IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

UNITED STATES OF AMERICA, **v.** **DYLAN M. WARD,** **JOSEPH R. PRICE,** **and** **VICTOR J. ZABORSKY,** **Defendants.**	**Criminal Nos. 2008-CF1-26996** **2008-CF1-27068** **2008-CF1-26997** **Judge Lynn Leibovitz** **Status Hearing – January 15, 2009**

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

On November 5, 2009, Defendants Dylan M. Ward ("Ward"), Joseph R. Price ("Price") and Victor J. Zaborsky ("Zaborsky") (collectively the "Defendants") moved this Court to dismiss Counts One and Two of the superseding indictment ("Indictment"). Grounded in the plain reading of the relevant statutes and well-established case law, the Defendants' Motion to Dismiss demonstrates that even if the government proved each of the allegations contained in the Indictment, as a matter of law they would fail to establish obstruction of justice or conspiracy to obstruct justice. No argument made or law cited by the government in its Opposition saves these fatally flawed counts. They should be dismissed.

I. THIS COURT HAS THE CLEAR AUTHORITY TO DISMISS LEGALLY INSUFFICIENT COUNTS OF THE INDICTMENT.

The government begins its Opposition by challenging this Court's ability to dismiss counts of the Indictment. "As a general proposition," the government argues, the Defendants cannot challenge an indictment "on the grounds that the evidence underlying the indictment was incompetent or insufficient." Opp. p. 6.[1] In making this argument, the government misconstrues the Defendants' challenge to Counts One and Two of the Indictment.

For purposes of their Motion to Dismiss, the Defendants do not challenge the *factual* sufficiency or competence of the evidence.[2] Rather, for the sake of argument, the Defendants invite this Court to assume that the evidence placed before the grand jury was competent and sufficient to make out the allegations contained in the Indictment. Their challenge is to the *legal* sufficiency of that evidence to make out the crimes charged.[3] In short, even assuming the government competently proves each fact it has alleged, as a matter of law that evidence fails to constitute the crimes of obstruction of justice and conspiracy to obstruct justice.

The government's flawed argument rests on cases which relate to a defense challenge to the sufficiency of the *facts* underlying the indictment. In each case cited by the government the defendant asked the trial court to dismiss the indictment based on a

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[1] Since the Government's Opposition to the Motion to Dismiss has a mix of numbered and unnumbered paragraphs, references to the Opposition are to page numbers.

[2] It bears mentioning, however, that at trial the Defendants will aggressively challenge the government's evidence.

[3] The Court has the authority to consider the Defendants' motion pursuant to Sup. Ct. Crim. R. 12(b): "Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. . . . The following must be raised prior to trial: . . . (2) Defenses and objections based on defects in the indictment (other than it fails to show jurisdiction in the Court or to charge an offense which objections shall by noticed by the Court at any time during the pendency of the proceedings. . . "

perceived weakness in the reliability or competence of the evidence presented to the grand jury – an argument not advanced by the Defendants in this Motion.

In *Bank of Nova Scotia v. United States*, 487 U.S. 250, 260-61 (1988), cited and relied upon by the government, the Court held that errors in the grand jury proceedings and the presentation of "unreliable" evidence to the grand jury were not grounds to dismiss an otherwise valid indictment. Similarly, the United States Supreme Court rejected pretrial challenges to an indictment where the defendant questioned the grand jury's reliance on hearsay testimony, *Costello v. United States,* 350 U.S. 359, 363-64 (1956), and "incompetent" statements made by the defendant, *Holt v. United States*, 218 U.S. 245, 247 (1910).

The District of Columbia Court of Appeals reached the same result in *Chambers v. United States*, 564 A.2d 26, 29 (D.C. 1989). In *Chambers*, the defendants challenged the use of hearsay evidence before the grand jury, claiming that the detective's summary, erroneous, and hearsay grand jury testimony was insufficient to "enable the grand jury to find probable cause and therefore insufficient to support the indictment." *Id.* The Court of Appeals rejected this argument, holding that an indictment may be based on hearsay. *Chambers*, like the Supreme Court cases cited by the government, dealt only with an allegation of factual – not legal – insufficiency of the indictment.[4]

None of the cases relied upon by the government is relevant here because the Defendants are not with this Motion challenging the sufficiency of the evidence placed before the grand jury. Instead, this Court should look to a well-established body of law

[4] The final case cited by the government for the proposition that the Court may not dismiss counts of the indictment pretrial is *Nichols v. U.S*, 343 A.2d 336 (D.C. 1975) which considered whether the defendant was properly charged with felony malicious destruction of property where the language in the indictment varied from the statutory language. Like the other cases cited by the government, *Nichols* is equally inapposite since no such argument is made here.

demonstrating that the Court has the authority to dismiss counts of an indictment pretrial where those counts are legally insufficient.

One such case cited in the Defendants' Motion to Dismiss and wholly unaddressed by the government is *United States v. Yakou*, 428 F.3d 241 (D.C. Cir. 2005). In *Yakou*, the United States District Court dismissed an indictment brought against the defendant charging him with violations of the Arms Export Control Act and its implementing regulations finding that, as a matter of law, the defendant could not be a "U.S. person" as required by those regulations. *Id.* at 245-46. Although the relevant facts underlying the indictment were uncontested, the government challenged the pretrial dismissal of the indictment arguing that the District Court exceeded its authority under Rule 12(b) of the Federal Rules of Criminal Procedure.[5] The Court of Appeals for the District of Columbia Circuit disagreed and found that there was precedent and authority for dismissing counts of an indictment pretrial based on questions of law. *Id.* at 246-47. It then affirmed the lower court's decision dismissing the indictment.

Other cases demonstrating the Court's authority to dismiss counts of an indictment for legal insufficiency include: *United States v. Espy*, 145 F.3d 1369 (D.C. Cir. 1998) (dismissing count brought under 18 U.S.C. § 1001 alleging the defendant made a false statement to the President's Chief of Staff and Counsel where, as a matter of law, the Executive Office of the President was not an 'agency' for purposes of that statute); *United States v. Oakar*, 111 F.3d 146 (D.C. Cir. 1997) (dismissing false statement count where defendant submitted allegedly false financial disclosure form to the Clerk of the House of Representatives where the House Clerk, as a matter of law, was not an agency for purposes of the false statement statute); and *United States v. Smith*, 729

[5] Fed. R. Crim. Proc. 12(b)(3)(B) is substantially similar to Sup. Ct. Crim. R. 12(b)(2).

F. Supp. 1380 (D.D.C. 1990) (dismissing obstruction of justice count under 18 U.S.C. § 1503(a) pretrial where there was no pending judicial proceeding at the time of the alleged acts); *Stein v. United States*, 532 A.2d 641 (D.C. 1987) (holding that the trial court properly considered the pretrial legal question of whether the defendant was immune from prosecution for gun offenses where the relevant facts were undisputed); and *United States v. Brown*, 309 A.2d 256 (D.C. 1973) (affirming pretrial dismissal of indictment charging violation of 'three-card monte' gambling statute where alleged actions of defendants could not, as a matter of law, violate such statute).

The same holds true here. As discussed in the Motion to Dismiss, and amplified below, even if the government was able to prove each and every one of the allegations it leveled against the Defendants, it would fail to establish – as a matter of law – the crimes of obstruction of justice and conspiracy to obstruct justice as charged in the Indictment. Because the Defendants could not be convicted of those counts, they should be dismissed and this Court has the clear authority to do so.

II. ALLEGED ACTS BEFORE THE 911 CALL DID NOT OCCUR 'IN AN OFFICIAL PROCEEDING' AND FAIL TO ESTABLISH OBSTRUCTION OF JUSTICE.

The essence of the government's argument that the Defendants' alleged actions prior to the 911 call can support a conviction for obstruction of justice is the government's 'plain reading' of D.C. Code § 722(a)(6). The statutory language, the government claims, "does not expressly place a limiting, temporal component on the status of "official proceeding" that the obstructive conduct seeks to disrupt or impede." Opp. p. 18-19 (emphasis in original). Remarkably, this claim ignores the true plain reading of the statute, its place in the overall Theft and White Collar Crimes Act of 1982,

the legislative history underpinning the law, important persuasive case law, and the approved jury instruction.

First, the language of the statute is clear: "[a] person commits the offense of obstruction of justice if that person corruptly, or by threats of force, any way obstructs or impedes or endeavors to obstruct or impede the due administration of justice in any official proceeding." D.C. Code § 22-722(a)(6). The phrase "in any official proceeding" clearly modifies the preceding clause, and applies where a person "obstructs or impedes or endeavors to obstruct or impede the due administration of justice." Put differently, the statute may be read as follows:

> A person commits the offense of obstruction of justice if that person corruptly, or by threats of force, any way obstructs or impedes the due administration of justice in any official proceeding or endeavors to obstruct or impede the due administration of justice in any official proceeding.

The phrase "in any official proceeding" does, indeed, place a temporal limitation on actions or endeavors to obstruct or impede the due administration of justice. The Court need look no further than the dictionary for the obvious meaning of the word "in" which is "used as a function word to indicate inclusion, location, or position within limits." *Merriam-Webster's On-Line Dictionary*.[6] It is therefore not enough that obstructive actions occur. They must occur "include[ed]" or "position[ed] within [the] limits" of "an official proceeding."

Second, the government's assertion that the "common sense" reading of the statute would apply to conduct that obstructs or impedes, or endeavors to obstruct or impede, "any imminent" criminal investigation," Opp. p. 19, is wholly without support in the text of the statute or in case law. "Official proceeding" is defined in the District of

[6] Available at: http://www.merriam-webster.com/dictionary/in.

Columbia Code as "any trial, hearing, investigation, or other proceeding in a court of the District of Columbia or any agency or department of the District of Columbia government, or a grand jury proceeding." D.C. Code § 22-721(4). Nowhere does that definition contemplate 'inevitable and imminent' police investigations, as the government would have this Court believe.

Third, trying to support its interpretation of the statute, the government argues that because the Council for the District of Columbia did not insert the words "active" or "pending" before the phrase "official proceeding," that absence demonstrates that there is no temporal requirement for the official proceeding. Once again, the government ignores the words that the Council did place in the statute, requiring the actions to occur "in any official proceeding."

Moreover, in its Opposition the government does not discuss or attempt to explain the important language difference between obstruction of justice and tampering with evidence, D.C. Code § 22-723, which were passed as part of the very same Theft and White Collar Crimes Act of 1982, and both of which rely on the very same definition of "official proceeding." A person commits the offense of tampering with physical evidence if he alters, mutilates, conceals, or removes a document or other object, "knowing or having reason to believe an official proceeding has begun or knowing that an official proceeding is likely to be instituted." D.C. Code § 22-723(a) (emphasis added). This language is different from that used in the obstruction statute, an important difference noted by the court in *Timberlake v. United States*, 758 A.2d 978 (D.C. 2000).[7]

[7] The government's footnoted treatment of *Timberlake* is emblematic of the short-shrift the government gives this important argument. Of course the Defendants are aware that *Timberlake* dealt with tampering with evidence and not obstruction, but the importance of the case for purposes of this Motion is the difference in the statutory language and recognition that the Council made a specific choice to extend the

From this it is apparent that:

- the Council knew well how to use language to make clear that tampering should apply not only where "an official proceeding has begun" but also where the defendant knew or had reason to know that "an official proceeding was likely to be instituted"; and

- the definition of "official proceeding" does not on its face, or by implication, include an 'inevitable and imminent' police investigation as claimed by the government.

Fourth, the Defendants are aware of no case law in the District of Columbia – and the government cites none[8] – holding that conduct that obstructs or impedes, or endeavors to obstruct or impede, any 'imminent' or 'inevitable' criminal investigation, violates D.C. Code § 22-722(a)(6). Every Court of Appeals case reporting a conviction under that statute reflects a pending and on-going official proceeding.[9]

The most recent case from the Court of Appeals discussing § 722(a)(6) corresponds with the Defendants' clear reading of the statute. In *Andrews v. United States*, 981 A.2d 571 (D.C. 2009) the defendant was a police officer who compelled the victim, a prostitute who had been arrested and was in the defendant's custody, to perform oral sex on him while in his police vehicle. The victim retained the condom that was used during the sex act and hid it inside her underwear to preserve it as evidence of the assault. At the police station, while in a police station conference room, the defendant suspected that the victim had saved the condom. Desperate to conceal his conduct, he grabbed the victim and started beating her head against the table, "threw her on the floor,

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reach of tampering *and not obstruction* to persons who knew or had reason to know that an official proceeding is likely to be instituted. *Timberlake* is discussed more fully in the Defendants' Motion to Dismiss.

[8] Remarkably, the only case cited by the government for the proposition that conduct designed to delay the onset of an investigation may support obstruction of justice is *Womack v. United States*, 350 A.2d 381 (D.C. 1976) a case which (1) is based on an earlier and now-repealed obstruction statute and (2) predates the 'official proceeding' requirement of the current law by 19 years.

[9] Many of those cases are identified in the Defendants' Motion to Dismiss.

ripped off her pants and panties, grabbed the condom from between her buttocks, and flushed it down the toilet--all in the presence of other MPD officers who did nothing to stop him." At this point other officers entered the room and the victim – for the first time – reported the sexual assault. *Id.* at. 572-75.

The defendant in *Andrews* was charged with first degree sexual abuse of a ward, tampering with evidence, and obstruction of justice under D.C. Code §§ 722(a)(3)(B) and 722(a)(6). The trial court dismissed the charge under § 722(a)(6) – the statute at issue here – because the alleged act of obstruction "must occur in an ongoing "official proceeding" but there was no "official proceeding" pending at the time Andrews assaulted [the victim] to get the condom." *Id.* at 577. The Court of Appeals was not asked by the government to consider this decision, but instead reviewed Andrews' conviction under § 722(a)(3)(B) which makes it a crime to "harass another person with the intent to hinder, delay, prevent or dissuade the person from reporting to a law enforcement officer the commission of, or any information concerning, a criminal offense."

The Court rejected the government's argument that Andrews assaulted the victim in an effort to prevent her from reporting the sexual assault to the police. "If anything, Andrews' dramatic and violent assault on [the victim], made in the conference room of a police station and in the presence of three witnesses, two of whom were themselves police officers, almost certainly accelerated [the victim's] "report" of a crime rather than "hindered" or "delayed" it." *Id.* The Court concluded, "[i]n short, the trial court should have dismissed the charge under D.C. Code § 22-722(a)(3)(B), just as it dismissed the charge under D.C. Code § 22-722(a)(6)." *Id.* While the thrust of the Court's opinion in

Andrews was an analysis of the facts under § 722(a)(3)(B), it fully supports the plain reading of the statute that there must be an "ongoing," and not imminent or inevitable, official proceeding to violate § 722(a)(6).

Case law analyzing the federal counterpart to § 722(a)(6) is in complete agreement with this interpretation of the statutory language. As discussed more fully below in Section IV, the District of Columbia obstruction of justice statute was patterned on the federal obstruction of justice statute. Indeed, the language of D.C. Code § 722(a)(6) is virtually identical to that of 18 U.S.C. § 1503(a). Federal courts interpreting this statute "speak with one voice" on the requirement that there must be an active, pending proceeding to support a conviction for obstruction of justice. *Smith, supra*, 729 F. Supp. at 1384, citing *United States v. Capo,* 791 F.2d 1054, 1070 (2d Cir.1986) ("To obtain a conviction under this section, the government must show that there was a pending judicial proceeding, such as a grand jury proceeding, ... and the defendant knew of and sought to influence, impede, or obstruct the judicial proceeding....") (citations omitted), *reh'g granted on other grounds,* 817 F.2d 947 (2d Cir.1987) (*en banc*); *United States v. Walasek,* 527 F.2d 676, 678 (3d Cir.1975) ("[A] pre-requisite for a conviction for obstruction of justice under the final clause of 18 U.S.C. § 1503 is the pendency of some sort of judicial proceeding which equates to an "administration of justice.") (citations omitted); *United States v. Vesich,* 724 F.2d 451, 454 (5th Cir.1984) ("A prerequisite to any violation of section 1503 is the existence of a pending judicial proceeding known to the violator.") (citations omitted); *United States v. Risken,* 788 F.2d 1361, 1368 (8th Cir.) (same), *cert. denied,* 479 U.S. 923, 107 S.Ct. 329, 93 L.Ed.2d 302 (1986); *United States v. Ryan,* 455 F.2d 728, 733 (9th Cir.1972) ("[I]n order to constitute

an offense under Section 1503, the act charged must be in relation to a proceeding pending in the federal courts....").

This Court should look to *Smith*, supra, 729 F. Supp. at 1380, for guidance. In that case Smith, a District of Columbia police officer, was arrested in an undercover sting operation conducted by the Internal Affairs Division of the Metropolitan Police Department. Smith was videotaped seizing 18 packets of government-manufactured counterfeit cocaine, but only turned in 15 of those packets. *Id.* at 1381-82. Based on that conduct, Smith was charged with obstruction of justice in violation of 18 U.S.C. § 1503, tampering with evidence in violation of D.C. Code § 723, and theft under D.C. Code §§ 3811, 3812.

The Court dismissed the obstruction of justice count before trial finding that there was no pending judicial proceeding at the time of Smith's actions and therefore, as a matter of law, he could not be convicted of obstruction of justice. The Court expressly rejected the position the government advances here, that the defendant could be convicted of obstruction of justice because the required proceeding was 'imminent':

> That judicial proceedings be pending at the time of defendant's conduct is thus a *sine qua non* of a charge under Section 1503. In the present case, there is no dispute that at the time of the defendant's actions, no criminal charges had been filed, and no grand jury investigation or proceeding was pending. The government argues that defendant's conduct falls within the statute because "[h]e had every reason to believe that when he arrested [the undercover officer] and seized the suspected drugs, that judicial proceedings would have been imminent." The government candidly conceded at argument, however, that it found no cases supporting this "imminence" theory. Under this theory, as defendant points out, any offender aware of his imminent arrest and prosecution by federal authorities who conceals evidence of the crime could potentially be charged with obstruction of justice under Section 1503.... The Court is compelled to reject this boundless reading of Section 1503[].

Id. at 1385.

Like the Court in *Smith*, this Court should hold that a pending official proceeding is a *sine qua non* of a charge under § 722(a)(6) and since there was no such proceeding here until the 911 call was placed, actions before the 911 call are legally insufficient to support a conviction for obstruction of justice.

For all of these reasons, the standardized pattern jury instruction pertaining to obstruction of justice under § 722(a)(6) requires a jury to find that there was a "pending proceeding" and reads as follows:

> The elements of obstructing justice, each of which the government must prove beyond a reasonable doubt, are that:
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> 1. [Name of defendant] [obstructed or impeded] [endeavored to obstruct or impede] the due administration of justice in a *pending* [grand jury investigation] [trial] [hearing] [investigation] [other proceeding] [in a court of the District of Columbia] [conducted by [the Council of the District of Columbia][name of agency or department of the District of Columbia government]];
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> 2. [Name of defendant] did so [by threats of force] [with the intent to undermine the integrity of the pending [proceeding] [trial] [investigation].

Criminal Jury Instructions for the District of Columbia, 6.101 (F) (5th ed. Rev. 2009) (emphasis added). The government's attempt to read this requirement out of the instruction is without support in the statute or the case law and should be rejected.

III. DEFENDANT PRICE'S CONVERSATION WITH MS. WONE IN 2007 CANNOT CONSTITUTE OBSTRUCTION OF JUSTICE UNDER § 722(A)(6).

In November, 2007, Kathy Wone, widow of Robert Wone, invited Defendant Price to lunch. Over lunch, they had a conversation discussing a variety of things including how each was faring in the wake of Mr. Wone's death. This conversation is included in the Indictment as an overt act in furtherance of the conspiracy to obstruct justice:

> 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.

In an effort to save the only overt act that occurred after August 3, 2006, the government claims that Mr. Price's allegedly false statement to Ms. Wone, "an essential witness to the government's investigation," was made to "(1) falsely reassure Ms. Wone that he and his co-defendants were, in fact cooperating fully with the police's [sic] investigation", and "(2) corruptly . . . undermine Mrs. Wone's confidence in the government's ongoing efforts to identify the murderer(s)." Opp. p. 17. With no legal authority for its position, the government baldly alleges that Price's alleged failure to disclose that his brother had a key to the Swann Street home "is yet another affirmative act undertaken to influence the conduct of a material witness in the investigation as well as deprive the police of another potential source of information." *Id.*

For the reasons discussed above and in the Motion to Dismiss, only acts that occur "in an official proceeding" may support a finding of obstruction of justice under § 722(a)(6). Nothing about this conversation occurred 'in an official proceeding.' Ms. Wone is neither a law enforcement officer nor an agent. She played no role in the 'official proceeding,' that is the "criminal investigation into the murder of Robert Wone," other than as a witness. Even if she was an essential witness, as the government claims, it is nonsensical to believe that by *not* telling her that his brother had keys to the house Price was attempting to corruptly influence the police investigation. Indeed, the Indictment alleges that Price made that same nondisclosure directly to the police:

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

Because the conversation with Ms. Wone has no nexus to the "official proceeding," it may not support a violation of § 722(a)(6).

Moreover, nothing about the alleged conversation could remotely be seen as obstructing or impeding or endeavoring to obstruct or impede the "due administration of justice." There is no allegation that Mr. Price attempted to influence Ms. Wone's testimony in any way. Indeed, the part of the conversation referenced in the Indictment, that is, whether Michael Price had a key to the house, was knowledge possessed not by Ms. Wone, but by Mr. Price. He had no obligation – legal or otherwise – to tell Ms. Wone who had keys to the Swann Street residence. It defies logic for the government to now argue that Mr. Price's *failure* to share information with Ms. Wone makes him culpable for impeding the administration of justice. Even if Mr. Price's goal, as the government claims in its Opposition, was to "falsely reassure" Ms. Wone that the Defendants were cooperating with the police, or "undermine Ms. Wone's confidence in the government's investigation," that utterly fails to make out obstruction of justice.

The government's argument here is nothing short of astonishing: a suspect could have a private conversation with a potential witness in a criminal investigation and by *not* disclosing information to that witness the suspect could be criminally liable for obstruction of justice. Nothing in the language of the statute supports such a farfetched interpretation of obstruction of justice and tellingly, the government cites no case law in support of its theory.

Like the other obstruction theories advanced by the government, this one fails as a matter of law.

IV. FALSE STATEMENTS TO INVESTIGATING OFFICERS ARE LEGALLY INSUFFICIENT TO SUPPORT A FINDING OF OBSTRUCTION OF JUSTICE UNDER D.C. CODE SECTION 22-722(A)(6).

A. IN CONSTRUING AND APPLYING D.C. STATUTES, D.C. COURTS LOOK TO INTERPRETATION OF SIMILAR FEDERAL STATUTES.

The government argues that in construing and applying the omnibus or "catchall" provision of the District's obstruction of justice statute, D.C. Code § 22-722(a)(6), this Court should look to the interpretation of three federal criminal statutes, specifically: 18 U.S.C. §§ 1505, 1512 and 1519(b)(3). Opp. p. 11. Inexplicably, however, the government argues that in interpreting D.C. Code § 22-722(a)(6), this Court should not look to the interpretation of the omnibus provision of the federal obstruction of justice statute, 18 U.S.C. § 1503(a), Opp. p. 15, which is not only the exact federal counterpart to § 22-722(a)(6), it is the law from which § 22-722(a)(6) was derived. The government has it backwards.

The District of Columbia Court of Appeals ("DCCA") and the courts of the District of Columbia consistently "look[] to federal decisions construing federal statute[s] for guidance in construing [a] similar local statute." *District of Columbia v. Jerry M.*, 717 A.2d 866, 869 n.5 (D.C. 1998) ((emphasis added), citing *Arthur Young & Co. v. Sutherland,* 631 A.2d 354, 361 n. 17 (D.C.1993).[10] *See also, Corley v. United States,* 416 A.2d 713, 714 (D.C.), *cert. denied,* 449 U.S. 1036, 101 S.Ct. 614 (1980).

Here, the four cases relied upon by the government are not only factually inapposite, they construe and apply federal statutes which are aimed at behavior not at

[10] Holding that "[t]his court has 'often looked to cases construing Title VII [of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1988),] to aid us in construing the D.C. Human Rights Act.' The anti-discrimination provisions of both statutes are substantially similar. From time to time in the course of this opinion, therefore, we shall cite as authority federal cases arising under the federal act in interpreting similar provisions of the DCHRA." *Arthur Young & Co.*, 631 A.2d at 361 n.17 (citations omitted).

issue in this case,[11] and which lack certain substantive elements required by D.C. Code § 22-722.[12] By comparison, 18 U.S.C. § 1503(a), which the government contends the Court should ignore, is the direct counterpart to the District's obstruction of justice statute, D.C. Code § 22-722(a)(6). As the DCCA has long recognized, § 722 was directly adopted from and is substantively identical to the federal obstruction of justice statute, 18 U.S.C. § 1503: "D.C. Code § 22-722 was part of the District of Columbia Theft and White Collar Crimes Act of 1982. In the main, it carried forward the provisions of pre-existing law, D.C. Code § 22-703 (1981), which in turn reflected the provisions of former 18 U.S.C. § 1503 (1970)." *Smith v. United States*, 591 A.2d 229, 231 (D.C. 1991). *See also Ball v. United States*, 429 A.2d 1353, 1359 (D.C. 1981) (comparing D.C. Code § 22-703 with 18 U.S.C. § 1503, holding that they contain the same substantive provisions and can be broken down into the same three categories of prohibited conduct).

Even a cursory review of the language of the omnibus provisions of the two statutes makes clear their common heritage. In relevant part, 18 U.S.C. § 1503(a) provides that:

> Whoever . . . corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b).

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[11] *See* Opp. at 11. The government cites the following cases: *United States v. Hunt*, 526 F.3d 739, 745 (11th Cir. 2008) (applying 18 U.S.C. § 1519 which criminalizes falsifying, altering or destroying records to impede investigation); *United States v. Price*, 951 F.2d 1028, 1032 (9th Cir. 1991) (applying 18 U.S.C. § 1505 which criminalizes obstructing civil proceedings before government departments, agencies and committees); *United States v. Jacquemain*, 368 F. Supp. 2d 800, 805 (E.D. Mich. 2005) (applying 18 U.S.C. § 1512 which criminalizes tampering with witness, victims or informants); *Unites States v. Sprecher*, 783 F. Supp. 133, 163-64 (S.D.N.Y. 1992) (same as prior).

[12] For example, two of the cases relied upon by the government, *Jacquemain*, 368 F. Supp. 2d at 805, and *United States v. Sprecher*, 783 F. Supp. at 163-64, both construe and apply 18 U.S.C. § 1512. Section 1512 does not require the "nexus" element required by both 18 U.S.C. § 1503(a) and D.C. Code § 22-722(a)(6). *United States v. Ring*, 628 F. Supp. 2d 195, 221-22 (D.D.C. 2009)

Id. (emphasis added). D.C. Code § 22-722(a)(6), provides in nearly identical language that:

> A person commits the offense of obstruction of justice if that person . . . [c]orruptly, or by threats of force, in any way obstructs or impedes or endeavors to obstruct or impede the due administration of justice in any official proceeding.

Id. (emphasis added).

The elements required to prove a violation of both statutes are, likewise, identical. Those elements relating to a violation of § 22-722(a)(6) are set forth in Instruction 6.101 (F) of the Standardized Criminal Instructions for the District of Columbia and spelled out in Section II, above. Likewise, the "'core elements that the government must establish to prove a violation of the omnibus clause of § 1503 [are]: (1) there must be a pending judicial proceeding; (2) the defendant must have knowledge or notice of the pending proceeding; and (3) the defendant must have acted corruptly with the specific intent to obstruct or impede the proceeding in its due administration of justice.'" *United States v. Wood*, 6 F.3d 692, 695 (10th Cir. 1993) (quoting *United States v. Williams*, 874 F.2d 968, 977 (5th Cir.1989)). *See also, United States v. Littleton*, 76 F.3d 614, 619 (4th Cir.1996) ("To be guilty of obstructing justice under § 1503, a defendant must have knowledge or notice of a pending judicial proceeding, and must have acted with the intent to influence, obstruct, or impede that proceeding in its due administration of justice.").

Precisely because of the shared history and substantive equivalency of the two statutes, the DCCA consistently and regularly looks to federal interpretation and application of 18 U.S.C. § 1503 in construing and applying D.C. Code § 22-722 (adopted in 1982), and its precursor, D.C. Code § 22-703. *See, e.g., Smith*, 591 A.2d at 231

(relying on federal interpretation of term "witness" in 18 U.S.C. § 1503, in construing the same term in D.C. Code § 22-722); *Ball*, 429 A.2d at 1359 n.10 (construing conduct precluded by D.C. Code § 22-703, in accord with conduct precluded by 18 U.S.C. § 1503); *McBride v. United States*, 393 A.2d 123, 131 (D.C. 1978) (looking to federal cases construing § 1503 in determining the elements of D.C. Code § 22-703).

B. TO CONSTITUTE ACTIONABLE OBSTRUCTION OF JUSTICE UNDER D.C. CODE § 22-722(A)(6), THE ALLEGED OBSTRUCTIVE CONDUCT MUST HAVE THE NATURAL AND PROBABLE EFFECT OF OBSTRUCTING THE DUE ADMINISTRATION OF JUSTICE.

As noted in Defendants' Motion to Dismiss, there is not a single DCCA case decided since the current version of D.C. Code § 22-722 was passed in 1982 holding that a suspect who makes false statements to an investigating officer during an investigation commits obstruction of justice under § 22-722(a)(6).[13] Moreover, Defendants are unaware of any reported federal case—and the government cites none—where a person was convicted of obstructing justice based solely on unsworn false statements to law enforcement agents.

The absence of such cases is explained by the plethora of judicial decisions limiting the broad language of the omnibus or "catchall" provision of 18 U.S.C. § 1503(a), the federal obstruction of justice statute, from which the District's statute is directly derived. As the Second Circuit recently explained, "[t]he omnibus clause contains a more general and open-ended prohibition, punishing anyone who corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of

[13] Indeed, having reviewed every DCCA case in which obstruction is mentioned, we can find no case, *ever*, holding that a suspect who lies to the police during an investigation commits obstruction of justice under § 22-722.

justice. Wary of the breadth of this language in a criminal prohibition, courts have limited its scope in several ways." *United States v. Triumph Capital Group, Inc.*, 544 F.3d 149, 166 (2d Cir. 2008).

First, as discussed in Section II above, the United States Supreme Court long ago "imposed a requirement that a judicial proceeding actually exist, and that the defendant know or have notice of its existence" at the time the obstructive conduct occurred, for the law to be violated. *Id.* (citing *Pettibone v. United States,* 148 U.S. 197, 206-07 (1893)). *See also, United States v. Reed,* 773 F.2d 477, 485 (2d Cir.1985) ("[T]he existence of an ongoing proceeding is an element of a § 1503 violation . . . ."). In light of the federal courts' construction of the federal obstruction statute as requiring both the existence and knowledge of a pending official proceeding for a violation to occur, the District has likewise construed § 22-722(a)(6) as requiring the existence and actual knowledge of an official proceeding, not simply anticipation of such a proceeding.

Second, numerous federal courts of appeal "in order to confine § 1503's application to sufficiently harmful conduct, imposed a 'nexus' requirement, under which the defendant's conduct must be such 'that its natural and probable effect would be the interference with the due administration of justice.'" *Triumph Capital Group, Inc.*, 544 F.3d at 166 (quoting *United States v. Wood,* 6 F.3d 692, 695 (10th Cir.1993) (internal quotations and citations omitted) (emphasis added)). In 1995, in *United States v. Aguilar*, 515 U.S. 593, 600-601 (1995), "the Supreme Court adopted this 'nexus' requirement" with a slight modification. 515 U.S. at 600. In doing so, the *Aguilar* Court ruled that to violate the omnibus section of the obstruction of justice statute, the defendant's action must have "the natural and probable effect of obstructing the judicial proceeding."

Aguilar, 515 U.S. at 601. *See also, id.* at 613 (Scalia, J., concurring in part and dissenting in part).

The government seeks to avoid this nexus requirement by opining, without supporting authority, that "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." Opp. p. 15. Their argument is plainly at odds with—and contradicted by—the fact that the DCCA has and does look to the federal courts' interpretation and application of 18 U.S.C. § 1503 in determining, construing and applying the elements of D.C. Code § 22-722. *Smith*, 591 A.2d at 231; *Ball*, 429 A.2d at 1359 n.10; *McBride*, 393 A.2d at 131. Accordingly, in light of the Supreme Court's holding that § 1503(a) encompasses the nexus requirement, the District's substantively identical § 22-722(a)(6) must be construed to include the nexus requirement articulated in *Aguilar*.[14]

C. Count II of the Indictment Fails to Allege Obstructive Acts Because as a Matter of Law Defendants' Allegedly False Statements Do Not Have The Natural and Probable Effect of Obstructing MPD's Investigation.

Aguilar and cases pre- and post-dating it consistently hold that false statements to an investigating officer—as compared to other obstructive conduct, *e.g.*, destroying evidence or witness tampering—do not constitute obstruction of justice because such statements do not have the 'natural and probable effect of obstructing an official

[14] It is worth noting that federal courts have also found the nexus requirement present in 18 U.S.C. § 1505 and 18 U.S.C. § 1512. See, *e.g.*, *United States v. Reich*, 479 F.3d 179, 185-86 (2nd Cir. 2007). As previously noted, in its opposition, the government expressly encourages the Court to look to federal cases interpreting §§ 1505 and 1512, to guide the Court's interpretation of DC Code § 22-722(a)(6).

proceeding.' *See Aguilar*, 515 U.S. at 599-602; *Triumph Capital*, 544 F.3d at 166; *Wood*, 6 F.3d at 696-97.

As more fully set forth in Defendants' Motion, in *Aguilar* a sitting federal judge lied to law enforcement officers. Affirming reversal of his conviction, the Supreme Court held "[w]e do not believe that uttering false statements to an investigating agent—and that seems to be all that was proved here—who might or might not testify before a grand jury is sufficient to make out a violation of the catchall provision of § 1503." 515 U.S. at 600. The Court found that under those circumstances the false statements alone "cannot be said to have the 'natural and probable' effect of interfering with the due administration of justice." *Id.* at 601.

The Second Circuit reached the same decision in *Triumph Capital*. There the defendant was charged with obstructing justice under §1503(a) by destroying incriminating documents. 544 F.3d 155-56. The defendant, citing *Aguilar*, argued that his conviction should be overturned on the basis that he did not know that his destruction of the documents would, even if intended, impede the due administration of justice. *Id.* at 165, 169. Rejecting this argument, the Second Circuit distinguished the obstructive conduct of destroying a document from making false statements to an investigating officer:

> [Defendant's] argument ignores a key difference between the issuance of a grand jury subpoena *duces tecum* seeking the production of documents and the questioning of a subject by an investigating agent. Grand jury subpoenas *duces tecum* are customarily employed to gather information and make it available to the investigative team of agents and prosecutors so that it can be digested and sifted for pertinent matter. . . . Accordingly, subpoenas *duces tecum* are often drawn broadly, sweeping up both documents that may prove decisive and documents that turn out not to be. This practice is designed to make it unlikely that a relevant document will

> escape the grand jury's notice, and it is generally effective. Destruction of a relevant document is therefore likely to impact the grand jury's deliberations. *Cf. Aguilar*, 515 U.S. at 601, 115 S.Ct. 2357 ("delivery of false documents" to the grand jury would be obstruction of justice).

Id. at 168. The *Triumph Capital* court explained that where a defendant makes a false statement to an investigating officer, even where the defendant has the "impression"[15] that his false statement will affect the proceeding, he cannot *know* that because "'what use will be made of false testimony given to an investigating agent who has not been subpoenaed or otherwise directed to appear before the grand jury is ... speculative.'" *Id.* at 169 (quoting *Aguilar*, 515 U.S. at 600-01).

Moreover, as the Tenth Circuit observed in *Wood,* in which the court dismissed from the indictment an obstruction charge under §1503(a), the making of false statements to an investigating officer does not have the natural and probable effect of impeding the due administration of justice because:

> [I]t [is] difficult to believe that the FBI agents would terminate their investigation based on the self-serving exculpatory explanation offered by defendant. If the agents had reason to believe that defendant was a participant in MacDonald's political corruption, they would not expect a full confession in the context of an unsworn interview. That the investigation eventually revealed what the government claims is the truth about the car is evidence that they did not rely exclusively on defendant's statements. We conclude that defendant's unsworn exculpatory statements given in his own office to interviewing FBI agents did not have the natural and probable effect of impeding the due administration of justice in the sense required by 18 U.S.C. § 1503, and a prosecution under that section is therefore barred.

Wood, 6 F.3d 696-97 (citations omitted).

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[15] "Aguilar himself testified that, at the end of the interview, it was his 'impression' that his remarks would be conveyed to the grand jury." *Triumph Capital*, 544 F.2d at 170 (citing *Aguilar*, 515 U.S. at 614 (Scalia, J., concurring in part and dissenting in part)).

The government seeks to distinguish *Aguilar* and *Wood* from the instant case, arguing that "[u]nlike the defendants in *Aguilar* and *Woods,* [sic] who had made false statements to law enforcement personnel that [sic] 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)." Opp. at 15 (emphasis in original). The government misreads *Aguilar* and *Wood.*

In *Aguilar,* the defendant was charged with obstructing justice under §1503(a), specifically because he made false statements in hopes and indeed with the impression his statements would be provided *to a grand jury.* 515 U.S. at 596-97. In explaining why such actions did not have the natural and probable effect of interfering with the due administration of justice, the Court drew a distinction between the investigative process of a grand jury and that of an investigating agent. In the case of the former, false documents or false testimony provided directly to a grand jury "all but assures that the grand jury will consider the material in its deliberations," whereas it is purely speculative as to what use an investigating agent would make of false testimony. 515 U.S. at 601. The *Triumph Capital* court's decision hinged on this same distinction. Destroying a document that the grand jury would likely have requested and would have considered decidedly obstructs the investigative process in a way that making false statements to an investigating agent, who can and frequently does investigate the veracity of such statements, simply cannot. *See,* 544 F.3d at 166

The Tenth Circuit's decision in *Wood* clearly illustrates this point. Indeed, in stark contrast to the government's argument, the *Wood* court did not mention, never mind hinge its decision to dismiss the obstruction count of the indictment on the question of

whether the investigating agents would or would not testify before a grand jury. Rather, the *Wood* court's decision was premised on the court's conclusion that a defendant's unsworn exculpatory statements to an investigating agent could not and did not have the natural and probable effect of impeding the due administration of justice because such statements could not plausibly be expected to end or otherwise meaningfully impede the agent's—not a grand jury's—investigation. As *Aguilar, Triumph Capital* and *Woods* reflect, the operative question is whether false statements to an investigating agent have the natural and probable effect of impeding the agent's investigation. As a matter of law, the courts have held it cannot.

The rationale of *Wood* is directly applicable to the obstruction indictment in this case. Assuming that the Defendants' statements to MPD were false and were made with the intent to obstruct, at most the government has alleged that Defendants each denied knowing what happened to Robert Wone. That general denial, without more, cannot have the natural and probable effect of impeding the police investigation. Indeed, assuming Defendants' statements amount to no more than the 'self-serving exculpatory explanations,' alleged by the government, the interrogating MPD officers hearing those explanations "would not expect a full confession in the context of an unsworn interview." *Id.* at 696. Likewise, as in *Wood*, "that the investigation eventually revealed what the government alleges is the truth about [what happened to Mr. Wone] is evidence that they did not rely exclusively on defendant[]s' statements." *Id.* at 697. As a matter of law, therefore, the Defendants' unsworn exculpatory statements given to interrogating MPD officers could not have the natural and probable effect of impeding the due administration of justice in the sense required by D.C. Code § 22-722.

IV. CONCLUSION

This Court has the clear authority to dismiss legally insufficient counts of the indictment. *Not one* of the alleged acts in the Indictment, even if proved at trial, would sustain a conviction for obstruction of justice under D.C. Code § 722(a)(6) or conspiracy to obstruct justice. The Defendants should not be made to stand trial on counts which cannot survive a motion for judgment of acquittal. Counts One and Two are legally and fatally flawed and should be dismissed.

Dated: January 5, 2010

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendants' Joint Motion to Dismiss Counts One and Two of the Indictment was served via fax and hand, this 5th day of January, 2010, upon:

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