceedings under 18 U.S.C. §§ 1505 where defendant communicated a false report in a 911 call to local law enforcement in order to impede or obstruct a pending proceeding against him); and United States v. Jacquemain, 368 F. Supp. 2d 800, 805 (E.D.Mich. 2005) (evidence sufficient to support conviction for obstruction pursuant to 18 U.S.C. §§ 1512(b)(3) where defendant falsified a written police report in advance of a federal investigation into his alleged excessive use of force); cf. U.S. v. Sprecher, 783 F.Supp. 133, 163-64 (S.D.N.Y. 1992) (defendant convicted of obstruction under 18 U.S.C. 1505 for making false statements to the SEC during an SEC investigation). Therefore, because the defendants' alleged placement of the fabricated 911 call itself qualifies as actionable obstruction of justice under 22

[3] This is true whether or not said obstructionist act is made orally or in writing, and whether or not it is separately chargeable in this jurisdiction as a "false statement to the police" in violation of a separate D.C. Code provision.

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D.C. Code 722(a)(6), Counts I and II must survive as a matter of law and this Court could end its inquiry here.[4]

2. The defendants' false statements to law enforcement authorities on August 3, 2006, intending to misdirect and mislead the police into believing that an unidentified intruder had murdered Robert Wone, constitute actionable obstruction of justice.

The acts of obstruction alleged in overt acts 13-16 assert that the defendants made false statements to law enforcement authorities on August 3, 2006, about the circumstances of Mr. Wone's murder, intending to obstruct the police in its attempts to identify the true perpetrator of the murder. The defendants argue that, even assuming that they lied to the police, such "false statements to the police" in the course of a murder investigation do not constitute actionable obstruction of justice under D.C. Code 22-772 as a matter of law. In support of this argument, the defendants contend that: (1) the District of Columbia Court of Appeals has never held that lies to the police can constitute obstruction under the statute (Defs' Mot. at 10); (2) the legislative history of the statute does not indicate that the statute intended to criminalize "lying to the police" (Defs' Mot. at 10), and (3) the U.S. Supreme Court held in United States v. Aguilar, 515 U.S. 593 (1995) that "false statements to law enforcement, without more, do not constitute obstruction of justice" (Defs' Mot. at 12). The defendants' arguments, however, ignore a straightforward application of the statute's plain language, particularly as applied to the factual allegations in this case.

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[4] The government notes as well that the 911 call is alleged to have contained various falsehoods concerning the true circumstances surrounding Mr. Wone's murder and the defendants' knowledge of and response to his murder, including, by way of example, the misleading representation that defendant Price was using a towel to apply pressure to Mr. Wone's stab wounds (see overt act 10), when, in fact, he was not (see overt act 12).

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First, that the DCCA has not had the occasion to decide a case in which a defendant was charged and convicted of obstruction under D.C. Code 22-722(a)(6) (or its predecessor) for lying to the police is of no moment. This Court need only consider whether the plain language of the statute would proscribe the defendants' alleged false statements to the police during its investigation into Mr. Wone's murder. In that regard, the applicable statutory provision reads:

> (a) A person commits the offense of obstruction of justice if that person:
>
> (6) Corruptly, or by threat of force, any way obstructs or impedes or endeavors to obstruct or impede the due administration of justice in any official proceeding.[5]

22 D.C. Code 722(a)(6). The meaning of the above statutory provision could not be plainer: Any person who in "any way" corruptly obstructs or impedes or endeavors to obstruct or impede the due administration of justice in any official proceeding (including, as alleged here, an investigation undertaken by the D.C. Metropolitan Police Department), commits the offense of obstruction of justice. Here, the defendants are "persons" who are alleged to have corruptly obstructed or impeded or endeavored to obstruct or impede MPD's investigation into the murder of Mr. Wone, in part, by lying to the police about the true circumstances of Mr. Wone's murder and their knowledge of and response to his murder.

Second, the defendants' reliance on the legislative history of D.C. Code 22-2405–as opposed to 22-772, the statute at issue here–is unwarranted and unpersuasive. It is well-

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[5] An "official proceeding" as defined by the obstruction statute is "any trial, hearing, investigation, or other proceeding in a court of the District of Columbia or conducted by the Council of the District of Columbia or an agency or department of the District of Columbia government." See D.C. 22-721(4). As a department of the District of Columbia, the Metropolitan Police Department's investigation into the murder of Mr. Wone was and is an "official proceeding" under the statute.

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established that when the language of a criminal statute is plain and admits of only one meaning, the need for interpretation does not arise and the rules of statutory interpretation are inapposite. (Albert) Smith v. United States, 357 A.2d 418, 420 (D. C.1976); accord Haney v. United States, 473 A.2d 393, 394 (D. C.1984) (when the language of a criminal statute is plain and unambiguous, admitting of only one meaning, the need for interpretation does not arise). Here, there is nothing ambiguous about the operative language of D.C. Code 22-772(a)(6), and thus, there is no reason to consider or attempt to dissect the legislative history of the statute. That said, the legislative history of section 22-722(a)(6) itself, to which the defendants do not even refer, supports the government's view that the defendants' false statements to the police fall within the broader range of obstructive conduct the statute sought to proscribe. Indeed, the D.C. Council made clear that the amendments to the statute in 1992 were intended to "expand[] the scope of the current obstruction of justice statute to encompass the wide-range of activities used by criminals to impede justice." Council of the District of Columbia, Committee on the Judiciary, Report on Bill 9-385: "The Law Enforcement Witness Protection Amendment Act of 1992," at 2 (May 20, 1992). The defendants' failure to address the applicability of the unambiguous plain language of the obstruction statute and their corresponding reliance on the legislative history of a statute that is not even at issue in this case is unavailing.[6]

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[6] The defendants dedicate two full pages of their argument to an analysis of D.C. Code 22-2405, the "written false statements"statute and its legislative history. It is unclear to the government how that statute or its legislative history has any bearing whatsoever on this Court's consideration and application of the plain language of D.C. Code 22-722(a)(6) in the context of the instant Motion. It appears that the defendants are setting up the written false statements statute as a straw man by suggesting that it is the only applicable criminal statute in D.C. that governs "false statements" to the police (Defs' Mot. at 11). Conveniently, the defendants then knock down the applicability of D.C. Code 22-2405 under the facts of this case (Id.). The defendants, however, cite no legal authority for the proposition that D.C. Code 22-2405 is the only D.C. criminal statute proscribing

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Morever, as already indicated above, the federal courts have considered the application of similar conduct in the context of similarly-worded federal obstruction statutes and concluded that persons making false reports/statements to the police in the course of a criminal investigation had obstructed the due administration of justice. See infra pg. 10-11, citing Hunt, 526 F.3d 739; Price, 951 F.2d 1028; and Jacquemain, 368 F. Supp. 2d 800. Accordingly, because the defendants' alleged false statements to the police here would constitute obstruction of justice under the plain language of 22-722(a)(6), such false statements qualify as actionable obstruction of justice.

Finally, United States v. Aguilar, 515 U.S. 593 (1995) and United States v. Wood, 6 F.3d 692 (10th Cir. 1993) are inapposite to this case. First, the Aguilar and Wood courts involved the application of allegations of obstruction under a federal statute, 18 U.S.C. § 1503, and its corresponding "nexus" requirement, that is not at issue in this case. Second, in applying the "nexus" requirement under the federal statute, the Aguilar and Wood courts found that under circumstances materially different than the alleged false statements to police in this case, the "false statements" at issue did not constitute obstruction under the federal statute. Unlike the defendants in Aguilar and Woods, who had made false statements to law enforcement personnel that may or may not testify before the grand juries investigating certain crimes, these defendants are accused of making false statements directly to members of the very entity investigating the crime at the time (i.e., MPD). Accordingly, the defendants' reliance on Aguilar and Wood is

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false statements to the police. Indeed, "there is nothing remarkable in the fact that the same act may violate two or more statutory provisions." See, Smith v. U.S., 591 A.2d 229, 232 (D.C. 1991) (citing, e.g., Holt v. United States, 565 A.2d 970 (D.C.1989) (en banc)). In any event, the defendants are not charged with violating D.C. 22-2405.

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misplaced in that both the governing law (i.e., the existence of a "nexus" requirement under the federal statute versus no "nexus" requirement under D.C. Code 22-722(a)) and the relevant facts are materially different.

3. Defendant Price's false statement to Mrs. Wone stating that he had provided law enforcement officials with the names of all individuals having key access to the defendants' residence constitutes actionable obstruction of justice.

Overt act 17 asserts that the in or about November, 2007, defendant Price falsely told Robert Wone's widow, Katherine Wone, that he had provided law enforcement officials with the names of all individuals having key access to the defendants' residence, when he had not told the police that his brother Michael Price possessed keys to the residence at 1509 Swann Street as well. The defendants argue that defendant Price's alleged misrepresentation to Mrs. Wone cannot constitute obstruction because she had no "official role in the investigation" and any misrepresentation to her had no nexus to the MPD investigation (Defs' Mot. at 15). This argument, of course, ignores Ms. Wone's status as an essential witness to the government's investigation into her husband's murder.

On the date of the murder, no one knew Mr. Wone better than Mrs. Wone, his wife and closest confidant. Mrs. Wone, more so than any other prospective government witness in this case, had relevant knowledge concerning the circumstances under which Mr. Wone was staying at the defendants' residence that night, the relationship vis-a-vis Mr. Wone and the three defendants, particularly defendant Price, and Mr. Wone's regular habits and customs (both extraordinary and mundane). It was abundantly clear to everyone familiar with the murder and subsequent investigation that Ms. Wone would serve as one of the government's primary

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witnesses and sources of information throughout the course of the murder investigation and at any subsequent criminal trial.

In November, 2007, it is also clear that defendant Price, a suspected obstructionist in the murder investigation at the time, knew that Mrs. Wone was a unique witness in the ongoing murder investigation. Indeed, the government expects to present evidence at trial establishing that defendant Price was seeking, through intermediaries, information about what Mrs. Wone had told the police when she spoke with them about the murder of her husband. By falsely representing to Mrs. Wone that he had provided the police with the names of all persons having key access to the defendants' residence, Mr. Price purposefully concealed his earlier omission to the police: namely, that his brother, Michael Price, also had key access to the home. Defendant Price's material omission to Mrs. Wone was particularly manipulative in that defendant Price: (1) falsely sought to reassure Ms. Wone that he and his co-defendants were, in fact, cooperating fully with the police's investigation into the murder of her husband, and (2) corruptly sought to undermine Mrs. Wone's confidence in the government's ongoing efforts to identify the murderer(s). At trial, the defendants will no doubt seek to introduce evidence of their friendly relationship with the Wones at the time of the murder as affirmative evidence of their innocence. Defendant Price's material omission to Mrs. Wone (and the police) concerning Michael Price's access to the defendants' home, however, is yet another affirmative act undertaken to influence improperly the conduct of a material witness in the investigation as well as deprive the police of another potential source of information. See e.g., Womack v. U. S., 350 A.2d 381, 384 (upholding defendant's conviction for obstruction of justice where he observed fellow off-duty police officers assaulting a person under the guise of making a lawful arrest and "discourag[ed]

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attention from other police sources . . . [and] obstruct[ed] communication of information with respect to such crime").

In summary, because any one of the alleged acts of obstruction occurring after Mr. Zaborsky initiated the 911 call, including the call itself, is actionable under 22 D.C. Code 722(a)(6), the defendants' motion to dismiss Count II fails.

B. The alleged acts of obstruction occurring before Mr. Zaborsky initiated the 911 call constitute actionable obstruction of justice under 22 D.C. Code 722(a)(6).

The defendants also assert that the alleged acts of obstruction occurring "before [Mr. Zaborsky's] 911 call" are not actionable. Specifically, the defendants argue that because the "official proceeding" in this case (i.e., MPD's homicide investigation) began when Mr. Zaborsky placed the 911 to report the murder, any alleged obstruction occurring before the 911 call is not actionable under 22 D.C. Code 722(a)(6) (Defs' Mot. at 6-10). The defendants' suggested interpretation of the statute ignores the broad language and intended scope of the statute and would result in absurd results, as applied. See Lange v. United States, 143 U.S. App. D.C. 305, 308, 443 F.2d 720, 722-723 (1971) (words of statute should not be read "so as to command an absurd result").

As set forth above, 22 D.C. Code 722(a)(6) criminalizes conduct that in "any way obstructs or impedes or endeavors to obstruct or impede the due administration of justice in any official proceeding." See 22 D.C. Code 722(a)(6) (emphasis added). An "official proceeding" is defined as "any trial, hearing, investigation, or other proceeding in a court of the District of Columbia or conducted by the Council of the District of Columbia or an agency or department of the District of Columbia government." See D.C. 22-721(4). Significantly, the statutory language

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does not expressly place a limiting, temporal component on the status of "official proceeding" that the obstructive conduct seeks to disrupt or impede. The statutory language, for example, does not employ the terms "pending" or "active" before the phrase "official proceeding"–as it clearly could have–to mandate that the only proscribed obstructive conduct is that which occurs during an official proceeding that has already been initiated and is ongoing. And, the only DCCA case of which the government is aware that references the phrase "official proceeding" under the statute does not address the temporal status of the "official proceeding" vis-a-vis the alleged obstruction. See, e.g., Crutchfield v. United States, 779 A.2d 307, 327-28 (D.C. 2000) (referencing the statutory definition of "official proceeding" under D.C. 22-722 in upholding an obstruction conviction in which there was circumstantial evidence that the defendant was aware that an investigation into a triple murder occurring less than two weeks earlier was in progress when he killed a material witness to the murder).

Moreover, consistent with the broad language of the statute and its intended role as the "catchall"provision, a common sense interpretation of D.C. 22-722(a)(6) is one that appropriately criminalizes conduct that in any way obstructs or impedes or endeavors to obstruct or impede any imminent or ongoing criminal investigation. This interpretation of the statutory language is particularly appropriate, where, as here, the defendants are alleged to have engaged in an ongoing conspiracy to obstruct justice, consisting of various complimentary acts of obstruction, beginning around the time of the murder and continuing well after the police were first notified of it.

The alleged acts of obstruction referenced in overt acts 1-8, when proven, will establish that the defendants undertook elaborate efforts to stage the murder scene before even notifying the police. In doing so, they clearly knew not only that (1) a police investigation into the

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circumstances of Mr. Wone's murder was inevitable and imminent, but that (2) the crime scene must present itself in a manner consistent with their fabricated story that an unidentified intruder–not they or someone they knew–killed Mr. Wone. As such, while the obstructive conduct referenced in overt acts 1-8 clearly began before the police arrived on the scene, the evidence will establish that the defendants attempted to make continued use of the "fruits" of their pre-police obstructive conduct to later corroborate their fabricated statements to the police.

For example, overt acts 4-7 allege that in an effort to avoid detection and misdirect law enforcement authorities and others, the defendants orchestrated the crime scene to make it appear as if an intruder had entered through the back door of the residence, retrieved a knife from the kitchen of the residence, traveled to the second floor of the residence, stabbed Robert Wone, and then fled the residence. As part of this, the defendants discarded or concealed the actual murder weapon, retrieved a "plant" knife from a knife set located in the kitchen, blotted Mr. Wone's blood on the "plant" knife to give it the appearance of the actual murder weapon, and then placed the bloody "plant" knife on the night stand located beside Mr. Wone's bed. Surely, the fact that the defendants are alleged to have taken these steps to stage the scene before the police arrived, but did not, for example, touch the "plant" knife on the bedside table after the police arrived in no way ended their reliance on the staged scene to misdirect and mislead the police and obstruct their investigation. Indeed, the defendants made repeated reference to the "plant" knife in their subsequent statements to the police, indicating that it was obviously the murder weapon used by the patio door intruder, because it was readily accessible to him upon entering the home. Therefore, like the other aspects of the staged crime scene, although the defendants took certain

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affirmative actions to stage the scene before placing the 911 call, they continued to rely upon and make use of the staged evidence to corroborate their false statements to the police.

Although the DCCA's decision in Womack pre-dated the enactment of D.C. Code 22-722, its broad application of the obstruction statute at the time is instructive on how 22-722(a)(6) (the "catchall" provision) should be applied today. In Womack, a defendant challenged the sufficiency of his convictions for aiding and abetting a simple assault carried out by his fellow off-duty officers and obstruction of justice. Womack, 350 A.2d at 382. The facts established that the defendant "twice staved off the attention of [a law enforcement officer]" by identifying himself as a police officer and claiming to be "taking care of the matter." Id. The Court upheld the defendant's conviction for obstruction of justice, even though the facts indicated that the defendant's obstructive acts served to delay the onset of the actual criminal investigation into the matter. Id. at 384. Similarly, D.C. Code 22-722(a)(6) should properly reach any and all obstructionist conduct by the defendants before they made their belated call to 911 call to notify the police of Mr. Wone's murder.

As support for their much narrower interpretation and application of D.C. Code 22-722(a)(6), the defendants claim that "in every District of Columbia Court of Appeals (DCCA) case discussing obstruction of justice since 1995, the pre-existence of an 'official proceeding' is an absolute requisite for conviction" (Defs' Mot. at 7). This contention and its presumed significance, however, is inaccurate. None of the post-1995 DCCA cases that the defendants cite for this proposition actually addressed the discrete legal issue raised here: namely, whether the statute criminalizes obstructive conduct occurring during a pending (as opposed to imminent and

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inevitable) criminal investigation. As such, the DCCA has never actually held that a "pre-existing" official proceeding is a prerequisite for liability under the statute.

A case in point is the defendants' reliance on Andrews v. United States, 981 A.2d 571 (D.C. 2009). The defendants incorrectly claim that the Andrews court "agree[d] that the trial court properly dismissed [an] obstruction of justice count because there was no official proceeding at the time of the defendant's actions." In fact, the Andrews court neither "agreed" with nor affirmed the trial court's dismissal of the D.C. Code 22-722(a)(6) obstruction of justice count because that ruling was not raised on appeal. Andrews, 981 A.2d at 577. Rather, the Andrews court simply noted that the trial court had dismissed the D.C. Code 22-722(a)(6) count as part of its broader recitation of the procedural history of the case. Id. It then went on to analyze and decide the distinct issue on appeal (i.e., whether the evidence of the defendant police officer's assault upon the victim was sufficient to affirm his obstruction conviction under D.C. Code 22-722(a)(3)). Id. Accordingly, contrary to the defendant's argument, the DCCA has not weighed in on the issue.[7]

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[7] Because the applicable statute and factual allegations at issue in this case differ from those in Timberlake v. United States, 758 A.2d 978 (D.C. 2000), the defendants' reliance on that case is also misplaced. In Timberlake, the DCCA addressed whether there was sufficient evidence to sustain the defendant's conviction under D.C. Code 22-723(a) ("Tampering with Physical Evidence") where he had reason to know that the police were almost upon him at the time he concealed illegal drugs in his mouth. Id, 758 A.2d at 979-82. The Timberlake court was interpreting the language of the tampering with evidence statute–not D.C. Code 22-722–and it was applying that statute to the unique facts of that case. Id. In affirming the conviction, the Timberlake found that the defendant "knew the police officers were investigating his illegal activity and thereby knew an official proceeding was imminent." Id, 758 A.2d at 982-83. After doing so, the Timberlake court stated in a footnote that, "we need not reach the difficult questions of what constitutes an 'official proceeding' and what is sufficient subjective knowledge that an official proceeding is 'likely to be instituted' absent circumstances that objectively manifest the proceeding . . . . We have never addressed the degree of formality or specificity required for there to be an 'official proceeding.'" Id. at 983 n.6. In short, the government fails to see how the Timberlake dicta is "instructive" here.

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D. Because the Indictment properly alleges actionable obstruction of justice by the defendants and at least one overt act in furtherance of the alleged conspiracy to obstruct justice charge, that count survives as well.

As set forth above, the elements of the offense of conspiracy are that: (1) an agreement existed between two or more people to commit a criminal offense; (2) the defendant knowingly and voluntarily participated in the agreement, intending to commit a criminal objective; and (3) in furtherance of and during the conspiracy, a co-conspirator committed at least one overt act. McCoy v. United States, 890 A.2d 204, 213-14 (D.C.2006) (citing McCullough v. United States, 827 A.2d 48, 58 (D.C.2003)). Here, Count I of the indictment adequately informs the defendants that they are accused of conspiring to obstruct the investigation into the murder of Mr. Wone and alleges 17 overt acts committed by the defendants, individually or in combination, in furtherance of that conspiracy. Based on their argument, the defendants effectively concede (as they must) that if the Indictment properly alleges an "unlawful act" (i.e., obstruction of justice), then in conjunction with the alleged overt acts, conspiracy is properly alleged. Because that is the case here, the defendants' motion to dismiss Count I should be denied as well.

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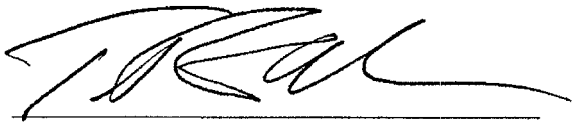
III. CONCLUSION

The indictment sufficiently notifies the defendants of the charges against them and is not otherwise defective in any manner. Accordingly, the United States of America, by its counsel, the United States Attorney for the District of Columbia, respectfully requests that the Court deny the defendants' Joint Motion to Dismiss Counts One and Two of the Indictment .

Respectfully submitted,

CHANNING D. PHILLIPS
ACTING UNITED STATES ATTORNEY

By: 

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing to be served by facsimile on December 11, 2009, upon Bernard Grimm, Esq., Cozen O'Connor, The Army and Navy Building, 1627 I Street, NW, Suite 1100, Washington, DC 20006, counsel for defendant Price, Thomas G. Connolly, Esq., Harris, Wiltshire & Grannis, LLP, 1200 Eighteenth Street, N.W., 12th Floor, Washington, DC 20036-2506, counsel for defendant Zaborsky, and David Schertler, Esq., Schertler & Onorato, LLP, 601 Pennsylvania Avenue NW, North Building, 9th Floor, Washington, DC 20004-2601, counsel for defendant Ward.

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