SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CRIMINAL DIVISION
2010 JUN 16 P 12:19

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

DEFENDANTS' JOINT MOTION FOR JUDGMENT OF ACQUITTAL

Defendants Joseph R. Price ("Price"), Victor J. Zaborsky ("Zaborsky") and Dylan M. Ward ("Ward") move the Court for an entry of judgment of acquittal on all counts of the superseding indictment ("Indictment") pursuant to Rule 29(a) of the Superior Court Rules of Criminal Procedure. The evidence before the Court, even viewed in the light most favorable to the government, would not permit any reasonable finder of fact to conclude that each element of the offenses with which they have been charged has been established beyond a reasonable doubt. To convict the Defendants on this record, a fact finder would have to "cross the bounds of permissible inference and enter the forbidden territory of conjecture and speculation."[1] This a fact finder may not do. The Court should enter a judgment of acquittal.

I. BACKGROUND

Each of the Defendants is charged in a three-count Indictment filed on January 15, 2009. Count One, conspiracy to obstruct justice (D.C. Code § 22-1805(a)), alleges that

[1] *Shelton v. United States*, 505 A.2d 767, 771 (D.C. 1986).

the Defendants unlawfully agreed 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." and identifies fifteen overt acts in furtherance of that conspiracy. Count Two alleges that the Defendants each "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 (D.C. Code § 22-722(a)(6)). Finally, Count Three alleges that the Defendants tampered with physical evidence, "that is blood and bloody items, a knife, and items used to clean the scene of the homicide," with the "intent to impair the integrity and availability of that evidence for use in the official proceeding." Tampering with Physical Evidence (D.C. Code § 22-723).

At the conclusion of pretrial motions, the Defendants waived their right to a trial by jury and on May 17, 2010 the case proceeded to trial before the Court. The government presented 31 witnesses, numerous exhibits, and stipulated facts before resting its case on June 16, 2010.

The Defendants now move the Court for the entry of a judgment of acquittal. Super. Cr. Crim. R. 29(a) provides that "[t]he court on motion of a defendant or on its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses." As discussed below, the volume of evidence presented by the government cannot hide the vacuum that persists in its proof. Granting the government all permissible inferences, the evidence is

simply legally insufficient to permit any fact finder to conclude that any of the three Defendants conspired to obstruct, or obstructed, justice or tampered with any physical evidence in the case.

II. THE LEGAL STANDARD

The Court knows well that in a criminal case the government bears the constitutional burden of proving that the accused committed each element of the charged offense beyond any reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). In keeping with this principle, a defendant may move for judgment of acquittal when the evidence presented at trial is legally insufficient to permit a finder of fact to conclude guilt to the required degree of certainty. "If there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted." *Curley v. United States*, 160 F.2d 229, 232-33 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947).

In deciding a motion for judgment of acquittal, the court reviews the evidence in the light most favorable to the government, "giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, and making no distinction between direct and circumstantial evidence." *Curry v. United States*, 520 A.2d 255, 263 (D.C. 1987), citing *United States v. Covington*, 459 A.2d 1067, 1070-71 (D.C. 1983). A motion for judgment of acquittal must be granted if the evidence, when viewed in the light most favorable to the government, is such that a reasonable juror *must* have a reasonable doubt as to the existence of any of the essential elements of the crime. *Curry*, *supra*, 520 A.2d at 263 (emphasis in original); *Austin v. United States*, 382 F.2d 129, 138 (D.C. Cir. 1967).

The finder of fact may draw only "justifiable" inferences from the evidence produced at trial in deciding guilt. The evidence is insufficient if, in order to convict, "the jury is required to cross the bounds of permissible inference and enter the forbidden territory of conjecture and speculation." *Shelton, supra*, 505 A.2d at 700-71 (holding that the trial court should have granted a motion for judgment of acquittal on the charge of attempted second degree burglary where there was no direct or circumstantial evidence of the defendant's intent to steal at the time he unlawfully entered the victims' home).

What constitutes a reasonable and justifiable inference will, of course, depend upon the evidence produced by the government. While the finder of fact is entitled to draw logical conclusions from the actual evidence adduced at trial, it may not engage in conjecture and guesswork. The inferences may not be irrational or arbitrary. The case of *Griffin v. Unites States*, 861 A.2d 610 (D.C. 2004), makes this point clear.

In *Griffin*, the defendant was charged with obstructing justice under D.C. Code § 22-722(a)(2) by endeavoring to "influence, delay, or prevent" a witness's truthful testimony at the defendant's preliminary hearing. The charge was based on a statement made by Griffin to the witness's sister asking her to tell the witness "to come down to his court date which was the next day after that and tell his lawyer everything that [she] told the police." *Id.* at 612. The government argued that from that statement, the jury was entitled to draw the inference that the defendant intended to prevent the witness from giving truthful testimony. The Court of Appeals disagreed:

> On this record . . . we cannot discern the requisite intent that would support beyond a reasonable doubt Mr. Griffin's conviction for obstruction of justice. Indeed, the record is not extensive enough for us to fathom what Mr. Griffin knew, if anything, concerning what [the witness] had told the police.

> Drawing the inferences the government advocates would take us into the realm of speculation. The record shows that Mr. Griffin did not ask [the witness] to come down and testify or lie in his behalf at his preliminary hearing. Rather, in a regular voice, he asked that she speak with his lawyer to tell him what she had said to the police. It is simply too much of a stretch to conclude that Mr. Griffin's message instructed [the witness] to lie at his preliminary hearing, or that by importuning her to tell his lawyer what she had told the police (a statement that in fact inculpated him) he somehow intended false testimony to be put before the tribunal. In short, on this limited and attenuated record, to convict Mr. Griffin of obstructing justice, jurors would have to engage in speculation and the drawing of several inferences which would not comport with the reasonable doubt standard required for a criminal conviction.

Id. at 614-15.

With this framework firmly in place, we turn to the evidence presented by the government in the instant case and consider what reasonable and justifiable inferences may be drawn from that evidence. As the Court will plainly see, neither the evidence presented by the government, nor the justifiable inferences that can be drawn from that evidence, is legally sufficient to establish the elements of the offenses beyond a reasonable doubt.[2]

III. MATERIAL AND REASONABLE INFERENCES FROM THE GOVERNMENT'S EVIDENCE

The Court is tasked with determining whether any reasonable trier of fact could find each element of the charged offenses beyond a reasonable doubt, considering the evidence in the light most favorable to the government. Before applying the relevant law to the facts of this case, the Court needs to be clear on what actual facts, material to the charges in the indictment, may fairly be concluded from the evidence presented by the government.

[2] Although the Defendants have jointly filed this Motion for Judgment of Acquittal, the Court should consider the evidence that has been introduced against each Defendant individually. While all Defendants share some facts and all of guiding legal principles, other facts – particularly those established by the Defendants' statements to the police – are admissible only against particular Defendants.

The government alleges, by way of the fifteen overt acts in Count One ("Overt Acts"), separate actions of the Defendants in furtherance of the conspiracy to obstruct justice.[3] Those Overt Acts provide a useful structure in considering the fair inferences that may be drawn from the record. We therefore examine each Overt Act before discussing the elements of the charged offenses and the applicable law.

A. OVERT ACT NUMBER 1

Overt Act 1 alleges that the Defendants cleaned the body of Robert Wone. There is no direct evidence on this record that any Defendant took any action that could be construed as "cleaning" Wone's body. None of the Defendants acknowledged to the police – or anyone else – that he cleaned Wone's body. There is no other witness who testified that Wone's body was cleaned by the Defendants.

Similarly, there is no circumstantial evidence that could lead a finder of fact to conclude that any one or all of the Defendants cleaned Wone's body. There is no evidence to suggest that, given the nature of the wounds, there should have been more blood (or any other material) on Wone's body than was observed by the EMT workers, medical personnel, or law enforcement leading to an inference that the body had been cleaned.[4] There is: no evidence that any implement was used to clean his body; no unexplained cloths with blood; no blood in the sinks or showers; and no water or cleaning agents on or near his body.

In fact, aside from the Defendants' statements, the only evidence relating to the

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[3] The superseding indictment originally contained seventeen Overt Acts. Overt Acts 2 and 3 were dismissed in their entirety, and the reference in Overt Act 1 to cleaning the crime scene was struck by the government, pretrial.

[4] Dr. Goslinoski testified that there was significant internal bleeding, resulting in approximately 20% of Wone's blood flowing into his body cavity. There was no testimony or evidence of any unexplained missing blood.

appearance of Wone's body on the scene came from paramedic Jeff Baker:

> Q: And you said – what did you do, as you were sort of at the head or in the captain's chair?
> A: I looked down, and I noticed his abdomen.
> Q: And what did you notice on his abdomen?
> A: It looked like his abdomen had been wiped.
> Q: What makes you say that? What did you see?
> A: It looked like striations on his abdomen that weren't on his chest, it reminded me of a kitchen towel wiping.
> Mr. Kirschner: And the witness has, a couple of times, kind of wiped his own palm from his chest down his stomach and ---
> Witness: It was his abdomen. It wasn't his chest. That's where I noticed the striations.
> Q: Okay. And when you say, "striations," were those sort of – was it striations of blood or striations of something else, if you could tell?
> A: It looked like it was an imprint of maybe a kitchen towel that kind of has lines that go down it, that's what it reminded me of.

(5/18/10 225:12 – 226:7)

During cross examination Baker made clear that he did not believe that there was wiping, but rather an impression of a towel, like a kitchen towel:

> Q: Tuesday you told us there appeared to be an impression of a towel; correct?
> The Court: You can answer that.
> The Witness: I said it appeared to be a film. That's what it looked like to me. And the way I explained it was it looked like a kitchen towel with lines.
> Q: Okay.
> A: That's the best way I could describe it.
> Q: Okay. Not wiped; correct?
> A: Not that a kitchen towel wiped his abdomen. I used it as a parallel to explain it.

(5/20/10 35:7-18)

Even in the light most favorable to the government, this testimony would not support any finding that (1) the body of Robert Wone was "cleaned," or (2) that any particular Defendant "cleaned" Wone's body. Indeed, the strongest inference that can be

drawn from this testimony is that at the time Wone was being transported,[5] it appeared to Baker that there was an impression on Wone's abdomen, leaving a "light layer of film, kind of like when you wash a window and you come back and look at it, and it's dried, and it's for the dirty part still there." (5/18/10 226:23 – 227:2) The fact that something may have made an impression on Wone's abdomen cannot support a finding that Wone's body was "cleaned," which is defined as "to rid of dirt, impurities or extraneous matter."[6] There is simply no evidence that any cleaning occurred, that anything that should have been present was, in fact, cleaned, or that the Defendants took part in any cleaning.[7]

B. OVERT ACT NUMBER 4

The fourth Overt Act, alleging that the Defendants manipulated the crime scene, contains two components. First, there is an allegation as to the mental state of the Defendants:

> In an effort to avoid detection and misdirect law enforcement authorities and others.

Second, there is the allegation of "orchestration":

> [T]he 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.

If the Court could properly find that the Defendants "endeavored to orchestrate the crime scene," then it could similarly infer that they did so for a malicious purpose. There is, however, absolutely no evidence that any one or all of the Defendants orchestrated the

[5] Baker specifically testified that he noticed the "striations" for the first time in the ambulance. (5/18/10 226:8-14).
[6] See http://www.merriam-webster.com/dictionary/clean .
[7] There is evidence in the record that Price, after discovering Wone stabbed, pushed up Wone's shirt to have access to the wounds and apply pressure as directed by the 9-1-1 operator. While this action may have created the film of blood, it can hardly support a finding that Price "cleaned" Wone's body.

crime scene. Such a conclusion would be rank, impermissible speculation.

Merriam-Webster's dictionary defines "orchestrate" as "to arrange or combine so as to achieve a desired or maximum effect."[8] There is no direct evidence in the record that any Defendant tried to orchestrate or arrange the crime scene. Instead, the Court is left to consider whether there is circumstantial evidence sufficient to support such a finding beyond a reasonable doubt. There is not.

There was no testimony or evidence suggesting, in any way, that:

- Wone's body was orchestrated, or arranged, by any Defendant;[9]
- the room in which Robert Wone was found was somehow arranged to "misdirect law enforcement," or
- anything contained in the house was orchestrated or arranged.[10]

The only specific allegation of 'orchestration' relates to the knife that was located in the guestroom. Those allegations, forming the basis of Overt Acts 5, 6, and 7, are addressed next.

C. Overt Acts Number 5, 6 and 7

Collectively, Overt Acts 5, 6, and 7 concern the knife that was recovered from the guestroom where Wone was found stabbed and allege that the Defendants "individually or in combination" planted that knife. Specifically, Overt Act 5 alleges that the Defendants "retrieved a knife from a knife set located on the kitchen counter of the residence." Overt Act 6 then alleges that the Defendants "used a white cotton towel to place Robert Wone's blood" on that knife. Finally, Overt Act 7 alleges that the

[8] See http://www.merriam-webster.com/dictionary/orchestrate .
[9] In fact, Overt Acts 2 and 3, which contained allegations that the Defendants placed Wone's body on the bed in the guestroom, were dismissed pretrial.
[10] Similarly, the government abandoned the allegation, originally contained in Overt Act 1, that the crime scene was cleaned by the Defendants.

Defendants "placed the bloody knife on the night stand located beside the bed in the guestroom." There is simply no evidence, direct or circumstantial, that any of the three Defendants retrieved the knife from the kitchen and placed blood on that knife with a white cotton towel before leaving it on the night stand.

To be fair, the Court may properly conclude that the knife recovered from the guestroom of 1509 Swann Street came from the kitchen. The knife would appear to match the knives in a block found in the kitchen where one knife was missing. The Defendants also made statements to the police indicating that they believed that the knife found in the guestroom came from the kitchen.

While there is evidence that the knife came from inside the house, there is absolutely no evidence that any of the three Defendants touched the knife before Price discovered that Wone had been stabbed. By his own admission, Price moved the knife from Wone's chest to the nightstand where it was found by the police. The record is otherwise devoid of direct or circumstantial evidence that any of the three Defendants touched the knife – by retrieving it or by placing blood on it – before Wone was found stabbed. To conclude otherwise would be pure, impermissible speculation.

The government's case has been marked by a conspicuous absence of evidence related to its claim of a "planted" knife.

First, there is none of more common types of direct evidentiary proof, such as eyewitness testimony or admissions by any of the Defendants which would support the government's claim of a "planted" knife.

Second, while photographs taken of the knife found in the guestroom (Gov't Ex. 13) clearly show blood on the blade of the knife (which the government stipulates is

Wone's blood), the government failed to present any evidence from which a fact-finder could conclude beyond a reasonable doubt that the blood pattern seen on the crime scene knife was the result of anything other than stabbing Wone. The government offered no expert testimony from a blood pattern expert that would permit an inference that the pattern of blood on the knife resulted from wiping it with a towel as opposed to it having been thrust three times into Wone's chest. Similarly, the government produced absolutely no evidence to suggest that the blood pattern seen on the towel found in the guestroom resulted from wiping a knife through the towel. Without such evidence, the government's assertion that one or more of the Defendants used a white, cotton towel to place Robert Wone's blood on the knife from the kitchen remains unproved.

Third, contrary to the government's earlier claims, Dr. Lois Goslinoski did not testify that the crime scene knife was inconsistent with the wounds inflicted on Wone. In fact, Dr. Goslinoski found that the wounds were entirely consistent with the dimensions of the crime scene knife.

> Q: Okay. Now Mr. Connolly had asked you a question about the knife. The knife that the officers brought you – Officer Egan brought you to examine in the autopsy when you were doing the autopsy of Mr. Wone, you can't say with certainty that that was the knife that was used to make those stab wounds, correct?
> A: That's correct.
> Q: But what you can say is that based on the shape, the size of the knife, the width, the length that then this knife would be consistent with or a possible weapon that was used to inflict those wounds, correct?
> A: Yes.

(5/21/10 80:6-17)

Fourth, the photographs of the crime scene knife show clearly that not only was the blade of the knife covered in Wone's blood, but that it also contained obvious pieces

of human tissue and hair fragments,[11] all of which is consistent with the conclusion that the crime scene knife was used to stab Wone.

Finally, the only evidence pertaining to the issue of the planted knife came from the government's hair and fiber expert, Douglas Deedrick. Careful review of his testimony demonstrates the very limited scope of his opinions and could not possibly support a finding beyond a reasonable doubt that the knife was 'planted' in the way suggested by these Overt Acts and argued by the government.

Mr. Deedrick's opinion testimony was limited to his belief that, based upon *slight* differences in "fluorescence," white cotton fibers found on the blade of the crime scene knife, could not be associated with the t-shirt that Wone was wearing when he was stabbed. However, Mr. Deedrick could not testify that the white cotton fibers on the knife blade originated from the white towel.

> Q. You are not – just to be clear, you are not saying that the white cotton fibers that are on the knife blade came from that towel?
> A. I'm not saying that.
> Q. And the source of those white – there could be a wide variety of sources for the white cotton fibers that you found on the knife, correct?
> A. Yes.
> Q. So you cannot say to a reasonable degree of scientific certainty, for example, that the white cotton fibers on the knife came from the towel.
> A. I can't.

(5/28/10 79:23-25-80:1-9)

In fact, Mr. Deedrick acknowledged that the white cotton fibers on the knife could have come from any number of items, given the ubiquitous nature of white cotton fibers. Nor, as the Court noted in its ruling on Mr. Deedrick's "tests," did Mr. Deedrick testify

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[11] Indeed, the government's trace evidence expert, Douglas Deedrick, noted that cut hairs of possible Mongol (*i.e.*, Asian) origin were found on the knife.

that the stabbing of Mr. Wone would have necessarily resulted in the transfer of fibers from the t-shirt to the knife.[12]

> Counsel: [T]hat's simply not enough, we believe, for him to reliably conclude that, any time you stab a knife through a tee shirt, whether it's in a body, a pork loin, or anything else, there's going to be a transfer from the tee shirt.
>
> The Court: I don't think he did conclude that. He never did. All he did was testify about the difference between the fiber transfer in his experiments and that which he observed on the knife and didn't draw a further conclusion about it . . .

(6/1/10 18:24-25-19:1-8)

Because there is (1) no evidence from which one could conclude that fibers from the t-shirt transferred to the knife when Wone was stabbed and (2) no evidence from which one could conclude that the cotton fibers on the knife came from the white towel, even viewing Mr. Deedrick's testimony in the light most favorable to the government, a reasonable fact-finder could not infer beyond a reasonable doubt that anyone used the white cotton towel to transfer blood onto the knife.[13]

Altogether, therefore, there is no evidence from which any trier of fact could justifiably conclude that the knife was planted, much less by the Defendants in the way alleged in Overt Acts 5, 6 and 7.

D. Overt Acts Number 9 and 10

Overt Acts 9 and 10 relate to the 9-1-1 call placed by Zaborsky at 11:49 p.m.:

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[12] Mr. Deedrick's "fabric imprint" test, in which he lightly dabbed the bolster of the knife with a towel dipped in blood offers no support for the government's theory of a planted knife. Mr. Deedrick testified the dotted pattern he observed on the crime scene knife could have been caused by any number of other actions, including blood spatter that might result from the stabbing of Wone or contact between Mr. Wone's t-shirt and the knife during the stabbing. Even the Government conceded that fact: "Ms. Lieber: And again, to be clear, Mr. Deedrick is not rendering any opinion that something that the towel caused blood on the knife to a reasonable degree of scientific certainty." (5/27/10 75)

[13] The Government also introduced into evidence a "cutlery set" found in Ward's bedroom closet with a knife missing from it. There is absolutely no evidence that would connect the "missing" knife from the cutlery set with Wone's murder and any attempt by the government to argue that the missing knife was the murder weapon amounts to nothing more than rank speculation, unsupported by any evidence.

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 place a call to 9-1-1 and related, in part, the story that the defendants had fabricated and agreed to tell 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.

The record is clear that Zaborsky called 9-1-1 at 11:49 p.m. It is pure speculation, however, that the call was placed "a considerable period of time" after Robert Wone suffered his "fatal wounds." There is no direct evidence of exactly when Wone was stabbed. The Court is left to rely on circumstantial evidence in determining whether a reasonable trier of fact could conclude beyond a reasonable doubt that this unspecified, "considerable" period of time elapsed between the stabbing and the call to 9-1-1. On the record before the Court, no such conclusion can be drawn.

The government's only evidence in the record – aside from the statements of the Defendants themselves – relating to any fact between 10:30 p.m. and 11:49 p.m. on the evening of August 2, 2006 comes from two sources: (1) the testimony of Detective Bryan Waid that emails were sent from Wone's blackberry at 11:05 and 11:08 p.m.; and (2) the testimony of William and Claudia Thomas who live at 1507 Swann Street, next door to 1509 Swann Street.

As to the testimony of Det. Waid, the only inference that could be properly drawn is that Wone may have been alive and sending emails as late as 11:08 p.m.

From the testimony of the Thomases, drawing all inferences in favor of the government, the Court could properly conclude that William Thomas heard a scream sometime between 11:00 and 11:30 p.m. when Maureen Bunyan was doing her news broadcast. Mr. Thomas had been asleep when he woke to use the bathroom. He heard a

scream, was unable to determine whether it was made by a male or female, thought little of it and went back to sleep. Notably, he did not testify that he believed the scream came from any place in particular. He woke again a short while later after the ambulance arrived. Claudia Thomas, who was awake and in the kitchen of 1507 Swann Street, did not hear anyone scream.

There is no evidence in the record to support where the scream came from or who screamed. It would be pure speculation for the Court to conclude that any particular person – Wone, Zaborsky, or someone else – was responsible for the scream. More importantly, the Court cannot fairly conclude that the scream coincided with the moment that the "fatal wounds had been inflicted on Robert Wone." With absolutely no other evidence in the record relating to the time at which Wone was stabbed, the Court may not infer that there was a "considerable period of time," as alleged in Overt Act 9, between the fatal stabbing and Zaborsky's 9-1-1 call.

The only direct evidence in the record about the moments before the 9-1-1 call can be found in the form of statements of the Defendants. These statements, introduced by the government against the declarants *only*, establish the following as to each individual Defendant:

1. ZABORSKY

- Zaborsky went to bed at about 11 p.m. after the Project Runway program ended. Sometime after going to sleep, Zaborsky awoke to a series of noises that sounded like loud grunts or screams. Realizing that the noises were coming from inside of 1509 Swann Street, Zaborsky ran downstairs from his bedroom on the third floor to the second floor.

- Zaborsky saw Wone on the pull-out couch in the second floor guestroom.

- After seeing blood on Wone, Zaborsky became hysterical and screamed. Zaborsky then ran to the third floor to get the landline telephone and called 9-1-1. The call was placed at 11:49 p.m.

2. **PRICE**

- Price went to bed at about 11 p.m. after the Project Runway program ended. Sometime after going to sleep, Price heard the door chime signaling that a house door had been opened. Shortly thereafter, Price heard noises that sounded like loud grunts or screams. Realizing that the noises were coming from inside of 1509 Swann Street, Price ran downstairs from his bedroom on the third floor to the second floor.

- Price saw Wone on the pull-out couch in the second floor guestroom with blood on him. Price told Zaborsky to call 9-1-1.

3. **WARD**

- Ward retired to his bedroom at about 11:00 p.m. After reading for a few minutes, Ward went to sleep. He woke to a loud commotion and Zaborsky screaming shortly before midnight.

- Ward stepped out of his room to discover that Zaborsky was already on the telephone with 9-1-1.

Aside from the statements of the Defendants, which place the 11:49 p.m. 9-1-1 call immediately following the discovery that Wone had been stabbed, there is no evidence that the call was placed a "considerable" time after the wounds were inflicted. It would be conjecture to conclude otherwise.

As for the content of the statement Zaborsky made to the 9-1-1 operator and whether it was, as alleged in Overt Act 9, a "story that the defendants had fabricated and agreed to tell law enforcement authorities," see the discussion of Overt Acts 8, 13, 15 and 16 in Section F below.

E. OVERT ACTS NUMBER 11 AND 12

Paramedic Jeff Baker's interactions with Defendants Ward and Price form the basis of Overt Acts 11 and 12:

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 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.

There is evidence in the record that Baker arrived at 1509 Swann Street at about 11:54 p.m. while Zaborsky was still speaking to the 9-1-1 operator. The evidence further shows that Baker encountered Ward as Baker was walking up the steps leading to the second floor of the house. There is no evidence that Ward was coming from the "area of the second floor bathroom." Instead, the evidence from Baker is that Ward was coming from a "side hallway," consistent with the location of Ward's bedroom.

Q; And where was that, when you first caught sight of that second gentleman, as you're going up the steps, where is he coming from, where do you see him?
A: It looked like a side hallway.
Q: Okay. And so what do you do, as you're heading up the steps and you see him coming out of that side hallway?
A: What's going on?
Q: You said to him, "What's going on?"
A: Yes.

(5/18/10 211:13-22)

There is evidence that Baker asked Ward "what's going on?" and that Ward did not respond verbally:

Q: How close do you think you were from him, when you said, "What's going on?"
A: Eight, nine feet, maybe.
Q: Close enough for him to hear you?
A: I would think so.
Q: Did you make eye contact with him?

> A: Yes, I did.
> Q: What did he say to you?
> A: Nothing.

(5/18/10 211:23-212:6)

On cross examination, Baker did not recall telling Detective Waid that in response to Baker's question, "What's going on?" Ward pointed to the guestroom. Waid, however, remembered Baker's statements on this point, which were memorialized in Waid's notes:

> Q: And then investigator (sic) Baker told you that Mr. Ward pointed him in the direction of room where the victim was, correct?
> A: Yes.
> Q: So he never told - - EMT Baker never told you that Mr. Ward completely ignored him and turned and ran into the room, right?
> A: Correct.

(6/3/10 143:4-11)

As for Baker's interaction with Price, there is evidence from Baker's testimony from which the Court could properly conclude that as Baker approached the guestroom in which Robert Wone was located, Price was seated on the bed. The paramedic asked Price what was going on, to which defendant Price replied, "I heard a scream." There is evidence that Price then got up and moved away from the bed. There is, however, no evidence to support the allegation contained in Overt Act 12 that when Baker walked into the guestroom Price was "not applying pressure to Robert Wone's wounds." Because no one asked Baker whether he observed Price applying pressure to the wounds as Baker entered the room, the record is silent on that issue.

F. OVERT ACTS 8, 13, 15 AND 16

In three separate Overt Acts, there are identical allegations that each Defendant "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] Overt Act 8 alleges that the Defendants "constructed and coordinated the fabricated story they would tell the law enforcement authorities." Collectively, these Overt Acts are central to the government's apparent theory of the case: they allege that each Defendant knowingly lied to the police in an effort to "conceal from the authorities and others the true circumstances surrounding the homicide of Robert Wone." Ind. Ct. 1.

Before the Court can begin to analyze whether there is sufficient evidence on this record from which a reasonable trier of fact could conclude that each Defendant made false, material statements to the police, the Court needs to be clear on the content of those statements. The Court well knows that each statement made by a Defendant to law enforcement was admitted by the government only against the declarant himself. Thus, we consider what each Defendant told the police about what happened on the night that Robert Wone was stabbed.

PRICE

- On July 29, 2006, Wone emailed Price asking if he could spend the night at 1509 Swann Street on August 2, 2006. Price responded the following day, telling Wone he was welcome to spend the night. The two men planned on having breakfast the morning of August 3, 2006 to discuss a business matter.

- On August 2, 2006, after dinner, Price went upstairs to his bedroom on the third floor of 1509 Swann Street around 10:00 p.m. to watch the program Project Runway, on the Bravo Channel. After discovering that the Bravo channel was no longer available because of a recent programming change, Price called to upgrade his television programming. Price returned to his bedroom and watched Project Runway.

- At 10:24 p.m., Robert Wone called from his office at Radio Free Asia at 2025 M Street, N.W., Washington, D.C. 20036, to the home phone at 1509 Swann Street and Price answered the phone.

[14] Overt Acts 13, 15 and 16 relate to Defendants Price, Ward and Zaborsky, respectively.

- Subsequently, Mr. Price continued watching Project Runway until he heard the door chime, a control panel for which is located in the third floor bedroom in which Price was watching television.

- Price then went downstairs to the first floor living room and greeted Wone.

- Price had a glass of water with Wone while standing around the island in the kitchen, discussing various matters including Wone's reason for visiting the late crew at Radio Free Asia.

- While at the kitchen sink, Price observed a shadow outside in the back patio and went out to inspect. He stepped outside and then returned to the kitchen. Price does not recall whether he locked the rear door after reentering the house.

- After about ten minutes of small talk, Price showed Wone to the guest room in the second floor office. Wone indicated that he felt damp or sweaty and asked to take a shower. Price showed Wone to the second floor bathroom where he could shower.

- Price went up to the third floor where he watched the end of Project Runway and a few more minutes of television before turning off his light and going to sleep shortly after 11:00 p.m. Price was awakened at a time unknown to him by the door chime and thought it was his tenant returning home.

- Sometime later, Price heard a series of noises that sounded like yelling or loud grunting sounds. Realizing that the noises were coming from inside 1509 Swann Street and wearing only his underwear, Price went downstairs from his bedroom on the third floor to the second floor.

- At the foot of the staircase Price could see into the guest room and saw Wone lying on the bed with blood and a knife on his chest.

- Price moved the knife to the night stand and moved one of Wone's arms in order to be able to lift up Wone's t-shirt. Price observed one puncture wound and blood on Wone's chest. Price checked for a pulse and could detect none.

- Price, using a white bath towel, applied pressure to Wone's chest.

- Paramedics entered the second floor guestroom and Price moved from Wone's side. The paramedics placed Wone on a stretcher and took him out of the room. Price followed the paramedics with Wone down the stairs to the first floor of the house.

- When Price reached the first floor, MPD officers were already on the scene and inside 1509 Swann Street.

- When asked by various MPD officers what had happened, Price responded with an overview of the significant events of that evening.

- Price was asked to sit in the living room of 1509 Swann Street. While seated in the living room, within earshot of officers, Price called Kathy Wone.

- While seated in the living room, Price spoke to others in the living room in the presence of MPD officers.

- Price was escorted by the police to his room to get dressed before being transported to VCB where he was interviewed by several detectives.

ZABORSKY

- During the evening of August 2, 2006, Zaborsky learned that Robert Wone would be spending the evening at 1509 Swann Street. Zaborsky helped make the bed in the guestroom.

- Zaborsky went to his bedroom on the third floor of 1509 Swann Street at about 10:00 p.m. to watch the program Project Runway. The channel was not available until after the program began, but Zaborsky watched the program from the point it was available, around approximately 10:11 p.m., until its completion.

- Zaborsky went to sleep shortly after 11:00 p.m. on August 2, 2006.

- Sometime after going to sleep, Zaborsky awoke to a series of noises that sounded like loud grunts or screams.

- Zaborsky, after realizing that the noises were coming from inside 1509 Swann Street, ran downstairs from his bedroom on the third floor to the second floor.

- Zaborsky saw Wone on the pull-out bed in the second floor guestroom. After seeing blood on Wone, Zaborsky became hysterical and screamed.

- Zaborsky then ran to the third floor to get the landline phone and call 9-1-1. The call was placed at 11:49 p.m.

- The 9-1-1 operator instructed Zaborsky to grab a towel and give it to someone to apply pressure to the wounds. Zaborsky got a towel and his robe out of the third floor bathroom.

- Zaborsky, while remaining on the 9-1-1 call, took the towel down to the second floor guest room and told the 9-1-1 operator that his partner was applying pressure with the towel.

- While still on the 9-1-1 call, Zaborsky opened the door to 1509 Swann Street to allow the paramedics into the residence. On the doorstep of the residence, Zaborsky, crying and in a pleading voice, exclaimed to a paramedic, "Help us, he was stabbed, he is on the second floor."

- After police and EMTs arrived on the scene Zaborsky was seated in the living room of 1509 Swann Street. Zaborsky only left that area only when he was escorted upstairs by a police officer to change his clothing before being transported to the VCB. At the VCB Zaborsky was interviewed by several detectives.

WARD

- On the evening of August 2, 2006, Ward was aware that Robert Wone would be spending the night at 1509 Swann Street. Ward helped to put the sheets on the pull-out bed in the guestroom.

- After helping to make the guest bed, Ward retired to his bedroom to read.

- While reading in bed, Ward heard the doorbell at about 10:30 p.m., went downstairs, and opened the door for Wone.

- Ward greeted Wone, showed him inside the house, and offered him a glass of water. They chatted in the kitchen for a few minutes before Ward showed Wone to the guestroom.

- Wone said that he felt damp and would like to shower. Ward showed Wone to the second floor bathroom where Wone could take a shower. Ward then went to his bedroom, closed the door and read for a few minutes before falling asleep.

- While reading, Ward heard the shower running and heard what he assumed to be the office door closing.

- Ward checked his BlackBerry before taking his sleeping pill, turning off the light, and going to bed at 11:00pm.

- Sometime later, Ward heard some noises that failed to fully wake him. He then heard a commotion and a loud scream that fully woke him.

- Frightened, Ward got out of bed and stayed in his room until he felt it was safe to exit his room. Before leaving his room, Ward put on a bathrobe.

- Upon exiting his room, Ward approached the doorway of the guestroom, from where he could see some blood on Mr. Wone's chest and on the sheets around Mr. Wone. Ward did not enter the office and did not see the knife on the nightstand.

- In shock, Ward sat down momentarily on the sofa in the family room and remained in that area until the EMTs and firefighters arrived on the scene.

- While waiting in the family room area for the EMTs to arrive, Ward saw pressure being applied to Robert Wone in an effort to staunch any bleeding.

- Upon instruction by firefighters on the scene, Ward went downstairs. On his way downstairs, Ward noticed that the bolt to the back door was vertical, indicating that it was unlocked.

- Ward was instructed to wait in the living room while officers continued to arrive and secure the scene. Multiple officers were on the first floor. There was always an officer located by the front door and by the sofa in the living room.

- Ward had limited conversation with his roommates, always within earshot of officers, while waiting in the living room.

- At some point, Ward was told to get dressed because he was to be taken to a police station to make a statement. Ward was escorted upstairs to his bedroom by a police officer who observed him while he dressed. After dressing, he was taken to the Violent Crime Branch where he was interviewed by various police detectives.

As the Court can plainly see, each Defendant had a different vantage point from which he viewed the events of August 2, 2006. Nevertheless, their statements are largely consistent as to the chronology of the evening, the Defendants' interaction with Wone upon his arrival, the discovery that Wone had been stabbed, and notification of the police. Importantly, each Defendant – in his own words – made the same material representation

to the police: "I don't know what happened to Robert Wone. I didn't kill him. I can't imagine that the other two did so. Therefore it had to have been an outside intruder."[15]

PRICE

> MR. PRICE: I know Victor and Dylan, like, better than I know my mother. There's no chance on the face of this earth that either one of them could, you know, punch someone, never mind, you know, kill someone. It's ridiculous.

(8/3/06 8:6-9)

> DETECTIVE NORRIS: So, how do you know Dylan didn't go downstairs and open the door?
> MR. PRICE: I don't know that he didn't do that. But I know there's no reason on earth that either him or Victor would do any such thing. They couldn't do it. They're not violent people. They're not even close to violent people. It's—
> DETECTIVE NORRIS: Are you?
> MR. PRICE: No. No. Oh, God, no are you kidding me?

(8/3/06 94:13-22)

> MR. PRICE: So, I really believe the guy just went into our—you know, it was (inaudible) find some room, find something and, you know, found someone he didn't expect. That's—I mean, that's all I can think of. I don't know.

(8/3/06 140:14-141:2)

ZABORSKY

> MR. ZABORSKY: I am telling you 100 percent truth, exactly as I told what happened is the way it happened. I did not hear anything else, I had heard no struggle, I heard no—no fight, I have absolutely no reason to understand or believe why either Joe or Dylan would be angry at Robert.

(8/3/06 5:30 a.m. 10:19-11:2)

> MR. ZABORSKY: I've told you everything I know, I told you exactly what happened that I saw, what I heard, when I heard it and I have nothing more to add to that statement. I really honestly have no idea what happened. I don't know how somebody broke in and there's no evidence, I—and I don't believe that. I think your team will find evidence because it's impossible that something else happened.

(8/3/06 5:30 a.m. 25:14-21)

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[15] None of the Defendants said that he actually saw an intruder inside of the house.

DET. WAID: Now where did you come up with that somebody ke in, when you told the police that? Did you just assume that or did Joe or Dy tell you that somebody broke in?
MR. ZABORSKY: No, it was just an assumption.

(8/3/06 8:47 a.m. 13:9-13)

WARD

DETECTIVE NORRIS: So how do you know that it was Victor or m two?
MR. WARD: Of course I don't know one hundred percent, becau didn't see it happen.
DETECTIVE NORRIS: There we go.
MR. WARD: But I'm telling you that I can't believe it. I mean, it's true, it's true. But I can't—I just—I can't believe that.

(8/3/06 29:13-20)

DETECTIVE NORRIS: …you didn't even see Joe or Vic.
MR. WARD: No. I didn't go out of my room. I was still in bed. I asleep.
DETECTIVE NORRIS: Right. So therefore you don't know if Joe Vic did it.
MR. WARD: No, I don't know. I don't believe they did, but I don now that for certain.

(8/3/06 39:12-19)

MR. WARD: It was just speculation because that door was open nd I couldn't think of where else they would have come in.
DETECTIVE WAID: Right.
MR. WARD: You know, that is what I saw. So I didn't know tha iybody came in. I never heard anybody come in. I just saw that and leapt to a co lusion.

(8/3/06 81:13-22)

With this factual background, we now consider whether the ernment has proved that these statements are materially false as alleged in the Overt s. To do so, the government must present evidence from which the following two i rences could properly be drawn:

(1) Robert Wone was not killed by an unknown, outside intruder, a

(2) each Defendant, individually, had knowledge of that fact.

If the government fails to prove either one of these assertions, then it has failed to prove that each Defendant made false material statements to law enforcement "intended to misdirect and mislead law enforcement authorities into believing that an unknown intruder had, in fact, killed Robert Wone."

1. THE GOVERNMENT FAILED TO PROVE THAT WONE WAS NOT KILLED BY AN OUTSIDE INTRUDER

The government seeks to prove that the Defendants' statements to the police concerning a potential outside intruder were false by attempting to foreclose the possibility that an outside intruder came into the home and stabbed Wone without being discovered. In this effort, the government falls short.

There is, of course, no direct evidence of who killed Wone. That is to say, there is no direct evidence that he was not killed by an outside, unknown intruder. To prove the 'falsity' of the unknown intruder theory, the government again relies on circumstantial evidence. Considering the testimony in the light most favorable to the government, the Court might properly find that:

- There was no evidence of forced entry into the house; that is, no evidence that a door or window had been forced open.
- While there is evidence that the back door was unlocked, there is no evidence that someone climbed the seven foot fence that surrounds the back patio. There were no footprints or dirt on the car that is adjacent to the fence, and the dirt and plant life nearby the fence did not appear disturbed.
- Many persons who commit burglaries do so with the intent to steal; however, nothing of value was taken from the first or second floor of the home.
- The knife found in the guestroom came from the knife block inside the kitchen at 1509 Swann Street.

- The intruder would have walked up the stairs, past Ward' bedroom, on the way to the guestroom and could have been heard on the ps.

- None of the Defendants saw an intruder inside of the house

- None of the Defendants heard an intruder walking up or wn the first floor staircase.

- None of the neighbors who were interviewed by the poli saw anyone enter or exit the backyard patio area.

- Given the nature of Wone's wounds, he could have been c cious for up to ten minutes after he was stabbed. There is, however, n vidence that he made significant movements after being stabbed a he had no defensive wounds.

Notwithstanding this evidence, on the record before this Court a sonable trier of fact could *not* conclude that, however unlikely it was that an outside int er came into 1509 Swann Street and stabbed Robert Wone, it was *impossible* for an intr r to do so:

- The fence surrounding the patio could be scaled directly, by climbing up on the shed only a few feet from the fence. A pair of s glasses were discovered on top of the shed and not attributed to a kno person. A trash can was turned upside down and pushed up against t ence shared with 1511 Swann Street and the shed.

- The back door was unlocked and slightly ajar when the poli rrived.

- The knife came from a knife block in the kitchen immediat adjacent to the unlocked back door.

- Defendant Price heard the door chime, signaling that a r had been opened.

- The government and its witnesses acknowledged that not all rglaries are committed with the intent to steal.

- A number of people had keys to 1509 Swann Street includi contractors, tenants, the maid service, and Price's brother, Michael Price.

- Usable latent fingerprints were located in the guestroom w h could not be matched to any known person.

The government seeks to bolster its argument that there was n an unknown outside intruder by making two arguments:

- An outside intruder would have no motive to come into th ouse, take a knife from the kitchen, walk upstairs, pass Ward's bedroo nd then stab Wone in the guestroom; and

- Price's brother, Michael, "certainly may have been" the pe n who killed Robert Wone,[16] and he is someone that the Defendants uld seek to protect.

Not only is there no evidence for either of these propositions by the gover ent, they are fundamentally inconsistent.

First, the fact that the government cannot identify a motive for an o ide intruder to have killed Wone is not evidence that there was not, in fact, an outsid truder who killed him. While motive can often be used to help identify potentia sailants, as Sergeant Wagner acknowledged, there are many crimes committed in District of Columbia – including murder - without an identifiable motive:

> Q: Right. So one of the – the reasons that you are asking the q tions about the relationships is to see whether or not somewhere mixed in th here was a motive to hurt Mr. Wone; isn't that right?
> A: Yes.
> Q: Now, because motive is one way that you as an experienc letective, a sergeant detective – a sergeant, excuse me, is motive is one way to lp solve an unsolved homicide; isn't that right?
> A: Yes.
> . . .
> Q: Now you've had plenty of other cases where you were unab determine the motive for the crime; isn't that right?
> A: Many, many, many.

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[16] The Court: Maybe I'm misunderstanding the purpose of this evidence. Is the purp r the reason you're saying it's admissible to show, again, that this is a family that rallies around . or are you proffering this evidence, as evidence that Michael Price did something himself inside 15 Swann Street or, you know, may have been the one who committed the murder?
Mr. Kirschner: Both.
The Court: And so –
Mr. Kirschner: Certainly may have been. Can't prove it beyond a reasonable doubt.
(6/1/10 55:24 – 56:9)

Q: And it's fair to say that you often - - not often. There some times when you don't know why somebody causes another person m; isn't that right?
A: That's true. . . .

(5/25/10 10:11-20; 11:17-24)

Because the absence of motive on the part of an unknown intruder ca t be used to exclude the possibility of an unknown intruder, the government's argu t on motive adds nothing to the quantum of evidence.

Second, the government's focus on Michael Price as the person wl might" have killed Robert Wone amounts to pure conjecture. The government's argu is based on a collection of miscellaneous facts about Michael Price, none of which p s him at the scene on the night of August 2, 2006:

- Price's brother Michael has a history of substance abuse.
- Over the years Price made efforts to support his bro including emotional and financial support.
- During the summer of 2006, Zaborsky and Ward h a friendly relationship with Michael Price.
- Michael Price had a key to 1509 Swann Street and knew the urity code.
- Michael Price was taking phlebotomy classes in the summ f 2006 and missed a class on August 2, 2006, one of several missed cla .
- Michael Price met Defendants Price, Zaborsky, and late ard at the Violent Crimes Branch in the early morning hours of Augus 006.
- While attending the funeral of Robert Wone, Michael Pri gressively challenged the detectives who were present about the in gation into Wone's death.
- In October, 2006, Michael Price entered 1509 Swann Stree ng his key and stole electronic equipment.

The government tries to make much of Michael Price's phlebot[illegible] training and attempts to link that training with the 'unexplained' needle marks on Wo[illegible] body, but to no avail. Dr. Goslinoski testified that she believed all of the observable [illegible]dle puncture marks on Wone's body were consistent with medical intervention:

> Q: Now yesterday we talked – Mr. Kirschner asked yo[illegible] number of questions about needle marks. All the needle marks you found [illegible]s case you listed under the heading of medical intervention, correct?
> A: I did.
> Q: Because to a reasonable degree of medical certainty, [illegible]elieve that that's what occurred there, correct?
> A: Yes.

(5/21/20 59:5-13)

There is evidence from which the Court could conclude that a[illegible] the needle puncture marks on Wone were not identified by the medical personnel wh[illegible]ted Wone. But because the medical professionals who testified for the government c[illegible]ot exclude the possibility that all of the puncture wounds were made during medical i[illegible]ention, the Court may not conclude, without speculating, that they were made otherwi[illegible]

There is also absolutely no evidence in the record that the needl[illegible] played any role in the death of Robert Wone. Dr. Goslinoski said that su[illegible]rks were consistent with having occurred "ante-mortem or early post-mortem." T[illegible]overnment introduced no evidence, and no inference can properly be drawn, tha[illegible] thi[illegible] was

[17] Q: And you were recording what you're seeing and what people are calling out; is t[illegible]ect?
A: Yes.
Q: Is it fair to say, though, your view is obstructed at times?
A: At times.
Q: So is it possible that a procedure was done that you didn't see?
. . .
A: Yes.
(Leah Lujan 5/20/10 124:21 – 125:6)

injected into or withdrawn from Wone in the moments surrounding his [illegible]ing.[18] Such an inference would be patent conjecture.

In short, no evidence was introduced that would place Mich[illegible]rice [illegible]t 1509 Swann Street on the night of August 2, 2006: no eyewitness testim[illegible] no [illegible]hysical evidence, no forensic evidence, and no circumstantial evidence. No r[illegible]ble trier of fact could conclude that Michael Price had any part in the killing of Rob[illegible]ne.

This lack of evidence notwithstanding, the government introduce[illegible]mony that, after discovering that Michael Price burglarized 1509 Swann Street i[illegible]ber 2006, Defendants Ward and Zaborsky delayed reporting the crime to the polic[illegible]il they first spoke with Defendant Price. Indeed, Ward and Zaborsky each testified [illegible] grand jury that they intended to report the break-in to the police and wanted to di[illegible] the matter with Price first, since Michael Price was his brother. The following day [illegible]efendants consulted with their attorneys and subsequently made the police report.

Based on this evidence the government would have the Court c[illegible]de that the Defendants, individually and collectively, demonstrated their willin[illegible] to delay reporting a crime committed by Michael Price, a member of their "fam[illegible] protect him. Presumably, the inference the government would then ask the Court [illegible] that the Defendants would be willing to cover up for him in the killing of Rol[illegible]. Of course, on the record before the Court, such an inference would be pure sp[illegible].

The Defendants did, in fact, report the October burglary and Mich[illegible] the police. They cooperated in the investigation: Ward and Zaborsky testif[illegible] the grand jury and Zaborsky voluntarily provided an email to the police in [illegible]hael

[18] The government stipulated to the results of extensive toxicology testing which rev[illegible] foreign substances in Wone's blood.

Price apologized for burglarizing the house. The fact that Ward and Z ky nted to speak to Price before making a report about his brother shows only eng of the relationship among the three men and respect for Price's relationship is ther,[19] and cannot fairly be an inference that Michael Price actually killed Won

In a discussion with the Court outlining the relevance of testi c cerning Michael Price, the government was forced to acknowledge that it had n en hat he had an identifiable motive for killing Wone and that "people who con he crimes don't necessarily act reasonably or responsibly."[20] This, of course, is ex he *posite* conclusion the government asks the Court to draw from the eviden ate to the absence of an unknown intruder, *i.e.*, because an outside intruder would n motive to kill Robert Wone under the circumstances presented here, it was ly have occurred. The contradiction is stark: for Michael Price the governm w ng to forgive the absence of a motive, but not so for an 'unknown' outside intr

In fact, the Michael Price scenario posited by the governn ro s the weakness in the government's case. Although there is no evidence that on rced his or her way into 1509 Swann Street, there is significant evidence that or ould have walked in – through the open back door, or through the front door k and killed Wone. The fact that this possibility exists necessarily precludes a r ble nder of fact from concluding that there could not have been an outside intruder.

On the basis of this evidence, no reasonable finder of fact could pr co ude that an outside intruder could not have caused the death of Robert Wone.

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[19] Any delay in making the report after the first day is attributable to the Defendants cons ith r attorneys.
[20] (6/1/10 57:3-10)

2. THERE IS NO EVIDENCE THAT EACH DEFENDA[illegible]D KNOWLEDGE THAT WONE WAS NOT KILLED B[illegible] OUTSIDE INTRUDER

The second proposition that the government must prove to estal[illegible] the [illegible]sity of the Defendants' statements is that, at the time each Defendant spoke to [illegible]li[illegible] he had knowledge that Wone was not, in fact, stabbed by an outside intruder[illegible] on this record would permit the Court to draw such an inference.

From the Defendants' own statements the Court can find that eac[illegible]fe[illegible]nt was inside of the house from the moment Wone arrived, at about 10:30 p.m[illegible] 9-1-1 call at 11:49 p.m. There is no evidence, however, that any Def[illegible]essed knowledge other than what he told the police about what occurred[illegible] time period. Certainly, there is no direct evidence that any Defendant had suc[illegible]vl[illegible]e.[21]

Nor is there circumstantial evidence to support a finding tha[illegible] other knowledge about what happened to Wone. As shown above, however[illegible] was not impossible for someone unknown to enter 1509 Swann Street – t[illegible] open back door or with a key - take a kitchen knife and stab Robert Wone[illegible] three Defendants were in their respective bedrooms. Nothing in the record wo[illegible] fair inference that each Defendant would have had knowledge about the "tr[illegible]nces surrounding the homicide of Robert Wone," other than what they report[illegible]lice. Regardless of the identity of the person who actually stabbed Wone, [illegible] this record would permit the Court to conclude that *each* Defendant would ha[illegible] that fact.

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[21] To the contrary, the only direct evidence about what the Defendants knew comes fro[illegible] De[illegible]ants themselves in their statements to the police.

Considering the evidence through the lens of hypothetical fact [illegible] om the perspective of the individual Defendants makes this plain:

- Price's statement, placing him in his third floor bedro [illegible] 11:00 and 11:49 p.m., could be completely true even if Ward, [illegible] ichael Price, or an unknown intruder stabbed Wone.

- Zaborsky's statement, placing him in his third floor [illegible] tween 11:00 and 11:49 p.m., could be completely true eve [illegible] Ward, Michael Price, or an unknown intruder stabbed Wone.

- Ward's statement, placing him in his second floor bedro [illegible] 11:00 and shortly after 11:49 p.m., could be completely tr [illegible] Price, Zaborsky, Michael Price, or an unknown intruder stabbe [illegible]

Nothing about the facts surrounding Wone's stabbing sugg [illegible] less compels -- conclusion that the Defendants knew more than they told the [illegible] re is no evidence that the Defendants, all located inside of a three-story ho [illegible] have witnessed or been more aware of how Wone was stabbed. The [illegible] the government managed to prove, through the Defendants' own statements [illegible] were present in the house when Robert Wone was stabbed. Mere presence [illegible] not enough for the Court to conclude specific knowledge and intent.[22] Witho [illegible] nce, there can be no finding that their statements to the police were false [illegible] to mislead and misdirect law enforcement authorities." Thus, Overt Acts [illegible] 16 remain unproved.

G. OVERT ACT 14

Overt Act 14 pertains only to Defendant Price, and alleges that on [illegible] 006 Price "concealed from law enforcement authorities" the fact that his bro [illegible] had a key to 1509 Swann Street.

[22] See *Jefferson v. United States*, 463 A.2d 681, 683 (D.C. 1983).

A reasonable trier of fact could conclude from the evidenc [illegible] by the government that Price did not tell the police explicitly during his [illegible] at his brother had a key to the residence. Although Price maintains that [illegible] ist to Detective Norris with that information during an interview that was [illegible], that fact was not elicited by the government. Instead, the state of the record [illegible] in the videotaped statements is that Price told the police that contractors and [illegible] ys to the house without a specific reference to Michael Price. Price did [illegible] other during the videotaped interview, sharing with the police his substanc [illegible] and evidence was introduced during the government's case that Michael [illegible] e of Price's tenants.

H. OVERT ACT 17

Overt Act 17 also relates only to Defendant Price:

> 17. In or about November 17, 2007, defendant Price [illegible] bert Wone's widow, Katherine Wone, that he had in fact given [illegible] ment authorities the names of workers and/or contractors who had ke [illegible] nce of 1509 Swann Street. However, defendant Price declined to tel [illegible] one that his brother Michael Price possessed keys to the residen [illegible] vann Street.

There is no evidence in the record relating to a conversation [illegible] and Ms. Wone on November 17, 2007. Instead, Ms. Wone testifie [illegible] d a conversation with Price over lunch on November 7, 2007:

> Q: Did there come a time now, moving forward to Nove [illegible] 07, when you met Joe Price for lunch?
> A: Yes.
> . . .
> Q: At any point, did he start talking about people who had [illegible] me on Swann Street at the time your husband was killed?
> A: Yes. He rhetorically asked, in the midst of his anger an [illegible], out the police, why haven't they contacted the list of people that I [illegible] po [illegible] ce?

There was a list of about four or five contractors that I h ... for the police, but none of them have been contacted.

And I believe he went on to explain the way con ... The general contractor generally does not come to your house ... y. He will have different teams of day laborers who will work o ... at any given time.

Q: So he indicated that he had provided the police a ... r five contractors who had keys to Swann Street at the time?

A: Yes.

Q: And he was upset because they hadn't followed up, i ... st ... n, the police hadn't followed up?

A: He was very upset.

Q: Did he mention that his brother Michael Price had a ke

A: No.

Q: Did he say that he had given Michael Price's nan ... e as someone who had a key?

A: No.

Q: Did he mention Michael Price's name at all during that

A: No. . . .

(5/18/10 38:7 – 40:25)

From this testimony the Court could fairly conclude that Price ... ll ... Wone that he had given to the police a list of four or five contractors who ... nn Street. As to whether this representation to Ms. Wone was fals ... nent introduced no affirmative evidence that Price provided a written list ... tr ... or who had keys to Swann Street.[23] Price did tell the police during his vid ... i ... ews, however, that contractors had keys to his house. Det. Waid ackn ... fact during his testimony and then admitted that he, himself, did not ask I ... nes and telephone numbers of those contractors. Price did, however, tell D ... ore than a year before this lunchtime conversation – that Michael Price had ... te ... e ... me along with the security code, in connection with Whelan's investigatio ... th ... ber 2006 burglary.

[23] Price maintains he did, in fact, provide such a list to Detective Norris who was not ... by the government. In the light most favorable to the government, the record does ... rice provided a written list of contractors with keys to the police.

While the Court can also conclude that Price did not mention [illegible] chael at all during that conversation with Ms. Wone, the Court may not [illegible] Price "declined" to tell Ms. Wone that Michael Price possessed keys to th[illegible] cause he was in fact never asked to disclose that information. By its very [illegible] line" means "to refuse to undertake, undergo, or comply with; to [illegible] cially courteously."[24] That Price never mentioned his brother Michael, [illegible] bout him by Ms. Wone, does not and cannot lead to the conclusion that he d[illegible] ised to tell her that Michael Price possessed a key to Swann Street.

IV. LEGAL ARGUMENT

Having identified the reasonable, material inferences that can b[illegible] n the evidence in the light most favorable to the government, we now a[illegible] ree offenses with which each Defendant is charged. As shown below, the e[illegible] lly insufficient as to each charge.

A. CONSPIRACY

1. THE ELEMENTS AND LEGAL STANDARD

Each of the three Defendants is charged with conspiracy by a[illegible] uct justice by altering and orchestrating the crime scene, disposing of, alt[illegible] ng evidence, and lying to law enforcement authorities. Ind. Ct. 1. The obje[illegible] ged conspiracy was "to conceal from the authorities and others the tru[illegible] nces surrounding the homicide of Robert Wone."

The substance of the crime of conspiracy is "knowing par[illegible] an agreement to accomplish an unlawful act." *Irving v. United States*, 67[illegible] 88

[24] See http://www.merriam-webster.com/dictionary/declined .

(D.C. 1996). The elements of conspiracy, as applied in this case, e[illegible] [illegible]h the government must prove beyond a reasonable doubt are:

> a. An agreement between two or more people to com[illegible] [illegible]ne of obstructing justice by "altering and orchestrating t[illegible] [illegible]ene, disposing of, altering, and planting evidence, and lying to [illegible] [illegible]ent authorities about the true circumstances surroundin[illegible] [illegible] of Robert Wone";
>
> b. Knowing participation in that agreement with the [illegible] [illegible]mit the criminal objective; and
>
> c. During the life of the conspiracy, and in fu[illegible] [illegible]f its objective, the commission by at least one conspirator of a [illegible] [illegible]f the overt acts specified in the indictment.

Castillo-Campos v. United States, 987 A.2d 476, 482 (D.C. 2010). Ins[illegible]r. [illegible]

Participation in a criminal conspiracy need not be proved by dire[illegible] [illegible] *Id.* Indeed, "the evidence supporting a conspiracy conviction nearly always [illegible]ntial because there is rarely in a conspiracy case direct evidence of the consp[illegible] [illegible]f of declaration." *Wheeler v. United States*, 977 A.2d 973, 982 n.19 (D.C. 2[illegible]). [illegible]ver, there must be something more than mere presence at the scene of th[illegible] [illegible] the crime to support a conspiracy charge. There must be evidence tha[illegible] [illegible]lant knowingly and voluntarily participated in the agreement, intending to co[illegible] [illegible]inal objective. *Wheeler, supra*, 977 A.2d at 981.

Earlier this year, the Court of Appeals had an occasion to con[illegible] [illegible]ors from which a conspiratorial agreement may be inferred. Faced wi[illegible] [illegible]ncy challenge to a conspiracy conviction, the Court held that

> a conspiratorial agreement may be inferred from circ[illegible] [illegible]hat include the conduct of defendants in mutually carrying [illegible] [illegible]non illegal purpose, the nature of the act done, the relationshi[illegible] [illegible]ies, and the interests of the alleged conspirators.

Castillo-Campos, *supra*, 987 A.2d at 483. See also *Wheeler*, *supra*, 9 2 82.

With this legal framework in place, we consider whether there t or circumstantial evidence of an agreement among the Defendants to ob and knowing participation in that agreement. Quite simply, there is none.

2. THERE IS NO DIRECT OR CIRCUMSTANTIAL EVI AN AGREEMENT TO OBSTRUCT JUSTICE

The government should readily concede that there is no dir f an agreement among the Defendants to obstruct justice. No witness te the existence of, and no other direct evidence was introduced establi an agreement. Any evidence of an agreement would necessarily be circumst

Considering the circumstantial factors outlined in *Castillo-Camp* mits a reasonable inference that there was a conspiratorial agreement to ob by altering and orchestrating the crime scene, disposing of, altering, and pl nce, and lying to law enforcement authorities about the true circumstances the homicide of Robert Wone.

First, although the Court may properly infer that the Defendants l and intimate relationship, there is no evidence from which a trier of fact could nfer that the "interests of the alleged conspirators" was to agree to obstruct ju ere in the record is there an actual, or implied, motive for any of the Def rm Wone or to cover up for the person who did. In conspiracy cases where t und circumstantial evidence of an agreement, the motive of the conspirators the most significant factors. *See*, *e.g.*, *Castillo-Campos*, supra, 987 A.2d at an agreement to commit assaultive conduct where the defendant was part o se members had a motive to kill rival gang members); *Wheeler*, *supra*, 9 981

(finding an agreement to commit murder where the defendant had a " [illegible] e" to murder the victim who had robbed the mother of his child of $17,000).

By contrast, here there is no motive for any of the Defendants [illegible] the investigation into Wone's death. Wone was Price's close friend [illegible] good relationship with Ward and Zaborsky. There is no evidence that wou[illegible] le [illegible] fair inference that any Defendant had a reason, or interest, in hurting Wone.

Similarly, there is no basis for a fact-finder to conclude that the D[illegible] would willingly cover up for the person who did harm Wone. The governme[illegible] that Michael Price "certainly may have" killed Robert Wone. Althou[illegible] is complete conjecture and speculation, the government would have the C[illegible] the further conclusion that if Michael Price did stab Wone, the Defendants [illegible] ngly participate in a cover up. The problem with the government's argum[illegible] -fold. First, there is no evidence that Michael Price was involved in Wone's de[illegible] the only justifiable inference from the evidence in the record is that the D[illegible] uld not, in fact, lie to protect Michael Price. When Michael Price burglari[illegible] in October, 2006, just two months after Wone was stabbed, the Defendants [illegible] to the police. It strains reason to believe that the Defendants would turn M[illegible] into the authorities for a burglary – which affected only *their* home and only [illegible] ons – and lie to protect him from a murder investigation which involved the d[illegible] an being.[25] No contrary inference can, or should, be drawn.

The government repeatedly argues that Defendant Price was [illegible] the relationship with Ward and Zaborsky and could manipulate the other me[illegible] lying

[25] It also seems patently illogical that the Defendants would go to great lengths to shield [illegible] from the police in connection with the homicide and then simply hand him over to law [illegible] for a burglary at the very same address.

with his will. Thus, the argument flows, since Price has a personal i[illegible]ting his brother he could coerce Ward and Zaborsky into entering such a[illegible]gr[illegible]nt. A careful review of the evidence, however, proves otherwise.

Certainly, there is evidence that on the night of August 2, 200[illegible] [illegible]ost of the talking with the police. That hardly is evidence that he control[illegible]ed [illegible]ship among the men. By contract, direct evidence from those pers[illegible] [illegible] the Defendants best establish – without contradiction – that each me[illegible] of [illegible]rice-Zaborsky-Ward family was an independent-minded free thinker. Sara[illegible] [illegible] has known the Defendants for many years was unimpeached in her assess[illegible]

> Q: Would you describe Victor Zaborsky as an intelli[illegible] [illegible]nt-minded man?
> A: Yes.
> Q: Would you describe Dylan Ward as an intelligent, i[illegible] [illegible]ded man?
> A: Yes.
> Q: And is it fair to say that in your observation of the [illegible] [illegible]lan Ward and Victor Zaborsky were not controlled by Joseph Pric[illegible]? [illegible]ir to say that they were not controlled by Joseph Price?
> A: It is fair to say that, yes.
> Q: That they were able to assert themselves if they disagre[illegible] [illegible]ce?
> A: Yes.
> Q: And you observed occasions on when they did ass[illegible] [illegible]nd disagree with Mr. Price?
> A: Yes.
> Q: And this would not be a relationship that you would de[illegible] [illegible]s kept together and controlled by Joseph Price?
> A: I wouldn't describe it that way, no.

(6/2/10 90:12 – 91:11). Scott Hixson, who also knows all three [illegible] [illegible]ified similarly.

Without evidence of a motive to harm Robert or a motive to [illegible] [illegible]erson who did, this factor cannot be used circumstantially to support [illegible] of a conspiratorial agreement.

The second factor identified in *Castillo-Campos* that could [illegible] ference of a conspiratorial agreement is the "conduct of defendants in mu[illegible] out a common illegal purpose." The Indictment identifies the Defendant[illegible] [illegible]uct as "altering and orchestrating the crime scene, disposing of, altering, a[illegible] [illegible]dence, and lying to law enforcement authorities and others about the [illegible] [illegible]stances surrounding the homicide of Robert Wone." From this alleged con[illegible] [illegible]nment would have the Court infer an underlying agreement.

The great flaw here, is that there is no evidence that such c[illegible] [illegible]rred. As shown above in Section III.B., there is no evidence from which [illegible] [illegible]ay be drawn that any defendant orchestrated the crime scene or planted evi[illegible] [illegible]rmore, on the evidence before the Court no trier of fact could conclu[illegible] [illegible] of the Defendants lied to the police about the circumstances of Wone's d[illegible] [illegible] made clear in the discussion of Overt Acts 8, 13, 15 and 16, above.

Since there is no evidence that any of the Defendants car[illegible] [illegible]lleged conspiratorial agreement by obstructing justice, this factor cannot be [illegible] [illegible]rt the existence of a conspiracy to do so.

The last factor in *Castillo-Campos* is the nature of the act do[illegible] [illegible]ses on the Defendants' actual conduct. At its best, the government's evid[illegible] [illegible]at (1) when the police arrived at the scene, Price "glared" at Ward when he [illegible] [illegible] the police about what happened; and (2) the versions of events recount[illegible] [illegible]ndants were, in the government's words, "strikingly similar." Neither fact [illegible] [illegible]lusion that there was an agreement to obstruct justice beyond a reasonable d[illegible]

Sergeant Patrick provided testimony that Price "glared [illegible] hen he attempted to speak:

> Q: Now, finally, you mentioned that there was a third i [illegible] living room as well. What was he wearing?
> A: He has on a white bathrobe.
> Q: And did he make any statements that you recall?
> A: Nothing that I recall. Every time he tried to make a s [illegible] as shut down. He wasn't allowed to really talk.
> Q: When you say he wasn't allowed to talk, what do you [illegible]
> A: He was given glares by the one individual that wa [illegible] of the talking. Once he got that glare, he seemed to stop talking.

(5/24/10 18:13-25)

Although it was Sgt. Patrick's impression that Price's glare w [illegible] revent Ward from talking, little can be inferred from that 'impression.' [illegible] of the glare was, in fact, to prevent Ward from talking, it was unsuccessful. [illegible] to the police for many hours back at the Violent Crime Branch.

The Court of Appeals warned against trying to infer inte [illegible] s and glares;' such efforts lead to impermissible speculation. In the case o [illegible] *ith v. United States*, 837 A.2d 87 (D.C. 2003), the defendant was on tri [illegible] ated charge when he, and two of his friends, happened upon one of the ju [illegible] f the courthouse. While the friends made comments to the juror telling h [illegible], that she should find the defendant not guilty, the defendant stood there w [illegible] ring at the juror. Based on this conduct all three were charged with obstruct [illegible]

In reversing Smith's conviction, the DCCA rejected the gov [illegible] ent that it was sufficient that Smith stared at or watched the juror while [illegible] to her. Emphasizing that more than mere presence at the scene of a cr [illegible] d to

prove his guilt of the offense, *id.* at 95, citing *Jefferson v. United S*[illegible]2d 681, 683 (D.C. 1983), the Court held:

> [T]here is no evidence in this case from which it can be infer[illegible] walk to the courthouse, where he was undisputedly required [illegible] and encouraged the remarks made by [his friends]. He simply [illegible] said anything that would warrant this finding. That he looked at [illegible] too thin a thread from which to infer his participation in the crime [illegible] to the complainant, Smith was the furthest away from her and said [illegible] would require speculation to conclude that since he was the defend[illegible] case [on trial], he must have instigated the remarks.

(Chavez) Smith, *supra*, 837 A.2d at 96.

The same reasoning holds true here. It would be impermissib[illegible] there was a conspiratorial agreement between Price and Ward simply beca[illegible]red' at Ward in the presence of the police. Glaring or staring cannot turn n[illegible] into a criminal act. It is, in the words of the Court of Appeals, "too thin a th[illegible]hich to infer participation in a crime."

Moreover, whatever might be said of Price's glaring at Wa[illegible] be attributed to Zaborsky. There is no evidence on this record of any si[illegible], or by, Zaborsky.

Finally, the government would have the Court infer an agre[illegible]struct justice from the fact that the Defendant's statements were all strikingly [illegible] in the government's estimation, materially false. To make such an infere[illegible]ord would be absolute speculation because, as discussed at length in Secti[illegible] the government has not shown by direct or circumstantial evidence that t[illegible] were false.

Also, based on the timeline suggested by the governmen[illegible] the Defendants would have had minutes to "unlawfully combine, conspir[illegible]nd

agree" to obstruct justice. As noted above in the discussion of Overt [illegible] there is no evidence in the record that a 'considerable' period of time elap[illegible] Wone's stabbing and the 9-1-1 call. The only evidence from which a timeli[illegible]ed is the Defendants' statements that Zaborsky called 9-1-1 immediately [illegible] Price discovered that Wone had been stabbed. Zaborsky remained on the [illegible]til the paramedics responded approximately five minutes later. Thus, a[illegible]t [illegible]ould have to have occurred in the minutes between when Wone was st[illegible]

The government's medical evidence also demonstrates that [illegible] had elapsed between the stabbing and the 9-1-1 call. The Deputy Med[illegible], Dr. Goslinoski testified that Wone would have lived only for minutes afte[illegible] stab wound to the heart. When the paramedics arrived, they engaged in li[illegible]es, as did the medical personnel at George Washington University Hosp[illegible]ere was a chance to save Wone's life. The only fair inference from this e[illegible]nly a period of minutes had elapsed between when Wone was stabbed an[illegible]lice were called. This suggests that there was little time for the Defend[illegible] to a conspiratorial agreement.

The Court is thus left with the statements of the three pers[illegible] of the house when Wone was stabbed. Each statement is intern[illegible]lly [illegible]ch corroborates the other from the declarant's respective vantage point. [illegible] in the immediate aftermath of Wone's stabbing, after each Defendant h[illegible]ed and held at the Violent Crime Branch for many hours. There is no e[illegible]ere was any coordination or planning of what the Defendants would tell th[illegible]ld

be error for the Court to conclude - from their similarity alone that [illegible] st[illegible]s were part of a conspiratorial agreement to obstruct justice.

3. No Trier of Fact Could Find that Each [illegible] Intentionally Joined a Conspiracy

The only avenue to a finding that each Defendant in[illegible] [illegible]ined a conspiracy to obstruct justice is through sheer speculation. No trier [illegible] fact [illegible] fairly conclude, beyond a reasonable doubt, that each Defendant knowin[illegible] an[illegible] [illegible]tarily participated in an agreement to obstruct justice. Even if, for the sake [illegible] [illegible]ne or two of the statements were materially false and intended to obstruct ju[illegible] [illegible] one or two of the Defendants orchestrated the crime scene, that does no[illegible] [illegible] of fact to conclude that *all three* statements were lies and thus evidence o[illegible] [illegible].

As discussed above in Section III.F.2, nothing about the ci[illegible]nst[illegible] [illegible]der which Wone was stabbed compels the conclusion that each Defend[illegible] [illegible]ally aware of facts other than what he told the police. Because the governm[illegible] [illegible]ove that each Defendant had 'different' knowledge than what was relate[illegible] [illegible] the Court must have a reasonable doubt that all three men voluntaril[illegible] [illegible] an agreement to lie to the police. In fact, the version of events given [illegible] [illegible] Defendant could be true whether the stabbing was committed by [illegible] Defendants, a known person, or an unknown intruder.

Without any direct or circumstantial evidence that each De[illegible] [illegible]gly joined an agreement to obstruct justice, the Court must have a reasonal[illegible] [illegible] this

element of the offense of conspiracy. This failure of proof requ[illegible] [illegible]o [illegible]nter a judgment of acquittal on Count 1.[26]

B. Obstructing Justice

1. The Elements and Legal Standard

There are six different ways to obstruct justice pursuant to D.C [illegible] le [illegible] [illegible](a). The first five methods – which are not charged here – relate to [illegible] [illegible] [illegible]ould intimidate or impede a juror, witness, or officer from carryin[illegible] [illegible] and prevent or retaliate against someone reporting a criminal offe[illegible]se. [illegible] [illegible]e §§ 722(a)(1)-(a)(5). The Defendants are charged only with the six[illegible]h m[illegible] [illegible] [illegible]hall provision' set forth at § 722(a)(6), which provides that "[a] perso[illegible] con[illegible] [illegible] of obstruction of justice if that person corruptly, or by threats of for[illegible] [illegible] [illegible] or impedes or endeavors to obstruct or impede the due administ[illegible] [illegible] any official proceeding."

The standardized pattern jury instruction pertaining to obs[illegible]ructi[illegible] [illegible]j [illegible] [illegible]der § 722(a)(6) requires a jury to find that there was a <u>pending</u> offici[illegible]l pr[illegible] [illegible] [illegible]ds as follows:

> The elements of obstructing justice, each of which the [illegible] [illegible] [illegible]ove beyond a reasonable doubt, are that:
>
> 1. The defendant obstructed or impeded or endeavored to obst[illegible] [illegible] the due administration of justice in a *pending* [grand ju[illegible] in [illegible] [illegible]al] [hearing] [investigation] [other proceeding] [in a co[illegible]rt o[illegible] [illegible] of Columbia] [conducted by [the Council of the District [illegible]f C[illegible] [illegible] of agency or department of the District of Columbia governm[illegible]nt]];

[26] Because the government failed to provide evidence from which a trier of fact [illegible]oul[illegible] [illegible] [illegible] two elements of conspiracy were established beyond a reasonable doubt, there is n[illegible] nee[illegible] [illegible] third element: the commission of at least one overt act. As discussed above in Se[illegible]ion I[illegible] [illegible] f the Overt Acts remain unproven, considering the evidence in the light most favor[illegible]ble t[illegible] [illegible] the Court could properly find that several of the Overt Acts have been established.

> 2. The defendant did so with the intent to undermine the integ[illegible] [illegible]iding [proceeding] [trial] [investigation].

Criminal Jury Instructions for the District of Columbia, ("Instr." 6.1[illegible] Rev. 2009) (emphasis added). The term "official proceeding" is def[illegible]ed i[illegible] any trial, hearing, investigation, or other proceeding in a court of the Distr[illegible]ia or conducted by the Council of the District of Columbia or any age[illegible]y o[illegible] the District of Columbia government, or a grand jury proceeding." D. C. C[illegible]

It is clear from a plain reading of the statute, its place in th[illegible]hite Collar Crimes Act of 1982, the legislative history underpinning the l[illegible]ive District of Columbia and federal case law that for purposes of ob[illegible]ructi[illegible] there must be an *active* official proceeding at the time the alleged acts of ob[illegible] for a person to commit the offense.

First, the plain language of the statute is unambiguous: "[a] p[illegible] the offense of obstruction of justice if that person corruptly, or by th[illegible]eats [illegible] ay obstructs or impedes or endeavors to obstruct or impede the due [illegible]lmin[illegible]tice in any official proceeding." D.C. Code § 22-722(a)(6). The phras[illegible]ial proceeding" clearly modifies the preceding clause, and applies wh[illegible]re [illegible]ucts or impedes or endeavors to obstruct or impede the due admin[illegible]ratio[illegible]ut differently, the statute may be read as follows:

> A person commits the offense of obstruction of justice if that p[illegible]y, or by threats of force, any way obstructs or impedes the due admin[illegible]tice in any official proceeding or endeavors to obstruc[illegible] or [illegible]e administration of justice in any official proceeding.

The phrase "in any official proceeding" places a temporal limit[illegible]i[illegible] or endeavors to obstruct or impede the due administration of justice. Th[illegible]ok

no further than the dictionary for the obvious meaning of the w d "i d as a function word to indicate inclusion, location, or position w thin r iam-*Webster's On-Line Dictionary*.[27] It is therefore not enough that c bstr ccur. They must occur "include[ed]" or "position[ed] within [the] limi cial proceeding."

Second, the legislative history supports this plain rea g. f an "official proceeding" was first introduced into the code with th Th ollar Crime Act of 1982 when tampering with physical evidenc w ime. Originally, there was no requirement that obstruction of justice be li ficial proceeding. When the obstruction statute was revised in 19 5, t r the District of Columbia, seeking to clarify and extend the reach c ld be considered obstruction, required that obstructive acts occur "in o g."

Significantly, the current laws criminalizing obstruction f j ering with physical evidence were part of the very same Theft and Wh e C ct of 1982, and both rely on the same definition of "official proceedin ." laws, however, the Council made a clear and meaningful distincti be on – requiring an obstructive act during an *active* official proceedi – with physical evidence – requiring knowledge of an *active or likely* offi cia

Third, as demonstrated in *every* District of Columbia ou case discussing obstruction of justice since 1995, the pre-existence of n ' ding' is an absolute requisite for conviction. *See, e.g., Hammond v. nit* A.2d

[27] Available at: http://www.merriam-webster.com/dictionary/in .
[28] A person commits the offense of tampering with physical evidence if he alte , m or removes a document or other object, "knowing or having reason to believe an c ficia begun or knowing that an official proceeding is likely to be instituted." D.C. Code § 2 -72 ed).

1066, 1074-75 (D.C. 2005) (pending trial); *Griffin v. United Sta[illegible]s*, [illegible] [illegible]12-13 (D.C. 2004) (pending trial); *Smith v. United States*, 837 A.2d 87, [illegible]2 [illegible] [illegible]nding trial); *McCullough v. U.S.*, 827 A.2d 48, 53-54 (D.C. [illegible]00[illegible] [illegible] police investigation); *In re: Public Defender Service*, 831 A.2d 8[illegible]), [illegible] [illegible] 2003) (pending trial); *Crutchfield v. United States*, 779 A.2d 307, 313[illegible]5 ([illegible] [illegible]nding police investigation). This includes three reported cases invol[illegible]ng [illegible]ons of D.C. Code § 22-722(a)(6), the provision at issue in this case. *[illegible]ite[illegible] [illegible]thers*, 493 F.3d 229, 231 (D.C. Cir. 2007) (pending trial); *United [illegible]at[illegible]* [illegible]03 F. Supp.2d 217, 219 (D.C. 2007) (pending police investigation); [illegible]nd [illegible] *[illegible]nited States*, 897 A.2d 187, 190 (D.C. 2006) (pending trial).

The most recent case from the Court of Appeals discus[illegible]ng [illegible] [illegible]ports the Defendants' clear reading of the statute. In *Andrews v. Uni[illegible]* [illegible] [illegible] 571 (D.C. 2009) the defendant was a police officer who compelled [illegible]he [illegible] [illegible]titute who had been arrested and was in the defendant's custody, to [illegible]rf[illegible] [illegible] [illegible] him while in his police vehicle. The victim retained the condom tha[illegible] [illegible]was [illegible] [illegible]e sex act and hid it inside her underwear to preserve it as evidence of [illegible] [illegible] a[illegible] [illegible]olice station, while in a police station conference room, the defendant [illegible]sp[illegible] [illegible]ictim had saved the condom. Desperate to conceal his conduct, he [illegible]gra[illegible] [illegible] and started beating her head against the table, "threw her on the floor [illegible]ipp[illegible] [illegible]s and panties, grabbed the condom from between her buttocks, and fl[illegible]hed [illegible]ilet-- all in the presence of other MPD officers who did nothing to [illegible]p [illegible] [illegible]point other officers entered the room and the victim – for the first ti[illegible]e [illegible] [illegible]xual assault. *Id.* at 572-75.

The defendant in *Andrews* was charged with first degre[illegible] se[illegible] ward, tampering with evidence, and obstruction of justice under D.C. [illegible]ode [illegible]3) and 722(a)(6). The trial court dismissed the charge under § 722(a[illegible]) [illegible] issue here – because the alleged act of obstruction "must occu[illegible] [illegible]fficial proceeding' but there was no 'official proceeding' pending at th[illegible] tin[illegible] [illegible]aulted [the victim] to get the condom." *Id.* at 577. The Court of App[illegible]ls [illegible]y the government to consider this decision, but instead reviewed And[illegible]ws [illegible]der § 722(a)(3)(B) which makes it a crime to "harass another person [illegible]th [illegible] inder, delay, prevent or dissuade the person from reporting to a law [illegible]nf[illegible] [illegible]r the commission of, or any information concerning, a criminal offens[illegible]"

The Court rejected the government's argument that And[illegible]ws [illegible]ictim in an effort to prevent her from reporting the sexual assault to [illegible]e p[illegible] [illegible]hing, Andrews' dramatic and violent assault on [the victim], made in [illegible] c[illegible] [illegible] of a police station and in the presence of three witnesses, two of [illegible]he[illegible] [illegible]elves police officers, almost certainly accelerated [the victim's] "repo[illegible]' o[illegible] [illegible] than "hindered" or "delayed" it." *Id.* The Court concluded, "[i]n sh[illegible] [illegible]ould have dismissed the charge under D.C. Code § 22-722(a)(3)(B) [illegible]ust [illegible] the charge under D.C. Code § 22-722(a)(6)." *Id.* While the thrust [illegible] th[illegible] [illegible]on in *Andrews* was an analysis of the facts under § 722(a)(3)(B), i[illegible] [illegible]ally [illegible]he [illegible]lain reading of the statute that there must be an "ongoing," and [illegible]t [illegible] [illegible]in[illegible]t or inevitable, official proceeding to violate § 722(a)(6).

Finally, case law analyzing the federal counterpart to § [illegible]22([illegible]o[illegible] [illegible]lete agreement with this interpretation of the statutory language. A[illegible] [illegible]isc[illegible] [illegible] [illegible]ly in

Section IV.B.2.b, the District of Columbia obstruction of justi[illegible] sta[illegible] te[illegible]ed on the federal obstruction of justice statute. Indeed, the language [illegible] D[illegible] 7[illegible] (a)(6) is virtually identical to that of 18 U.S.C. § 1503(a). Fede[illegible] co[illegible] eti[illegible] this statute "speak with one voice" on the requirement that there [illegible] [illegible]nding proceeding to support a conviction for obstruction of justice. [illegible] [illegible] [illegible] Supp. at 1384, citing *United States v. Capo,* 791 F.2d 1054, 1070 (2[illegible] Ci[illegible] [illegible]in a conviction under this section, the government must show [illegible] [illegible]nding judicial proceeding, such as a grand jury proceeding, ... and [illegible] de[illegible] [illegible] and sought to influence, impede, or obstruct the judicial proceedin[illegible]..." [illegible] [illegible]ted), *reh'g granted on other grounds,* 817 F.2d 947 (2d Cir.1987) ([illegible] [illegible] *S*[illegible] *v. Walasek,* 527 F.2d 676, 678 (3d Cir.1975) ("[A] pre-requi[illegible] [illegible] for obstruction of justice under the final clause of 18 U.S.C. § 150[illegible] [illegible] [illegible]ome sort of judicial proceeding which equates to an "administrati[illegible] [illegible] [illegible]ions omitted); *United States v. Vesich,* 724 F.2d 451, 454 (5th Cir. [illegible] [illegible] to any violation of section 1503 is the existence of a pending judi[illegible] [illegible] [illegible] to the violator.") (citations omitted); *United States v. Risken,* 788 [illegible] [illegible]ir.) (same), *cert. denied,* 479 U.S. 923 (1986); *United States v. Ryan* [illegible] [illegible]h Cir.1972) ("[I]n order to constitute an offense under Section [illegible] [illegible] must be in relation to a proceeding pending in the federal courts....").

This Court should look to *Smith, supra,* 729 F. Supp. [illegible] [illegible] In that case Smith, a District of Columbia police officer, was arres[illegible] in [illegible] [illegible]ng operation conducted by the Internal Affairs Division of [illegible] [illegible]ce Department. Smith was videotaped seizing 18 packets of [illegible] [illegible]ed

counterfeit cocaine, but only turned in 15 of those packets. *Id.* [illegible] that conduct, Smith was charged with obstruction of justice in viol[illegible] [illegible]03, tampering with evidence in violation of D.C. Code § 723, and [illegible] §§ 3811, 3812.

The Court dismissed the obstruction of justice count be[illegible] [illegible]here was no pending judicial proceeding at the time of Smith's a[illegible] [illegible]s a matter of law, he could not be convicted of obstruction of jus[illegible] [illegible]ly rejected the position that the defendant could be convicte[illegible] [illegible]tice because the required proceeding was 'imminent':

> That judicial proceedings be pending at the time of de[illegible] [illegible]s a *sine qua non* of a charge under Section 1503. In the [illegible] no dispute that at the time of the defendant's actions, no [illegible] [illegible]en filed, and no grand jury investigation or proceedi[illegible] [illegible]he government argues that defendant's conduct falls withi[illegible] [illegible]e had every reason to believe that when he arrested [th[illegible] [illegible] and seized the suspected drugs, that judicial proceedings w[illegible] [illegible]nt." The government candidly conceded at argument, howe[illegible] [illegible]ses supporting this "imminence" theory. Under this theory, [illegible] [illegible]ut, any offender aware of his imminent arrest and prosecu[illegible] [illegible]ties who conceals evidence of the crime could potentially be [illegible] [illegible]n of justice under Section 1503.... The Court is compell[illegible] [illegible]ss reading of Section 1503[].

Id. at 1385.

For all of these reasons, the Comment to Instr. 6.101 [illegible] [illegible]e extent that the current statute carries forward pre-1982 law, [illegible] is based upon cases construing the former provision and the anal[illegible] [illegible]8 U.S.C. §§ 1503 and 1510. . . . [U]nder this offense the gover[illegible] [illegible]e pendency of formal court proceedings . . . ."

With this clear understanding of the scope of 722(a)(6[illegible] [illegible]hat

there be a pending official proceeding at the time of the Defend ... der whether there is any evidence from which a reasonable finder ... hat the elements of obstructing justice have been established beyo ... As shown below, there is not.

2. THERE IS INSUFFICIENT EVIDENCE FRO... REASONABLE TRIER OF FACT MAY CO... THE DEFENDANTS OBSTRUCTED JUSTIC...

In assessing whether a reasonable trier of fact co... of obstructing justice beyond a reasonable doubt, it is helpful to ... (as outlined in the Overt Acts) in three distinct time periods:

- acts alleged to have occurred before the call w... :49 p.m.;
- the 9-1-1 call and acts alleged to have occurred ... ed; and
- the November, 2007 conversation between Price ...

We consider each in turn.

a. ANY ACT BEFORE THE 9-1-1 CA... "IN ANY OFFICIAL PROCEEDING...

Overt Acts 1, 4, 5, 6, 7, and 8 allege actions by th... red before Zaborsky placed the call to 9-1-1 at 11:49 p.m. on ... the reasons discussed above: (1) there is no evidence in the rec... rt a finding that any of these Overt Acts occurred; and (2) in any ... ort a finding that the Defendants obstructed justice under § 722(a ... not

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[29] None of the pre-9-1-1 call Overt Acts identifies which of the three D... act. Indeed, Overt Acts 1, 5, 6 and 7 allege that the Defendants acted "indivi... hile Overt Acts 4 and 8 refer simply to the "defendants" without further spe... icity reflects the government's fundamental lack of evidence that any particul... ular action in connection with the death of Robert Wone.

occur "in an official proceeding." There is no evidence befo[illegible] r [illegible] was an official proceeding until the 9-1-1 call was placed alerting [illegible] n [illegible] ies that Robert Wone had been stabbed. Without an active offic[illegible] i [illegible] not be obstruction of justice.

b. THE DEFENDANTS' STATEMEN[illegible] IS [illegible] AW ENFORCEMENT OFFICERS ARE [illegible] IN [illegible] TO ESTABLISH THE ELEMENTS [illegible] E

Overt Acts 9 through 16 focus on statements and alle[illegible] the Defendants to the first responders and police investigators. [illegible] ere made in an official proceeding, *i.e.*, a police investigation, t[illegible] b[illegible] ourt does not permit any inference that the statements made [illegible] D[illegible] ere materially false or made with the intent to mislead law e[illegible] t [illegible] rue circumstances of Robert Wone's death.[30]

Obstructing justice is a specific intent crime. *Crutc*[illegible] 779 A.2d 307, 327 (D.C. 2001). The government is required [illegible] t a defendant acted in a manner that obstructed or impeded the d[illegible] st [illegible] ice in a pending proceeding, but also that he did so "with t[illegible] the integrity of the proceeding." Instr. 6.101. As discussed at l[illegible] ble juror could conclude that each Defendant told the police ma[illegible] f[illegible] out the events of August 2, 2006.

Moreover, for the sake of argument such statements t[illegible] en if untrue, could not have had the natural and probable effect [illegible] ng the due administration of justice. The case law is clear: with[illegible] hi [illegible] be no conviction for obstruction.

[30] See Section III.F, above.

As an initial matter, there is not a single DCCA case [illegible] rent version of D.C. Code § 22-722 was passed in 1982 that holds [illegible] kes false statements to an investigating officer during an investiga[illegible] n of justice under § 22-722(a)(6).[31] Defendants are also unaware [illegible] ase where a person was convicted of obstructing justice base[illegible] lse statements to law enforcement agents.

The absence of such cases is explained by the p[illegible] ial decisions limiting the broad language of the omnibus or "catch[illegible] S.C. § 1503(a), the federal obstruction of justice statute, from wh[illegible] is directly derived.[32] As the Second Circuit recently explain[illegible] use contains a more general and open-ended prohibition, punishin[illegible] or by threats or force, or by any threatening letter or communic[illegible] ts,

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[31] Indeed, having reviewed every DCCA case in which obstruction is men[illegible] ver, holding that a suspect who lies to the police during an investigation comm[illegible] r § 22-722. Nothing in the case law or the legislative history remotely sugg[illegible] d to subject persons to a 30-year felony for lying to the police. To the c[illegible] ered carefully what penalty should attach to making false statements to Distric[illegible] ding MPD, in passing D.C. Code § 22-2405, which would not criminaliz[illegible] the circumstances here.

The crime of false statements was first passed as part of the very same [illegible] mes Act of 1982, which created both obstruction and tampering with physical [illegible] les that "[a] person commits the offense of making false statements if that [illegible] alse statement that is in fact material, *in writing*, directly or indirectly, to any [illegible] ct of Columbia government, under circumstances in which the statement coul[illegible] o be relied upon as true; *provided, that the writing indicates that the making o*[illegible] *ble by criminal penalties*." D.C. Code § 22-2405 (emphasis added). Violation[illegible] nor offense punishable by imprisonment for up to 180 days, a fine of $1,000, [illegible] (b). Thus, unless the statement is in *writing* and the *writing itself* indicates the [illegible] es, there is no general criminal liability for lying to a DC government agency.

The District's false statement law is a different approach - and represen[illegible] than the one adopted by Congress when it enacted 18 U.S.C. § 1001, which c[illegible] alse statements to federal agencies. Local officials chose to criminalize only fa[illegible] ear written notice of possible criminal penalties.

[32] The DCCA and the courts of the District of Columbia consistently "look [illegible] ing federal statute[s] for guidance in construing [a] similar local statute." *Dist*[illegible] 717 A.2d 866, 869 n.5 (D.C. 1998) ((emphasis added), citing *Arthur Young &* [illegible] 54, 361 n. 17 (D.C.1993). *See also*, *Corley v. United States*, 416 A.2d 713, 7[illegible] S. 1036 (1980).

or impedes, or endeavors to influence, obstruct, or impede th[illegible] [illegible]n of justice. Wary of the breadth of this language in a crimi[illegible] [illegible]ave limited its scope in several ways." *United States v. Trium[illegible] Ca[illegible]* [illegible] 544 F.3d 149, 166 (2d Cir. 2008).

First, the United States Supreme Court long ago "in[illegible] [illegible]at a judicial proceeding actually exist, and that the defendant [illegible] [illegible] its existence" at the time the obstructive conduct occurred, for [illegible] *Id.* (citing *Pettibone v. United States,* 148 U.S. 197, 206-07 (18[illegible]). [illegible] [illegible]*ates v. Reed,* 773 F.2d 477, 485 (2d Cir.1985) ("[T]he existence [illegible] [illegible]g is an element of a § 1503 violation . . . ."). In light of the feder[illegible] cou[illegible] [illegible] the federal obstruction statute as requiring both the existence [illegible] f a [illegible]ling official proceeding for a violation to occur, the District h[illegible] [illegible] ru[illegible] 22-722(a)(6) as requiring the existence and actual knowledge [illegible] ee[illegible] not simply anticipation of such a proceeding.[33]

Second, numerous federal courts of appeal "in [illegible]der [illegible] [illegible]03's application to sufficiently harmful conduct, imposed a 'nexu[illegible]' req[illegible]t, [illegible] [illegible]hich the defendant's conduct must be <u>such 'that its natu[illegible] [illegible] [illegible]ou[illegible] the interference with the due administration of justice.'</u>" *Trium[illegible] C[illegible] [illegible]p,* 544 F.3d at 166 (quoting *United States v. Wood,* 6 F.3d 692, [illegible] (1[illegible] [illegible]3) [illegible]ernal quotations and citations omitted) (emphasis added)). In 199[illegible] in *U[illegible] [illegible] v. [illegible]ilar,* 515 U.S. 593, 600-601 (1995), "the Supreme Cou[illegible] adopt[illegible] [illegible] [illegible]' [illegible]equ[illegible]ent" with a slight modification. 515 U.S. at 600. In doing so, th[illegible] [illegible] [illegible]rul[illegible] [illegible]at to violate the omnibus section of the obstruction of justice st[illegible]te, [illegible] an [illegible]tion

[33] See Section IV.B.1, supra.

must have "the natural and probable effect of obs[illegible]ucting [illegible]he j[illegible] p[illegible]ocee[illegible]."
Aguilar, 515 U.S. at 601. *See also*, *id.* at 613 (Scalia, J [illegible] concu[illegible]ng i[illegible] [illegible] dis[illegible]ng
in part).

Aguilar and cases pre- and post-dating it consis[illegible]ently h[illegible]d [illegible]ha[illegible] [illegible]em[illegible] to
an investigating officer—as compared to other obs[illegible]uctive [illegible]ondu[illegible], [illegible]est[illegible]ng
evidence or witness tampering—do not constitute ob[illegible]tr[illegible]ctio[illegible] of j[illegible] [illegible]e[illegible]aus[illegible]h
statements do not have the 'natural and probable [illegible]ff[illegible]ct [illegible] obs[illegible] [illegible]al
proceeding.' *See Aguilar*, 515 U.S. at 599-602; *Tr[illegible]m[illegible]h [illegible]pi[illegible]* [illegible] 56;
United States v. Wood, 6 F.3d 692, 696-97 (10th Cir. 19[illegible]3).

In *Aguilar* a sitting federal judge lied to law e[illegible]fo[illegible]cem[illegible]nt o[illegible] [illegible]s
interviewed about whether he disclosed a wiretap an[illegible] [illegible]ver[illegible] [illegible]r
judge about a pending matter. Affirming reversal of h[illegible]s [illegible]onv[illegible]tion, [illegible]r[illegible]ne[illegible]t
held "[w]e do not believe that uttering false statemen[illegible] a[illegible] [illegible]v[illegible] [illegible]ent[illegible]d
that seems to be all that was proved here—who might [illegible] might [illegible]ot te[illegible] [illegible]a[illegible]d
jury is sufficient to make out a violation of the catchall [illegible]ro[illegible]isio[illegible] of § [illegible] 51[illegible]t
600. The Court found that under those circumstances t[illegible]e [illegible]alse [illegible]tate[illegible] "[illegible]t
be said to have the 'natural and probable' effect of inter[illegible]ri[illegible]g w[illegible]h th[illegible] [illegible]m[illegible]nis[illegible]n
of justice." *Id.* at 601.

The Second Circuit reached the same decision in *Tri[illegible]p[illegible]* [illegible]he[illegible]e
defendant was charged with obstructing justice [illegible]nder [illegible] 50[illegible] [illegible]st[illegible]g
incriminating documents. 544 F.3d 155-56. The defe[illegible] [illegible] ng [illegible] [illegible]gue[illegible]t
his conviction should be overturned on the basis that he [illegible]id no[illegible] [illegible]now[illegible] [illegible]str[illegible]n
of the documents would, even if intended, impede the d[illegible] [illegible]dmi[illegible]strati[illegible] [illegible]s[illegible]e. [illegible]t

165, 169. Rejecting this argument, the Second Cir[illegible]uit dis[illegible]guished [illegible]bst[illegible]ve conduct of destroying a document from making fal[illegible] state[illegible]ents to a[illegible] [illegible]esti[illegible]ng officer:

> [Defendant's] argument ignores a key differenc[illegible] the issua[illegible] [illegible]a grand jury subpoena *duces tecum* seeking the [illegible]on of do[illegible] [illegible]ts and the questioning of a subject by an inves[illegible]gating [illegible]gent. Gra[illegible] [illegible]ry subpoenas *duces tecum* are customarily emplo[illegible]ed to [illegible]ther info[illegible]on and make it available to the investigative team [illegible]f [illegible] and pro[illegible]rs so that it can be digested and sifted for pertinen[illegible] matter. [illegible] Acco[illegible]y, subpoenas *duces tecum* are often drawn br[illegible]adl[illegible], [illegible]ing [illegible] [illegible]th documents that may prove decisive and docum[illegible]ts that [illegible]rn out n[illegible] [illegible]e. This practice is designed to make it unlikely th[illegible] a rele[illegible]nt docum[illegible] [illegible]ill escape the grand jury's notice, and it is general[illegible] effe[illegible] [illegible]e. Destru[illegible] [illegible]of a relevant document is therefore likely to [illegible]mpac[illegible] [illegible]he grand [illegible]'s deliberations. *Cf. Aguilar*, 515 U.S. at 601, 11[illegible] S.Ct. [illegible]57 ("del[illegible] [illegible]of false documents" to the grand jury would be obs[illegible]uction [illegible] justice).

Id. at 168. The *Triumph Capital* court explained tha[illegible] [illegible]here [illegible]efendan[illegible] [illegible]s a [illegible]se statement to an investigating officer, even where the [illegible]fe[illegible]d[illegible] has the [illegible]essi[illegible][34] that his false statement will affect the proceeding, he [illegible]nn[illegible] [illegible]ow that [illegible] [illegible]e "[illegible]hat use will be made of false testimony given to an inve[illegible]igat[illegible] [illegible]gent wh[illegible] [illegible] not [illegible]en subpoenaed or otherwise directed to appear before the [illegible]rand [illegible] ... sp[illegible] [illegible]ive. *Id.* at 169 (quoting *Aguilar*, 515 U.S. at 600-01).

Moreover, as the Tenth Circuit observed in *W[illegible]d*, [illegible] the c[illegible] [illegible]ism[illegible]ed from the indictment an obstruction charge under §1503[illegible]), th[illegible] [illegible]king of f[illegible] [illegible]ate[illegible]ts to an investigating officer does not have the natural an[illegible] pro[illegible] [illegible]effect o[illegible] [illegible]edi[illegible] [illegible]he due administration of justice because:

[34] "Aguilar himself testified that, at the end of the interview, it wa[illegible] [illegible]s [illegible] that [illegible] [illegible]ds [illegible]ld be conveyed to the grand jury." *Triumph Capital*, 544 F.2d at 170 [illegible]iti[illegible] [illegible]*lar*, 515 U[illegible] [illegible]14 ([illegible]lia, J., concurring in part and dissenting in part)).

> [I]t [is] difficult to believe that the FBI agents were [illegible] terminate [illegible]ir investigation based on the self-serving exculpatory explanation of [illegible] defendant. If the agents had reason to believe that defendant [illegible] a participant in MacDonald's political corruption they would not [illegible] a full confession in the context of an unsworn interview. T[illegible]e investigation eventually revealed what the government claims is [illegible]h about the car is evidence that they did not rely exclusively on def[illegible]'s statements. We conclude that defendant's unsworn exculpatory sta[illegible]ts given in his own office to interviewing FBI agents did not have the [illegible]al 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).

The rationale of *Wood* is directly applicable here. [illegible]ing, [illegible] sa[illegible] of argument, that the Defendants' statements to MPD were false and were [illegible] with the intent to obstruct, at most the government has proved that the Defendants each denied knowing what happened to Robert Wone and surmised that an [illegible]c intruder [illegible] must have committed the crime. A general denial, without more, cannot have the [illegible]ural and probable effect of impeding the police investigation. And the Defendants' [illegible]als about an outside intruder certainly did not impede the police investigation [illegible]h investigators dismissed that explanation after cursory [illegible] of the crime scene and fixed their sights on the Defendants as the suspects [illegible]ing the Defendants made no more than self-serving exculpatory explanations the interrogating officers hearing those explanations "would not expect a full confession in the [illegible] an unsworn interview." *Id.* at 696. As a matter of law, therefore, the Defendants' [illegible]n exculpatory statements given to interrogating MPD [illegible] not have the [illegible]al and probable effect of impeding the due administration of justice in the sense [illegible] by D.C. Code § 22-722.

c. **DEFENDANT PRICE'S C[illegible] WITH [illegible] IN 2007 DID NOT OCC[illegible]ICIAL P[illegible]**

For the reasons discussed above, only acts that [illegible] any offic[illegible]ng" may support a finding of obstruction of justice und[illegible]). Not [illegible] this conversation occurred in an official proceeding. Ms. [illegible] her a l[illegible] enforc[illegible]ent officer nor an agent. She played no role in the 'offic[illegible]' that [illegible] "c[illegible]inal investigation into the murder of Robert Wone," oth[illegible] witness [illegible] Ms. Wone was an essential witness, it is nonsensical to [illegible] not tel[illegible] his brother had keys to the house Price was acting [illegible]fic int[illegible]tly influence the police investigation. Indeed, the In[illegible] that [illegible] that same nondisclosure directly to the police.[35] Becaus[illegible] with [illegible] W[illegible] has no nexus to the "official proceeding," it may not sup[illegible] of § [illegible]

Moreover, nothing about the alleged conv[illegible] remo[illegible] as obstructing or impeding or endeavoring to obstruct [illegible] "due [illegible] of justice." There is no allegation that Mr. Price [illegible] influen[illegible] one's testimony in any way. Indeed, the part of the conv[illegible]ed i[illegible]di[illegible]ment, that is, whether Michael Price had a key to the ho[illegible]ledge [illegible] ot by Ms. Wone, but by Mr. Price. He had no obligatio[illegible] otherwi[illegible] Ms. Wone who had keys to the Swann Street residence.

It would be impossible for any finder of fact to [illegible] by [illegible]ng to Ms. Wone that Michael Price had a key to 1509 Sw[illegible] Price [illegible] ecific intent required to obstruct justice. Indeed, the gov[illegible] s that more than a year before the lunchtime conversation w[illegible] Wone. Pri[illegible] thy

[35] See Overt Act 14.

interview with Detective Danny Whelan in which [illegible] that M[illegible] e had a key to the house and knew the security code [illegible] ation [illegible] ce in November, 2006 in the aftermath of the October [illegible] y. [illegible] ready informed the police that Michael Price had a key, [illegible] no [illegible] that [illegible] led to obstruct justice by failing to mention that fact to Ms. [illegible] the [illegible] uction theories advanced by the government, this one fails [illegible] aw.

C. Tampering with Physical Evidence

1. The Elements and Legal Standard

Count Three of the Indictment charges each Defendant with [illegible] with physical evidence and alleges that the three Defendants "a[illegible] destroy[illegible] d and concealed objects and items, that is blood and blo[illegible] te[illegible] knife, a[illegible] sed to clean the crime scene of the homicide." Ind. [illegible] ain [illegible], the government must prove the following three elements, b[illegible] y[illegible] sonabl[illegible] bt:

> a. The defendant knew or had rea[illegible] n [illegible] e tha[illegible] ga ion had begun, or was likely to be instit ed [illegible] the Distr[illegible] umbia Metropolitan Police Department;
>
> b. He altered, destroyed, muti[illegible] [illegible] d, or [illegible] blood and bloody items, a knife, and item u[illegible] lean [illegible] of the homicide"; and
>
> c. The defendant intended to alter [illegible] o [illegible] to [illegible] the value as evidence or its availability for use as vid[illegible] e in[illegible] tio[illegible].

Instr. 6.114.

Like obstructing justice, tampering with phy ca[illegible] nce is [illegible] intent crime. It is not enough for the government to pro[illegible] t a[illegible] " [illegible] royed, mutilated, concealed or removed" the identified evide ce [illegible] d to h[illegible] o with the specific intent to impair its use as evidence in the i[illegible] es[illegible]

Unlike obstructing justice, however, the gov[illegible] there was an active official proceeding at the time the def[illegible]nt act[illegible] [illegible]lence. It is enough that the defendant was aware that an o[illegible]l pro[illegible] r was likely to be instituted." This distinction was note[illegible] he ca[illegible] [illegible]nited *States*, 758 A.2d 978 (D.C. 2000).

In *Timberlake* the defendant was charged w[illegible] [illegible]ysical evidence for making an effort to swallow drugs a[illegible] olice [illegible]n air drug market. The defendant argued that he did not k[illegible] that [illegible] drug investigation at the time, although there was evid[illegible] that [illegible] [illegible]uted "five-o" as the police were arriving.

In upholding the conviction, the Court note[illegible] [illegible]se of tampering with physical evidence if he alters, mutil[illegible] once[illegible] [illegible]ment or other object, "knowing or having reason to be[illegible] that [illegible] [illegible] has begun or knowing that an official proceeding is lik[illegible] be i[illegible] -980. The Court emphasized that:

> [to] satisfy the knowledge element of the o[illegible] an[illegible] [illegible] sets forth a subjective and an objective test wit[illegible] re pe[illegible] [illegible]ficial proceeding "has begun," but sets forth a sub[illegible] test [illegible] [illegible]er an official proceeding "is likely to be instituted[illegible] the l[illegible] [illegible]s "to sustain a conviction under this provision, it [illegible]cessa[illegible] [illegible]e the defendant tampered with the evidence, he or [illegible] knew [illegible] [illegible]ly to be instituted if such a proceeding had no[illegible] ct be[illegible] [illegible] the Judiciary, Council of the District of Columb[illegible], tensi[illegible] [illegible]ill 4-133; the District of Columbia Theft and Wh[illegible]e [illegible]llar C[illegible]nes [illegible] 104 (1982) [hereafter "Comm. Rep."].

Id. 758 A.2d at 983 n.6. *Timberlake* makes clear th[illegible] [illegible]uage and recognizes that the Council made a specific cho[illegible] exte[illegible] [illegible]ing -

and not obstruction - to persons who knew or [illegible]eason[illegible] k[illegible] t[illegible] [illegible]ficial proceeding is likely to be instituted.

Here, a Court could conclude that upon disco[illegible]ng th[illegible] Wo[illegible] [illegible]bbed the Defendants knew that an "official proceeding[illegible] was likely to be instituted

2. NO TRIER OF FACT COULD F[illegible]HE E[illegible] [illegible]TA[illegible]PI[illegible]NG WITH PHYSICAL EVIDENCE B[illegible]D A[illegible] [illegible]D[illegible]

Even in the light most favorable to the govern[illegible] there[illegible] [illegible]ab[illegible] [illegible]n[illegible] [illegible]ence – direct or circumstantial – that would enable any trier [illegible]ct [illegible]find [illegible] [illegible]n[illegible]ts of tampering beyond a reasonable doubt. This count sh[illegible] di[illegible]

Specifically, the Indictment alleges that the [illegible] four [illegible] [illegible]ce with which the Defendants tampered: (1) blood; (2) bloo[illegible]ms; [illegible] [illegible]tems used to clean the scene of the homicide. Because there [illegible] and no inferences that could be fairly be drawn, that [illegible]en[illegible]ts, [illegible]yed, mutilated or concealed" these items, the evidence [illegible]fic[illegible] [illegible]t the charge.

First, there is no evidence on this record th[illegible]bl[illegible] [illegible]or [illegible] [illegible]ere tampered with in any way. Indeed, there is no eviden[illegible] [illegible]ries would have produced more blood or bloody ite[illegible] [illegible]the paramedics and recovered by the police. Similarly [illegible] [illegible]id [illegible] [illegible]scene was cleaned or that items would have been used [illegible] the sc[illegible]ne [illegible]e [illegible]The absence of such evidence, the government abando[illegible] [illegible]n Overt Act 1 of the Indictment) that the crime scene w[illegible]ne[illegible]

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[36] The forensic evidence is actually to the contrary. No blood [illegible] [illegible]an on or near Wone's body and on the knife, and no cleaning agen[illegible]

Second, the remaining allegation as to [illegible] the [illegible]ons discussed above in Section III.C. The Court [illegible] ju[illegible]fi[illegible] fer [illegible] the government's evidence that the knife found in the [illegible] act, th[illegible] knife used to stab Robert Wone. Put differently, there is [illegible] a ju[illegible] [illegible]uld fairly conclude that the recovered knife was planted [illegible] that [illegible] knife on the scene – or another knife - was 'altered, de[illegible] ncea[illegible] and with no direct evidence to the contrary, the second [illegible]t.[37]

Finally, there is no evidence from which [illegible] de, be[illegible] a reasonable doubt, that the Defendants took any act [illegible] to [illegible] evidenc[illegible]th the specific intent to impair its use in the investiga[illegible] actual[illegible] the contrary: Zaborsky placed the 9-1-1 call to report [illegible] ght th[illegible] [illegible]ce to the scene; all three Defendants spoke with polic[illegible] the s[illegible]ng; and Price pointed out the location of the knife to inv[illegible] ier th[illegible] ke efforts to hide, conceal or alter evidence, the Defend[illegible] to the[illegible] me to investigate and recover evidence. With no ev[illegible] ndant[illegible] the specific intent to impair the use of any of the lis[illegible] th[illegible] nent [illegible]ns unproven.

V. CONCLUSION

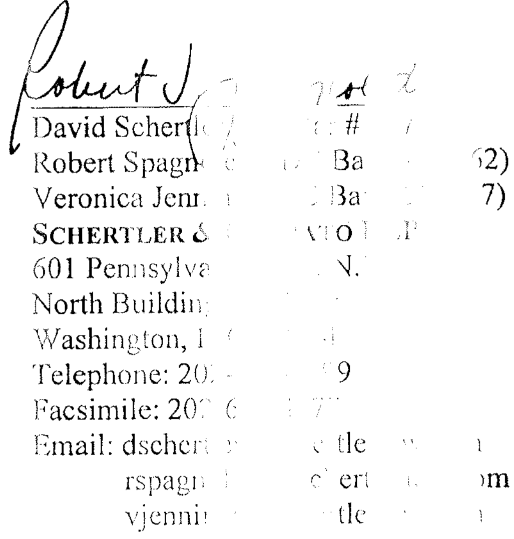
The government candidly acknowledges th[illegible] k[illegible] t happe[illegible] to Robert Wone. Neither do the Defendants; the go[illegible]'s [illegible] fails t[illegible] ve otherwise. Despite the many witnesses and exhibit[illegible] by th[illegible] nent d[illegible] its case-in-chief, there remains a fundamental lack of e[illegible] that [illegible] ble an[illegible] der

[37] While there is evidence that Price moved the knife from [illegible] hest [illegible] t stand [illegible] ply pressure to his wounds, it would not be a reasonable inference [illegible] at way [illegible] one to impair its use or availability in the investigation.

of fact to conclude, beyond a reasonable doubt, tha[illegible] harged [illegible]ses have been established. The Court should enter a [illegible] as to [illegible] three Counts and as to all three Defendants.

Dated: June 16, 2010

Respectfully S[illegible]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Robert Spagn[illegible] Ba[illegible]2)
Veronica Jenn[illegible] Ba[illegible] 7)
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601 Pennsylva[illegible] N.[illegible]
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Telephone: 20[illegible]9
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Email: dscher[illegible]tle[illegible]
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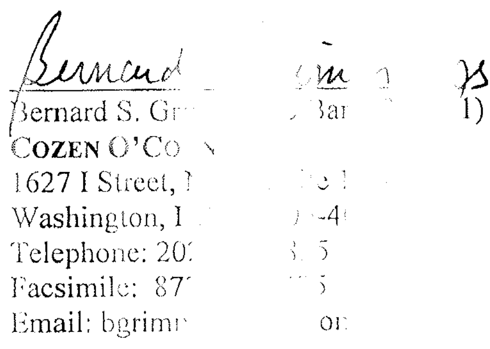
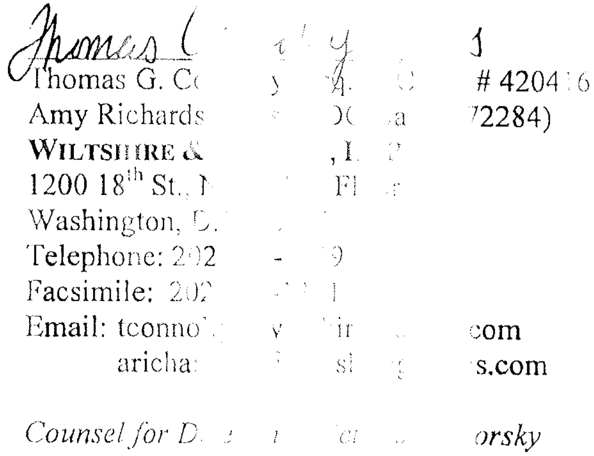
Counsel for D[illegible]yl[illegible]rd


Bernard S. Gr[illegible] Bar[illegible] 1)
COZEN O'CO[illegible]
1627 I Street, [illegible]
Washington, [illegible]-4[illegible]
Telephone: 20[illegible]5
Facsimile: 87[illegible]5
Email: bgrim[illegible]o[illegible]

Counsel for D[illegible]se[illegible]ce



Thomas G. C[illegible] #4204[illegible]6
Amy Richards[illegible] [illegible]72284)
WILTSHIRE & [illegible]
1200 18th St., [illegible]
Washington, D.[illegible]
Telephone: 2[illegible]2 [illegible]
Facsimile: 20[illegible]
Email: tconno[illegible]com
aricha[illegible]s.com

Counsel for D[illegible]orsky

CERTIFICATE OF SE[illegible]

I hereby certify that a true and correct copy of the fo[illegible] for Judgment of Acquittal was served via hand, this 16th day of Ju[illegible]

Glenn Kirschner
Rachel Carlson Lieber
Patrick Martin
Assistant United States Attorn[illegible]
Office of the United States Att[illegible]
for the District of Columbi[illegible]
555 Fourth Street, N.W.
Washington, D.C. 20530