No. 23-CF-0205

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IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

RONNIKA M. JENNINGS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the Superior Court of the District of Columbia,
No. 2018 CF1 006028 (Demeo, J.)

BRIEF FOR APPELLANT

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RULE 28(a)(2)(A) STATEMENT

The parties are appellant Ronnika M. Jennings and appellee United States of America.

Before the D.C. Superior Court, Jennings was represented by Russell Hairston and Alvin Thomas. During preliminary motions practice, Jennings was represented by Dorsey Jones, currently serving as a Magistrate Judge for the Superior Court of the District of Columbia. The United States was represented by Michael Truscott and Kevin Flynn.

Jennings is represented in this Court by Matthew T. Martens of Wilmer Cutler Pickering Hale and Dorr LLP. The United States is represented by Chrisellen Kolb.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under D.C. Code § 11-721(a)(1). The trial court issued a final judgment of conviction on March 13, 2023. App. 49; Tr. Dkt. 891. Jennings timely filed a notice of appeal the same day. App. 169; Tr. Dkt. 892.

STATEMENT OF ISSUES

1. Whether a conviction for obstruction of "the due administration of justice in any official proceeding," in violation of D.C. Code § 22-722(a)(6), can be sustained based on evidence (which was insufficient, in any event) of obstruction of a criminal prosecution pending in U.S. District Court, despite the statutory definition of an "official proceeding" as including only proceedings in D.C. Superior Court and the D.C. Court of Appeals.

2. Whether the trial court plainly erred in failing to instruct on the technical, statutory definition of "official proceeding" as used in Section 22-722(a)(6).

3. Whether there was sufficient evidence that Jennings was an accessory after the fact to assault with intent to kill and to murder.

4. Whether the trial court plainly erred in failing to instruct on the technical, common-law definition of the assistance element of an accessory-after-the-fact offense.

5. Whether, given that Jennings was a MPD employee required to cooperate with the police investigation, the prosecution's use of her interrogation statements was involuntary under *Garrity v. New Jersey*, 385 U.S. 493 (1967), and required a hearing pursuant to *Kastigar v. United States*, 406 U.S. 441 (1972).

STATEMENT OF THE CASE

On March 14, 2019, Jennings was charged in a superseding indictment with forty-five counts, alleging conspiracy to kill and assault (Count 1), accessory after the fact to unlawful possession of firearm (Counts 3, 8, 13, 23, 34, 39, 41), first degree murder (Count 35), accessory after the fact to murder (Counts 5, 36), possession of firearm while committing first degree murder (Count 37), assault with intent to kill (hereinafter, "AWIK") (Counts 9, 14, 17, 20, 24, 27, 30), accessory after the fact to AWIK (Counts 10, 15, 18, 21, 25, 28, 31), possession of firearm while committing AWIK (Counts 11, 16, 19, 26, 29, 32), conspiracy to obstruct justice (Count 42), and obstruction of justice (Counts 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55). App. 56-124; Tr. Dkt. 152.

A hearing on Jennings's motions to suppress was held on July 5, July 8, and September 6, 2022, at which Jennings sought to suppress statements made during a police interrogation as well as the contents obtained from a search of her cellphone. *See* App. 125-135; Tr. Dkt. 549, 557, 579.[1] On September 6, 2022, the trial court denied her motions to suppress. *See* App. 226-227; 230-231.

On September 12, 2022, a jury trial commenced in D.C. Superior Court, with a verdict rendered on December 14, 2022. Tr. Dkt. 602, 862. The jury found Jennings not guilty of forty counts, but found her guilty of Counts 15, 18, and 21 (accessory after the fact to AWIK), Count 36 (accessory after the fact to murder), and Count 47 (obstruction of justice). App. 152-167. On March 13, 2023, the trial

[1] On February 12, 2025, Jennings filed a Motion to Supplement the Record in this appeal with certain trial court exhibits and motions to suppress evidence.

court sentenced Jennings to fifteen years in prison on Count 36, with lesser sentences on the remaining charges to run concurrently. App. 49; Tr. Dkt. 884-889.[2]

STATEMENT OF FACTS[3]

A. Ronnika Jennings

At the time of the events in question, Ronnika Jennings was a 38-year-old single mother of three children living in the Barry Farms neighborhood. *See* Tr. Ex. RJ-1 at 5:40-6:30. Jennings had been employed since 2005 by the Metropolitan Police Department ("MPD"), most recently as a Customer Service Representative in the Seventh District. Tr. Ex. RJ-1 at 6:55-7:30; App. 360. Her duties did not include investigative work, although police officers sometimes asked her about incidents that took place in her neighborhood. *See* App. 259. She answered phones, assisted members of the public, and provided clerical support to other police department members. *See* Tr. Ex. RJ-1 at 7:30-7:45; App. 255, 280, 360.

Jennings's workstation in the Seventh District was approximately 50 feet away from a police radio. App. 275. However, the names of suspects were not called out over the radio. *See* Tr. Ex. RJ-1 at 39:40-40:10 ("they're not calling off

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[2] At the close of the evidence, the trial court considered whether to provide the jury with a consolidated version of the indictment that renumbered the counts. *See* App. 592. Ultimately, the court decided to submit the original indictment to the jury with instructions to disregard the fact that they were not asked to deliberate on some counts. *Id.* For reasons that are unclear, the trial court's judgments of conviction and docket reflect the count numbers as used in the consolidated version of the indictment rather than the operative Superseding Indictment of March 14, 2019. *See* App. 49, 152-167; Tr. Dkt. 884-889. In this brief, the count numbers used correspond to those of the Superseding Indictment.

[3] As required, this brief recounts the evidence and inferences therefrom in the light most favorable to the government, but admits the accuracy of neither.

people's names"); *see also* 1:41:30-1:42:05 (Det. Charles Fultz conceding a station clerk cannot hear the radio unless actively listening to it); App. 276-278 (station clerk would have to actively pay attention to hear the radio over continuous phone conversations by other clerks). And, of particular importance here, the government introduced no evidence that facts relevant to crimes Jennings purportedly assisted were transmitted over any police radio.

Jennings also assisted members of the public with accessing publicly available information in MPD databases. Tr. Ex. RJ-1 at 3:46:25-3:46:45; App. 280. To do so, Jennings had access to a MPD database known as "Cobalt," which contained information about specific criminal incidents reported to MPD. App. 397-398. Cobalt could generate "Public Incident Packets," which included information that members of the public were entitled to request. App. 280, 402-403, 424-425; *see also*, *e.g.*, App. 838-839. Additionally, Cobalt could generate "Internal Packets" that sometimes included more sensitive information. *See, e.g.*, App. 841-869.[4]

Jennings was introduced to co-defendant Derek Turner (aka "Fatz") through Antwan Jones, who she had long known from her neighborhood. Tr. Ex. RJ-1 at 11:05-12:00. Turner first called Jennings on November 23, 2016, following which the two engaged in regular phone correspondence until March 2017. *See generally* App. 696-723. Direct evidence of the substance of Jennings's and Turner's correspondence consisted of one recorded jailhouse call, three brief text message exchanges (only one of which is even arguably relevant to the charges of

[4] The government introduced the packets with redactions as exhibits to show how Jennings would have viewed them at the time. *See* App. 414, 419-420.

conviction),[5] and two sets of text messages sent to Jennings through third parties. *See* Tr. Ex. JC-14; App. 717, 721-722, 729, 732. The prosecution did not introduce any other evidence concerning the content of the communications between Turner and Jennings. In particular, there is no evidence that Jennings shared confidential MPD information with Turner, *see* App. 379-384, 433-435, 486-488, or that Jennings had a motive to engage in potentially criminal behavior. *See* App. 239-240 (acknowledging government had no theory as to motive for Jennings to supply information), 279-280 (Jennings did not live in or have issues with the violently feuding neighborhoods involved here); *see also* RJ-1 at 1:00:50-1:01:30 (Jennings responds to allegation that she told Turner she would look into parking ticket for him, stating "It sounds like I just blew [Turner] off … I blow a lot of people off when it sounds like they're fishing.").

B. Accessory To Assault With Intent To Kill (February 21-23, 2022)

On the evening of Friday, February 17, 2017, Turner allegedly shot Andrew McPhatter, Joseph Tyler, and Raheem Osborne near the Congress Heights neighborhood. *See* App. 161-163, 335, 449-450. On Monday, February 20 at 5:59pm, Turner called Jennings for one minute and thirty-one seconds. App. 713. On Tuesday, February 21 at 6:39am and 6:45am, Jennings accessed the Cobalt

[5] The government also introduced evidence of calls between Turner, Jones, and Jennings dating to November 2016, along with evidence of Jennings's MPD database searches. This evidence is irrelevant to the present appeal because Jennings was acquitted on all charges relating to conduct other than that presented here.

database to search for information related to the February 17 shooting.[6] App. 760. Both times, Jennings viewed the internal-facing packet. *Id*.

On February 22, Turner called Jennings at 12:09pm for thirty-three seconds. App. 711. This call took place within three hours of another shooting for which Turner was later charged.[7] App. 99-102, 335-336. On Thursday, February 23, 2017, at 11:03am and 11:07am, Jennings accessed the Cobalt database for information concerning the February 17 shooting, and did so for the February 22 shooting as well at 7:06am and 9:28am. App. 754-755.[8] Jennings viewed the internal-facing packet for the February 17 shooting and then converted a public-use packet concerning that shooting to a .pdf file. *Id.* That same day, Jennings called Turner at 2:34pm for sixteen seconds, Turner called Jennings at 2:58pm for six seconds, and Jennings called Turner at 3:01pm for twenty-six seconds. App. 709.

The government presented no evidence that, between February 21 and February 23, Jennings was aware that Turner was a suspect (if he was) in the February 17 shooting during that time. No evidence was presented concerning the content of any of the above-referenced calls between Jennings and Turner. There was no evidence that any Cobalt report was printed or sent to anyone. App. 433-

[6] Jennings made a total of 68 Cobalt searches on a variety of matters that day. *See* App. 757-760. Cobalt searches specifically related to the February 17 shooting are denoted in Trial Exhibit R-17 by CCN #17027584. App. 439.

[7] Both Turner and Jennings were acquitted of any misconduct with regard to this shooting. App. 157-160.

[8] Jennings made a total of 79 Cobalt searches on a variety of matters that day. *See* App. 751-755. Cobalt searches specifically related to the February 22 shooting are denoted in Trial Exhibit R-17 by CCN #17030219. App. 439.

435. Furthermore, Jennings's Cobalt database searches for the February 17 shooting did not identify any potential suspects; they merely recounted that there were two unidentified potential suspects, one of whom was described only as an African-American male, while the other was not described at all. *See* App. 777-778, 802.

C. Murder Of Andrew McPhatter (March 1)

On March 1, 2017, at 10:49am, Turner allegedly shot and killed Andrew McPhatter at 3501 Wheeler Road SE. App. 168, 336, 429. At 10:57am that day, Turner called Jennings for 1 minute and 35 seconds. App. 707. At 11:20am, Jennings called Turner for 1 minute and 25 seconds. *Id.* At 11:28am, Turner called Jennings for 4 seconds. *Id.* At 11:28am, Jennings called Turner for 37 seconds. *Id.* That afternoon at 1:42pm, Turner called Jennings for 20 seconds. App. 706. Jones called Jennings at 12:03pm for 10 seconds and at 2:57pm for 51 seconds. App. 745-746. The government introduced no evidence concerning the content of these calls.

On March 2, at 7:19am and 7:21am, Jennings accessed the Cobalt report for the McPhatter shooting the day prior.[9] App. 769. She converted an internal-facing report into .pdf format, but there is no evidence that she printed the report or shared it with anyone. App. 433-435. At the time Jennings accessed Cobalt, the incident report for the March 1 shooting did not identify any suspects or include any witness information. App. 841-869.

[9] Jennings made a total of 50 Cobalt searches on a variety of matters that day. *See* App. 762-770. Cobalt searches specifically related to the March 1 shooting are denoted in Trial Exhibit R-18 by CCN #17034417. App. 439.

Later that day, Turner called Jennings at 8:05pm for zero seconds. App. 704. At 10:12pm, Jennings called Turner back, and the call lasted for 2 minutes and 7 seconds. *Id.* Several days later, on March 6, 2017, Jennings called Turner at 10:17pm for 2 minutes and 8 seconds. App. 702. Again, the government introduced no evidence regarding the content of these calls.

On March 8, 2017, unidentified persons shot at Turner outside his parole supervision office. App. 249-251, 271, 375. Turner was unharmed, but his white Lexus was damaged. App. 284-285, 330-331. The police impounded the vehicle, searched it, and eventually found a 10mm Glock firearm in the glove compartment. App. 307-310. Jones called Jennings three times that afternoon: at 3:44pm for 8 seconds, 3:48pm for 5 seconds, and 6:29pm for 17 seconds. App. 741-743. At 9:03pm, Turner called Jennings for 24 minutes and 23 seconds. App. 700. Two days later, on March 10, Turner called Jennings at 8:24am for 6 seconds. App. 698. He then texted her at 8:25am: "Nik I need u to call me ASAP Please." App. 717. Jennings called Turner at 8:59am for 1 minute and 24 seconds. App. 698. He called her back at 9:01am for 8 minutes and 45 seconds. *Id.* The prosecution failed to introduce any evidence about the content of the March 8 or March 10 calls.

On March 11, 2017, at 2:55am, Turner was arrested for unlawfully possessing the handgun found in his car. App. 294-295, 375, 350-351. Turner's phones (one of which he had used to communicate with Jennings) were also seized. App. 299, 302-303. That night, at 7:18pm, Jones called Jennings for 4 minutes and 47 seconds. App. 739. Again, the prosecution offered no evidence of the content of those calls.

The next day, on March 12 at 12:04pm, Jones texted Jennings "Hey nik.man they said he in district court. can check me see wat they got." App. 748. Jones then called Jennings at 2:10pm for 35 seconds. App. 737. Jennings called Jones back at 2:13pm for 1 minute and 39 seconds. *Id*. At 2:21pm, Jennings ran a Cobalt search on the March 8 shooting outside the parole office.[10] App. 764. Two days later, on March 14, Turner was indicted by a federal grand jury in the case of *United States v. Derek Turner*, 1:17-cr-055 (CRC) (D.D.C.), for his possession of a firearm on a date that was not specified for the jury. App. 350-351.

Two weeks later, on March 28, 2017, Jennings replaced her cellphone, keeping the same phone number.[11] App. 386-387. The government introduced no evidence about why she did so. On April 12, Marshay Hazelwood, Turner's girlfriend, texted Jennings that Turner wanted to speak with her. App. 731-732. Jennings responded that she was willing to talk with him. *Id.* On May 13, Turner and Hazelwood were on a call recorded by the jail where Turner was housed, during which Turner instructed Hazelwood to dial Jennings into a three-way call. Tr. Ex. JC-14. After Jennings joined the call, Turner asked Jennings to meet with Hazelwood, and Jennings agreed. *Id.* Several days later, on May 16, during a recorded call from jail, Turner asked Hazelwood, "did you ever go holla at Nik?…That's important." Tr. Ex. JC-16.

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[10] Jennings made a total of 18 Cobalt searches on a variety of matters that day. *See* App. 762-770. Cobalt searches specifically related to the March 8 incident are denoted in Trial Exhibit R-18 by CCN #17038724. App. 439.

[11] When Jennings's phone was searched in January 2018, it did not contain text message or call data prior to March 28, 2017. App. 386-387.

On May 31, Hazelwood and Jennings met at Jennings's home, *see* App. 729, following which Hazelwood told Turner during a call that he was not being investigated. *See* Tr. Ex. JC-22. However, the government presented no evidence that between March 2 and September 6, 2017, Jennings ran any Cobalt searches related to Turner or otherwise looked into investigations concerning Turner's acts. During the call, Hazelwood texted Jennings, "He said he send his love." Jennings replied, "Tell him me [too]." App. 729.

On September 6, 2017, Turner was charged with Andrew McPhatter's murder. App. 582. At 8:02am that day, Turner's name was added for the first time to the Cobalt record for the March 1 murder. App. 460-461. That same day, Jennings accessed Cobalt at 8:42am, 8:48am, 8:53am, 8:57am, and 10:39am to search for the McPhatter murder incident.[12] App. 772-773.

Jennings texted Hazelwood at 8:58am on September 6, "This Ronnika," to which Hazelwood replied "Ok," along with an image. App. 727. The government presented no evidence concerning the content of that image. Hazelwood then asked Jennings, "Can you keep me updated with anything Else?" *Id.* Jennings replied, "I sure will." *Id.* The prosecution submitted no evidence of any further communications between the two about Turner, or that any information obtained from Cobalt that day was ever communicated to Turner, Hazelwood, or anyone else.

[12] Jennings made a total of 53 Cobalt searches on a variety of matters that day. *See* App. 772-774. Cobalt searches specifically related to the March 1 murder are denoted in Trial Exhibit R-19 by CCN #17034417. App. 439.

D. Police Interrogation Of Jennings

On January 17, 2018, at the direction of MPD Detective Charles Fultz, two detectives were sent to Jennings's workstation at the Seventh District to retrieve her for an interview. App. 176, 180-181, 208. Despite the availability of conference rooms at the Seventh District, the detectives drove Jennings in the back of a squad car to the homicide office. App. 176, 208-209. The nearly five-hour interview that followed was in a locked interrogation room with two detectives seated in front of the door. App. 210, 212-214, 221. She could not exit the room without one of the detectives using their access code to open the door for her. App. 212-214, 217.

Multiple times during the interrogation, Det. Fultz reminded Jennings that she could face termination if she did not fully cooperate with his questioning. For example, after telling her that "the only way to help this is [to] communicate everything," Tr. Ex. RJ-1 at 1:33:10-1:33:25, he pushed her to think about "the decisions that you're making about you and ... your future employment with the Metropolitan Police Department." *Id.* at 1:35:30-1:36:00. Later, Det. Fultz doubled down, reminding her she was a single mother with three kids to support, saying: "you may lose your job. How are you going to survive, dear? ... That's why I need to make sure to have everything." *Id.* at 1:37:15-1:37:50.

Detective Fultz made similar statements throughout the interview. "I want you to understand that honesty at this point in time is the only thing that we can go with .... Sometimes we gotta man up and take whatever comes with it … one thing is about 'manning up' is telling the truth." *Id.* at 9:25-9:45; *see also id*. at 36:00-36:25 ("You have everything [to lose] … mouths to feed, a house you're trying to buy, bills and all of that is about to change because of what side of the fence you're really on."); 41:45-42:25 ("You're making detrimental decisions regarding … your employment … I'm not trying to make you do anything but tell the truth."). Detective Fultz later testified to the grand jury that during the interrogation, Jennings "knows if she does not cooperate she is fired, she's gone." App. 214-215.

At one point, Det. Fultz requested Jennings's phone, saying "[H]ere comes the—one of the next biggest tests of you. It's in that purse. It's that phone. Are you willing to consent to us to download that phone?" Tr. Ex. RJ-1 at 1:16:10-1:16:30. In response, Jennings retrieved her phone and handed it to him. *Id.* at 1:16:30-1:16:35. She then signed a consent-to-search form that was provided by Det. Fultz. *Id.* at 1:21:40-1:21:50. As she handed him the signed form, he asked whether her phone had a password, and she gave it to him. *Id.* at 1:21:50-1:22:00.

Nearly forty minutes later, Det. Fultz told Jennings that, because of technical difficulties, the police might have to keep her cellphone. *Id.* at 2:01:00-2:01:20. Jennings replied, "My phone? What am I gonna do? I have kids." *Id.*; *see also* App. 195-196. Another police officer said, "[the technician] is still working on it," without responding directly to Jennings's concern about contacting her children. Tr. Ex. RJ-1 at 2:01:20-2:01:25. But the officers did not return Jennings's phone to her; rather, Det. Fultz advised her that "we have to take [your phone], seize it, do a search warrant, because we can't get in it [even though] you gave us the code." *Id.* at 3:45:15-3:45:35. Officers then drove Jennings back to the Seventh District. App. 199.

E. Motions To Suppress

Before trial, Jennings moved to suppress the statements she made during the interrogation and evidence obtained from the search of her cellphone. App. 126-130, 132-135.[13] Detective Fultz testified during the suppression hearing and reiterated his grand jury testimony that, during the interrogation, Jennings "knows if she does not cooperate she is fired, she's gone." App. 214-215. Jennings's counsel argued that her interrogation statements were involuntary and that she did not consent to the cellphone search. App. 126-130, 132-135.

The trial court denied each motion. App. 226-227, 230-231. In doing so, the court noted that Jennings was a MPD employee at the time of the interrogation. App. 226. But rather than recognize that Jennings's employment with MPD gave her no choice but to cooperate, the court concluded that she was more familiar with police procedures and settings than the typical interrogee. *Id.* Thus, according to the court, Jennings's interrogation statements and consent to search her cellphone were made more voluntary by her MPD employment, not less. App. 226-227, 230-231.

F. Direct And Indirect Use of Jennings's MPD Interrogation

The prosecution used Jennings's MPD interrogation statements throughout the case. A government witness testified about the interview to the grand jury. *See* App. 214-215. The prosecution played the interrogation video to the petit jury and entered it into evidence. App. 491-543, 552-572. The government also made the statements a focus of its closing argument. App. 655-656, 659-668, 677-681.

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[13] Jennings's motions were filed under docket number 2018 CF1 014357, which was consolidated into the present appeal. Tr. Dkt. 894.

Additionally, the government introduced the video to show that Jennings produced her cellphone in response to Det. Fultz's request for it during the interrogation. Tr. Ex. RJ-1 at 1:16:20-1:16:50; App. 521-522. Investigators also relied on Jennings's interrogation statements to acquire a search warrant for her phone. *See* App. 52-53. From that search, the government's technology expert extracted text and call data linking Jennings to Turner, Jones, and Hazelwood—all of which was presented to the jury at trial. *See* App. 318-320, 363-366, 465-470, 480-482, 578-579, 581-583; *see generally* App. 724-738.

SUMMARY OF ARGUMENT

I. Jennings was convicted of obstruction of "the due administration of justice in any official proceeding," in violation of D.C. Code § 22-722(a)(6). The "official proceeding" specified in the indictment and that the government referenced at trial was the federal criminal prosecution of Derek Turner pending in U.S. District Court. The D.C. Code, however, makes clear that an "official proceeding" within the scope of Section 22-722(a)(6) includes only court proceedings in "the Superior Court of the District of Columbia and the District of Columbia Court of Appeals." D.C. Code §§ 22-721(1), (4). Accordingly, any supposed obstruction of the criminal prosecution pending against Turner in the U.S. District Court was not, as a matter of law, within the scope of Section 22-722(a)(6).

II. The trial court failed to instruct the jury on the definition of "official proceeding," which is a term of art as used in Section 22-722(a)(6). This failure to instruct allowed the jury to make the same mistake the prosecution made—namely, convicting Jennings for supposed obstruction of a federal criminal proceeding.

III. An accessory-after-the-fact conviction requires proof that the alleged accessory, *inter alia*, (a) knew the principal had committed the underlying offense and (b) acted affirmatively to assist the accessory in escaping detection or apprehension. *Outlaw v. United States*, 632 A.2d 408, 411 (D.C. 1993). Mere evidence of a conversation between the supposed accessory and principal, without evidence of the contents of the conversation, is insufficient to prove the knowledge element. *Butler v. United States*, 481 A.2d 431, 443 (D.C. 1984). Yet evidence of telephone calls to and from Jennings without evidence of their content is all the government offered here. Regarding the affirmative assistance element, the government offered no evidence of any act by Jennings that could have assisted the principal (Turner) in escaping detection or apprehension. While the prosecution claimed that Jennings assisted Turner by accessing the police department's Cobalt database and passing information therein to Turner, the prosecution made this argument without any evidence of the content of telephone calls, without any evidence that Turner took any action to evade detection or apprehension as a result of information from Jennings, and despite the fact that there was no information in the Cobalt database at the time linking Turner to the underlying crimes.

IV. The trial court failed to instruct the jury on the definition of "assisted" for purposes of the accessory-after-the-fact charges. Unlike other jurisdictions, DC (drawing on Maryland common law) has a narrow definition of assistance mirroring early common law—namely, assistance in escaping, destroying evidence, or silencing a witness. Without advising the jury of this technical definition of "assisted," the jury could convict Jennings for conduct that did not constitute the kind of assistance that renders one an accessory after the fact.

V. Jennings was a MPD employee when she was interrogated by MPD detectives. As one of the interrogating detectives testified to the grand jury and at the suppression hearing, at the time of the interrogation Jennings "works for the police" and "knows if she does not cooperate she is fired, she's gone." App. 214-215. Given the known employment consequences to Jennings if she failed to cooperate, the statements obtained from her during the police interrogation were involuntary as a matter of law, in violation of her Fifth Amendment right to remain silent and thus could not be used in her criminal prosecution. *See Garrity v. New Jersey*, 385 U.S. 493, 497 (1967). The government bore the burden of proving that any evidence or insights obtained from the involuntary interrogation were not subsequently used, directly or indirectly, in her subsequent prosecution. *See Kastigar v. United States*, 406 U.S. 441, 460 (1972). No such showing was made or could have been made here, since the trial prosecutors were exposed to it and introduced it at trial. *See Aiken v. United States*, 30 A.3d 127, 136-137 (D.C. 2011).

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE CHARGE OF OBSTRUCTING AN OFFICIAL PROCEEDING

The sole obstruction charge of which Jennings was convicted was based on the theory that, by replacing her cellphone on March 28, she obstructed the federal firearms prosecution pending against Turner. The obstruction of justice statute under which she was charged, however, applies only to obstruction of proceedings in D.C. Superior Court. Because the obstruction of justice offense charged here does not apply to obstruction of federal district court proceedings, the evidence was insufficient as a matter of law to sustain Jennings's conviction on that charge.

A. Standard Of Review

At trial, Jennings timely moved under Rule 29 for a judgment of acquittal, challenging the sufficiency of the evidence to support the obstruction of justice charge. Tr. Dkt. 783; App. 596-598. Thus, this Court reviews the sufficiency of the evidence *de novo*. *Newby v. United States*, 797 A.2d 1233, 1237 (D.C. 2002). Even if a sufficiency claim is not specifically preserved, this Court reviews *de novo* an argument that charged conduct does not, as a matter of law, constitute a violation of Section 22-722(a)(6). *Wynn v. United States*, 48 A.3d 181, 188 (D.C. 2012).

B. Section 22-722(a)(6) Prohibits Obstruction Of A Criminal Prosecution Only If It Is Pending In D.C. Superior Court

Jennings was convicted of violating D.C. Code § 22-722(a)(6), which makes it a crime to "[c]orruptly … obstruct[]or impede[] or endeavor[] to obstruct or impede the due administration of justice in any official proceeding." This particular offense applies only to obstruction of court proceedings. *See Wynn*, 48 A.3d at 191. More specifically, the D.C. Code makes clear that the "official proceedings" covered by the offense are "proceeding[s] in a court of the District of Columbia," D.C. Code § 22-721(4), meaning ***only*** "the Superior Court of the District of Columbia and the District of Columbia Court of Appeals." *Id.* § 22-721(1).

C. The Government's Theory That Jennings Obstructed A Federal Prosecution Pending In U.S. District Court Was Legally Invalid

The prosecution's theory here did not involve any allegation of obstruction of a pending D.C. Superior Court case. Instead, in both its opening statement and closing argument, the government expressly identified the federal prosecution of Turner as the "official proceeding" purportedly obstructed by Jennings. *See* App. 651 ("The obstruction of justice conspiracy, the official proceeding being the United States versus Derek Turner, U.S. District Court, federal firearms charge … is the legal charge that is pending as to these defendants for obstruction of justice"). To this end, the prosecution requested and received judicial notice of Turner's March 14, 2017, indictment in U.S. District Court. App. 346, 350-351. And in opposing Jennings's Rule 29 motion, the prosecutor pointed to "the firearm that Mr. Turner had been charged with in the U.S. District Court case" as "an official proceeding, as the statute requires—as [the] obstruction statute requires." App. 607.

However, the federal criminal case against Turner was not, according to the D.C. Code definition, an "official proceeding" within the scope of Section 22-722(a)(6) because it was pending in U.S. District Court rather than in D.C. Superior Court. *See* D.C. Code §§ 22-721(1), (4). Therefore, even if the government had proved that Jennings acted to obstruct the federal criminal case against Turner—and, as discussed below, it did not—such conduct would not, as a matter of law, violate Section 22-722(a)(6). Jennings has, in other words, been convicted of something that is not a crime under the D.C. Code. Accordingly, her conviction on that obstruction charge must be reversed.[14]

D. There Was No Evidence That Jennings Replaced Her Cellphone To Obstruct A Criminal Prosecution

Even were it legally permissible for the government to prosecute under Section 22-722(a)(6) the obstruction of a criminal case pending in U.S. District Court, there was no evidence that Jennings's replacement of her cellphone on March 28 amounted to obstruction of the Turner firearms prosecution. Section 22-722(a)(6) requires proof that Jennings "(1) obstructed or impeded or endeavoured to obstruct or impede the due administration of justice in an official proceeding, and (2) did so with the intent to undermine the integrity of the pending" proceeding. *Smith v. United States*, 68 A.3d 729, 742 (D.C. 2013).

Here, the government failed to prove either element of the obstruction offense, even as (improperly) applied to the federal criminal proceeding pending against Turner. The government's theory was that Jennings's replacement of her cellphone caused a loss of the phone's data. *See* App. 681. But the government offered no evidence that the cellphone ever contained any data ***concerning Turner's federal***

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[14] To the extent the government tries to defend the Section 22-722(a)(6) charge on the theory that Jennings obstructed a police investigation, that theory was not presented to the jury. App. 690-692; *see also* App. 148-149 (jury instructed that Count 47 charged Jennings with "endeavor[ing] to obstruct or impede the due administration of justice in a proceeding *in a court of the District of Columbia*" (emphasis added)). Nor could that theory have been presented to the jury. As this Court has explained, Section 22-722(a)(6) applies only to the obstruction of court proceedings and not police investigations. *Wynn*, 48 A.3d at 191.

firearms offense.[15] Thus, the government failed to prove that Jennings's replacement of her cellphone could have "impeded" the federal criminal proceeding.

Furthermore, the government offered no evidence that Jennings acted with the specific intent to obstruct the federal proceeding, which the jury was advised originated on March 14, 2017 with Turner's indictment. App. 350-351. As a matter of law, obstruction of an official proceeding cannot occur until the official proceeding is pending. *See Crutchfield v. United States*, 779 A.2d 307, 327-328 (D.C. 2001); *see also Sheffield v. United States*, 111 A.3d 611, 626 (D.C. 2015).

According to the indictment, the alleged obstructive act by Jennings—*i.e.*, the replacement of her cellphone—occurred on March 28, 2017. App. 122. The prosecution presented no evidence that Jennings formed an intent to obstruct during the two-week period between Turner's indictment through the replacement of Jennings's cellphone. The government offered no evidence of any communications, direct or indirect, between Jennings and Turner during that two-week period. Nor is there any evidence that during that time-period Jennings accessed the Cobalt database to view any incidents in which Turner was involved. There is no evidence that anyone spoke to Jennings about data on her cellphone or about replacing it. And the government never even argued, much less proved, that the cellphone Jennings replaced ever contained evidence of Turner's firearms offense. There is simply no evidence connecting the entirely commonplace act of replacing a cellphone with the

[15] Indeed, the jury was told nothing about the details (such as the date) of the conduct charged in the federal indictment from which the jury could determine whether Ms. Jennings's phone contained evidence of such. *See* App. 350-351.

federal firearms proceeding initiated weeks earlier against Turner. Thus, even under the government's flawed legal theory, the government offered no evidence that Jennings replaced her phone with specific intent to obstruct the federal proceeding against Turner.

II. The Trial Court Erred In Failing To Instruct The Jury On The Technical Legal Definition Of "Official Proceeding" As Used In The Obstruction Statute

The trial court also erred in failing to instruct the jury on the definition of "official proceeding" as used in Section 22-722(a)(6), thereby allowing the jury to apply its own definition to a statutory term of art. This error permitted the jury to convict Jennings for conduct that is not, as a matter of law, a crime.

A. Standard Of Review

Jennings's trial counsel failed to object to the jury instruction on the obstruction charge. *See* App. 643-644. Thus, this Court reviews Jennings's arguments regarding that instruction for plain error. *Allen v. United States*, 495 A.2d 1145, 1151-1152 (D.C. 1985) (*en banc*). In order to prevail on plain error review, an "appellant must show that (1) the trial court erred; (2) the error was 'obvious or readily apparent, and clear under current law'; (3) the error affected their substantial rights; and (4) 'either a miscarriage of justice, that is, actual innocence; or that the trial court's error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" *Alleyne v. United States*, 327 A.3d 472, 484 (D.C. 2024).

B. The Jury Instructions On The Obstruction Charge Contained No Definition Of "Official Proceeding"

The trial court's instructions to the jury on the obstruction of justice charge were barebones. The court instructed on the offense's two elements: (1) "endeavor[] to obstruct or impede the due administration of justice in a proceeding in a court of the District of Columbia;" and (2) "intent to undermine the integrity of the pending proceeding." App. 148-149, 690-692. But the instructions did not define "court of the District of Columbia" or explain that the only court proceedings covered by the statute were those in the D.C. Superior Court or Court of Appeals. *See id.*

C. "Official Proceeding" Is A Technical Term Requiring A Jury Instruction Defining Such

The trial court's failure to instruct the jury on the definition of an "official proceeding" was plain error. A trial court is obligated to include in its instructions the definition of a term that "'has a technical legal meaning so different from its ordinary meaning that the jury, without further explanation, would misunderstand its import in relation to the factual circumstances.'" *Griffin v. United States*, 850 A.2d 313, 318 (D.C. 2004). Here, the phrase "court of the District of Columbia" has a technical legal meaning that involves a distinction between the local and federal courts that would be unfamiliar to a lay juror.

Where, as here, the scope of the term "official proceeding" confused even the prosecutors in this case, *see, e.g.*, App. 607, Jennings was entitled to an instruction that defined that term for the jury so as to prevent conviction on a legally invalid theory. Furthermore, the trial court's error was clear given the unambiguous statutory definition of an "official proceeding," the law regarding when instructions on technical terms are required, and the prosecution's reliance on a legally invalid theory of "official proceeding." Finally, the trial court's error affected Jennings's substantial rights and worked a miscarriage of justice by allowing her conviction based on conduct that is not a crime under the D.C. Code. *See Wynn*, 48 A.3d at 188 ("'It would be both an obvious error and a miscarriage of justice for a defendant to stand convicted of an offense which the law does not make a crime.'"). Accordingly, while Jennings's obstruction conviction should be reversed for insufficiency of the evidence, it should alternatively be reversed for plain error in the jury instructions.

III. THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE ACCESSORY-AFTER-THE-FACT CHARGES

The jury convicted Jennings of four counts of accessory after the fact (hereinafter, "AAF"), three of them to AWIK and the other to first degree murder. App. 155-157, 160. An AAF charge requires proof that the supposed accessory had actual knowledge, not merely suspicion, that the principal committed the underlying offense. Furthermore, this Court has noted the limited reach of the AAF offense to assistance that aids the principal in avoiding detection or apprehension. Here, the government failed to prove either that Jennings knew that the alleged principal (Turner) had committed the underlying offenses or that Jennings provided Turner with any assistance, much less assistance of the sort that would render her an accessory. (Jennings also incorporates by reference Turner's arguments that the evidence was insufficient to prove that he committed the AWIKs or the murder to which the government claimed Jennings was an accessory. *See* D.C. Ct. App. R. 28(j). Because the government never contended that Jennings assisted anyone other than Turner for the February 22 and March 1 shootings, finding insufficient the evidence that Turner committed those felonies would necessarily require finding insufficient the evidence that Jennings provided assistance to any felon.)

A. Standard Of Review

Jennings's counsel made a timely Rule 29 motion for a judgment of acquittal on the AAF charges. Tr. Dkt. 783; App. 596-598. Accordingly, Jennings's challenge to the sufficiency of the evidence is preserved for *de novo* review by this Court. *See Newby*, 797 A.2d at 1237. Similarly, this Court reviews *de novo* the court's denial of the Rule 29 motion. *Johnson*, 756 A.2d at 461.

"To support a conviction, due process requires the government to establish proof beyond a reasonable doubt of every element of the crime charged." *Hawkins*, 119 A.3d at 700. This standard "requires the factfinder 'to reach a subjective state of near certitude of the guilt of the accused.'" *Rivas v. United States*, 783 A.2d 125, 133 (D.C. 2001). "Slight evidence is not sufficient evidence." *Id.* at 134. While a court must view the evidence in the light most favorable to the government, appellate review for sufficiency is not satisfied "'through rote incantation of these principles followed by summary affirmance.'" *Id.* This Court "take[s] seriously" its obligation to ensure that the evidence is "strong enough that a jury behaving rationally really could find it persuasive beyond a reasonable doubt." *Id.* "'The evidence is insufficient to sustain a conviction 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.'" *Young v. United States*, 305 A.3d 402, 414 (D.C. 2023).

B. An AAF Offense Requires Proof Of Knowledge Of The Principal's Crime And Affirmative Assistance To The Principal

The AAF offense is not defined in D.C. Code § 22-1806, so this Court looks to the common law of Maryland "in effect in 1901, when the District's AAF statute was enacted," to define the offense. *Little v. United States*, 709 A.2d 708, 712 (D.C. 1998); *Heard v. United States*, 686 A.2d 1026, 1029 (D.C. 1996) ("[W]e look to the common law of Maryland for the substantive definition of the crime of accessory after the fact."). As late as 1978, "Maryland [was] one of the few, if not the only state, which has retained [the common law doctrine of accessoryship] in virtually ***the same form as it existed at the time of William Blackstone in the 18th century***." *State v. Ward*, 396 A.2d 1041, 1043 (Md. 1978) (emphasis added).

Under the common law, the elements of an AAF offense are: (1) a completed felony prior to the accessoryship; (2) the accessory must not be a principal in the underlying offense; (3) the accessory must know that the underlying offense was committed by the principal; and (4) the accessory "must act personally to aid or assist the principal to avoid detection or apprehension for the crime." *Outlaw*, 632 A.2d at 411.

With regard to the knowledge element, "[t]he common law rule" is that a defendant is "not guilty of being an accessory to a felony unless the government proved 'that the accused knew that ***such*** felony had been committed ***by the principal felon***.'" *United States v. Ferreboeuf*, 632 F.2d 832, 836 n.2 (9th Cir. 1980) (emphasis added); *see also Butler*, 481 A.2d at 443 (holding that accessory charge required proof that accessory "had knowledge of [principal's] participation in the murder"); *see also Butler v. State*, 643 A.2d 389, 400 (Md. 1994) ("the defendant must have had actual knowledge that the person assisted was the one who committed the felony").

"It is essential that the commission of the felony should be ***known to, not merely suspected by***, the person aiding the principal." Hochheimer, *The Law of Crimes and Criminal Procedure* § 26 (2d ed. 1904) (emphasis added).[16] Thus, the knowledge element requires proof that the accessory had knowledge, either "by his observations or by information transmitted to him, of the substantial facts of the felonious crime," including "knowledge of the identity of the principal felon." *Commonwealth v. Devlin*, 314 N.E.2d 897, 899-900 (Mass. 1974); *see also Wren v. Commonwealth*, 26 Gratt. 952, 956 (Va. 1875) ("It is necessary that the accessory have notice, direct or implied, at the time he assists or comforts the felon, that he has committed a felony.").

In other words, what is required is "actual knowledge" that the principal committed the offense. *Butler*, 481 A.2d at 443. Such knowledge (in contrast to suspicion) cannot be established by, for example, reports in a newspaper that the principal had been "identified" as a suspect in the crime with no details as to his involvement. *See id.* at 444. Nor can knowledge be established by mere evidence of a conversation between the alleged accessory and someone having knowledge of the principal's crime absent evidence of the content of that conversation. *See id.*

[16] Available at: https://hdl.handle.net/2027/chi.67517864. Maryland courts regularly cite Hochheimer's treatise for the common law of crimes. *See, e.g.*, *Hopewell v. State*, 712 A.2d 88, 92-93 (Md. Ct. Spec. App. 1998).

The element of aiding or assisting the principal requires proof of "specific intent to help [the principal] evade apprehension of punishment," *Butler*, 481 A.2d at 443, and "the aid rendered must be of such a character as to 'enable elusion of *present* arrest and prosecution.'" *Id.* at 444. "[I]t was recognized even in the very early law that comfort or assistance which had no tendency to frustrate the due course of justice was not included." *State v. Clifford*, 502 P.2d 1371, 1373 (Or. 1972) (quoting R. Perkins, *Perkins on Criminal Law* 749 (2d ed. 1969)). In his *Commentaries*, Blackstone provided examples of conduct that constituted culpable aid to the principal:

> [F]urnishing him with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force and violence to rescue or protect him. So likewise to convey instruments to a felon to enable him to break gaol, or to bribe the gaoler to let him escape, make a man an accessory to the felony.

Outlaw, 632 A.2d at 411 (quoting 4 Blackstone, *Commentaries on the Laws of England* 37-38 (Chitty ed. 1826)). More recently, commentators LaFave and Scott have identified similar acts of culpable assistance:

> [H]arboring and concealing the felon, aiding the felon in making his escape, concealing, destroying or altering evidence, inducing a witness to absent himself or to remain silent, giving false testimony at an official inquiry into the crime, and giving false information to the police in order to divert suspicion away from the felon.

Id. at 411-412 (quoting W. LaFave & A. Scott, *Substantive Criminal Law* § 6.9, at 169 & nn. 31 & 32 (1986)). This Court has "decline[d] to construe the [AAF] statute expansively as reaching conduct which falls so far short of the illustrations of accessoryship provided by Blackstone more than two centuries ago and LaFave and Scott in more recent times." *Id.* at 413. In fact, ***no*** decision of this Court has ***ever*** extended AAF beyond these traditional categories of accessoryship conduct.

C. The Government Produced No Evidence Of Either The Knowledge Or The Assistance Elements Of The AAF Charges

In response to Jennings's Rule 29 motion on the AAF charges, the government was unable to point to evidence that Jennings either (a) knew who had committed the underlying crimes or (b) affirmatively assisted the principal in avoiding detection or apprehension for those crimes. *See* App. 602-628.

1. The Government Failed To Prove That Jennings Knew Turner Had Committed The Underlying Crimes

With regard to each of the AAF charges, the government was required to prove that, at the time of the supposed aid to Turner, Jennings knew, not merely suspected, that Turner in particular had committed the AWIKs of Tyler, Osborne, and McPhatter on February 17 (Counts 15, 18, and 21), and the first degree murder of McPhatter on March 1 (Count 36). The government proved no such knowledge.

First, with regard to Counts 15, 18, and 21, the government's theory was that, following Turner's alleged shooting of McPhatter, Tyler, and Osborne on February 17, Jennings was an AAF by accessing the Cobalt database on February 21 and 23 after receiving a call from Turner on February 20, and then supposedly passing information from the database to Turner during two calls on February 22. But the government offered no evidence that, as of the time of those calls, Jennings ***knew*** that Turner was the person who had committed the February 17 shooting. There was no evidence that Jennings observed the shootings. The Cobalt database accessed by Jennings made no reference to Turner's involvement in the shooting, instead referencing only two "unidentified" male suspects, and generically referring to one of the suspect's race and gender. App. 777-778, 802. And the government introduced no evidence as to the content of the calls between Jennings and Turner, *see* App. 379-384, 486-488, and thus no evidence that Turner admitted to Jennings that he had committed the shooting.

Second, with regard to Count 36, the government's theory is that, following Turner's alleged murder of McPhatter on March 1, Jennings was an AAF as a result of various communications with Turner and others. But, again, there is no evidence that Jennings knew at the time who committed the McPhatter murder. The government argued that Jennings, based on her seating location at the police station, could hear police radio communications. App. 665. But there was no evidence that Turner was ever identified over the police radio as the perpetrator of the McPhatter murder, much less that Jennings heard such. Tr. Ex. RJ-1 at 39:40-40:10 (radio does not call off the names of suspects); *see also id.* at 1:41:30-1:42:05; App. 276-278. The government also pointed to phone calls between Turner and Jennings on March 1, 2, 6, 8, and 10, but the government offered no evidence of the contents of those communications. *See* App. 379-384, 486-488. As for the single text message sent by Turner on March 10, all it said was "Nik I need u to call me ASAP Please," App. 717, without any reference to Turner committing a murder.[17]

This Court's decision in *Butler v. United States*, *supra*, demonstrates the insufficiency of the government's knowledge evidence here. In that case, Abdul-Mani was charged as an AAF to the murder of Tabatabai by Belfield. 481 A.2d at 433. The government attempted to prove Abdul-Mani's knowledge by pointing to newspaper articles that "identified" Belfield in connection with the murder. *Id.* at 443. This Court deemed that evidence insufficient to establish knowledge, both because there was no evidence that Abdul-Mani read those news articles and because the mere identification of Belfield in those articles (without specification of his role or the sources for the articles) was insufficient to establish actual knowledge that Belfield was the perpetrator. *See id.* at 443. The government alternatively attempted to prove Abdul-Mani's knowledge through evidence of his in-person visit with Butler, who was detained at the jail and purportedly knew Belfield was the killer. *See id.* at 443-444. But this Court held that evidence of Abdul-Mani's "visit to appellant Butler at the D.C. Jail does not support any inference as to the content of their conversation," much less that "Butler told Abdul-Mani that Belfield" committed the murder. *Id.* Accordingly, this Court reversed Abdul-Mani's AAF conviction for lack of sufficient evidence of the knowledge element. *Id*. at 444.

[17] The government also argued that Jennings accessed the Cobalt database concerning the McPhatter murder on September 6, 2017, the same day that Turner was charged with that murder. App. 582. But an accessory must provide assistance while in possession of the relevant knowledge, *see Butler*, 481 A.2d at 442-443, and there is no allegation that Jennings provided any assistance to Turner after she accessed the Cobalt database on September 6.

Similarly, in *Clark v. United States*, 418 A.2d 1059, 1061 (D.C. 1980), this Court reversed the AAF conviction of a person who dropped the principal off on the street, drove around the block while the principal committed an armed robbery, and picked the principal back up after the robbery. *Id.* at 1060-1061. Even the accessory's presence in the car with the principal immediately after the principal's robbery was "insufficient to support an inference that ... the [accessory] knew the [principal] had committed the robbery." *Id.* at 1061. As this Court put it:

> The evidence taken in the light most favorable to the government, established that the appellant: knew [the principal]; was with him the night of the robbery; was obviously waiting for him to return to the car while the robbery was in progress; drove the car which [the principal] entered after the robbery; and denied knowing [the principal] when questioned at the scene of the arrest.

Id. This evidence, the Court concluded, "is too sketchy and tentative to permit such a weighty inference" that the defendant had the requisite knowledge. *Id.*

Here, the government's evidence against Jennings consisted of nothing more than her cellphone calls, the contents of which are unknown, and her accessing a police database that made no reference to Turner. Mere speculation as to the contents of the calls is insufficient to sustain a conviction. *See Butler*, 481 A.2d at 443-444. Absent that speculation, there is ***no*** evidence that, with regard to either the February 17 AWIKs or the March 1 murder, Jennings ***knew*** that Turner had committed those crimes. Accordingly, each of Jennings's AAF convictions must be reversed. *See Clark*, 418 A.2d at 1061 ("Adequate proof of guilty knowledge being lacking, the [AAF] conviction must be reversed.").

2. The Government Failed To Prove That Jennings Assisted Turner In Avoiding Detection Or Apprehension

With regard to each of the AAF charges, the government was also required to prove that Jennings acted to assist Turner in avoiding detection or apprehension for the February 17 AWIKs and the March 1 murder. In response to Jennings's Rule 29 motion, the government argued that cellphone calls proved that Jennings shared information with Turner, which "allowed him to continue his violent ends" and "allowed him and gave him license to be able to commit more crimes of violence." App. 604-605. This argument fails for three reasons.

First, as a purely legal matter, proving that Jennings provided assistance that allowed Turner to "continue his violent ends" by "commit[ting] more crimes of violence" is not what the accessory-***after-the-fact*** offense requires the government to prove. An accessory after the fact charge requires proof that Jennings assisted ***an already completed crime***. *See Outlaw*, 632 A.2d at 411 ("A completed felony must have been completed by another prior to the accessoryship."); *Stevenson v. United States*, 522 A.2d 1280, 1282 (D.C. 1987) (reversing AAF conviction for assistance provided while "robbery was still in progress"); *McClain v. State*, 268 A.2d 572, 577 (Md. Ct. Spec. App. 1970) ("Unlike an accessory before the fact or a principal to a crime, an accessory after the fact does not become connected with the offense until after its commission."). It is insufficient as a matter of law to prove that Jennings assisted in committing crimes in the future.[18]

[18] Even under the government's legally flawed theory of AAF, Jennings could not have assisted Turner in committing future crimes beyond March 11, 2017, because by then Turner had been arrested and remained in custody thereafter. App. 375.

Second, none of the conduct the government alleged that Jennings committed was of a type of assistance recognized by the common law of accessoryship. *See Outlaw*, 632 A.2d at 411 (listing conduct specified by Blackstone and LaFave & Austin). There is no allegation, much less proof, that Jennings helped Turner escape, hide, destroy evidence, or silence a witness. *See id.* Thus, regardless of the proof at trial, the government's theory of accessoryship fails as a matter of law.

Third, the government failed to prove that Jennings acted in any way to assist Turner in avoiding detection or apprehension for either the AWIK or murder. With regard to the AWIKs on February 17, the entirety of the government's evidence was that Jennings (a) accessed the Cobalt database regarding that crime on February 21 and 23, and (b) exchanged calls with Turner on February 20, 22 and 23. *See* App. 709, 711, 713, 754-755, 760. But the government offered no evidence about the content of any of the calls, much less proved that Jennings said anything that could have assisted Turner in evading detection or apprehension for the AWIKs. This Court has previously held that mere evidence of communications without proof as to their contents cannot support an AAF conviction. *See Butler*, 481 A.2d at 443-444 (evidence of principal's "visit to appellant Butler at the D.C. Jail does not support any inference as to the content of their conversation. Any such assumption would be pure speculation."); *see also Hawkins*, 119 A.3d at 699 (evidence of calls with "no evidence about what Mr. Hawkins and Ms. Campbell said to each other" was too speculative to support obstruction conviction); *In re Ferguson*, 54 A.3d 1150, 1154 (D.C. 2012) (evidence insufficient where trial court speculated as to purpose of call).

With regard to the murder of McPhatter on March 1, the government's evidence that Jennings served as an accessory after the fact was likewise insufficient. Critically, Turner was arrested (on a federal firearms charge) on March 11, App. 375, 350-351, only ten days after the murder. Between the McPhatter murder and Turner's arrest, the entirety of the government's evidence of Jennings's interactions with Turner consisted of a log of calls between Turner and Jennings on March 1, 2, 6, 8, and 10, App. at 698, 700, 702, 704, 706-707, a text message from Turner to Jennings on March 10 that read, "Nik I need u to call me ASAP Please," App. 717, a log of calls between Jennings and Jones on March 1 and 8, App. 810-812, 814-815, and records of Jennings viewing the incident report on Cobalt on March 2 (which included no identifying suspect or witness information). App. 802, 762-770, 841-869. Once again, the government offered no evidence of the content of any of the calls. Thus, the government failed to establish that Jennings took any action to aid Turner in avoiding apprehension for the McPhatter murder.

This Court's decision in *Outlaw*, *supra*, demonstrates why evidence of the content of the conversations is essential to support an AAF conviction: Given the limited types of conduct that fit within the definition of an AAF charge, the nuance of what was said is critical. In *Outlaw*, the supposed accessory was alleged to have reprimanded the principal for not killing the eyewitness to the crime and was alleged to have directed the principal to a place where he could hide. 632 A.2d at 412. This Court held that those statements were insufficient to support an AAF charge. As the Court explained, the defendant's reprimand was a "morally repugnant act," but it did not rise to the level of assistance in silencing a witness. *Id.* And the defendant's advice to the principal about hiding at his aunt's house was not assistance when the principal already knew of that option. *Id.* Similarly, here, even were this Court to assume, without evidence, that Jennings and Turner spoke about the AWIKs and the murder, the specifics of those conversations are critical to an evaluation of whether Jennings provided assistance that meets the narrow common-law definition of AAF. The prosecution, however, offered no evidence of the contents of the conversations, and thus they cannot sustain the AAF convictions.

The government introduced evidence that, subsequent to Turner's arrest, Jennings spoke by telephone with Turner on May 13 on a recorded jail line during which call she stated, "I love you, too. Keep your head up." Tr. Ex. JC-14. But the case law is clear that even approval of the principal's felony does not amount to accessoryship. *McClain*, 268 A.2d at 576 ("All authorities agree that ... mere approval of the felony is not sufficient to constitute one an accessory after the fact."); *see also Butler*, 643 A.2d at 400 (same). It follows that a mere expression of approval of or affection for the principal cannot render one an accessory.

The government further introduced evidence that, during a recorded call from jail on May 16, Turner advised Hazelwood to "did you ever go holla at Nik?…That's important." Tr. Ex. JC-16. But there was no evidence that Jennings did anything that could have assisted Turner in response. There was not even evidence that Jennings accessed Cobalt or any other police database regarding the McPhatter murder between May 2 and September 6. Nor was there evidence that Jennings thereafter passed any information to Turner, either directly or indirectly.

The government offered evidence that on May 31, Hazelwood met with Jennings and, after the meeting, called Turner at the jail to advise that he was not being investigated. *See* App. 731; Tr. Ex. JC-22. Even assuming (1) that information came from Jennings, and (2) it was true, it is inconceivable how the information could have assisted Turner, who had been incarcerated months earlier, in avoiding detection or apprehension for the McPhatter murder. *See Butler*, 481 A.2d at 444 (noting that alleged accessory cannot "assist the escape of a felon by an overt act done at a time the felon ... had already been arrested").

Finally, the government introduced evidence that on September 6, 2017, the same day on which Turner was charged with McPhatter's murder, App. 582, Jennings accessed Cobalt regarding the McPhatter murder. App. 772-773. But there was no evidence that whatever Jennings could have viewed in Cobalt that day was of any consequence, given that Turner had already been arrested and charged for the crime. *See* App. 582. Jennings did send a text to Hazelwood promising to update her about the case as more information was added to the Cobalt database. App. 727. There was no evidence, however, that Jennings did so or that such information could have assisted Turner, who was detained and charged with murder, in avoiding detection of his crime or apprehension therefor.

At the end of the day, the case against Jennings as an AAF was smoke and mirrors. The government invited the jury to speculate that, when Turner called Jennings, "he was probably seeking out information what the police knew about him." App. 613. Even if prosecutorial speculation of what was "probably" occurring during calls could satisfy the proof beyond a reasonable doubt standard—

and it cannot, *see Young*, 305 A.3d at 414 (holding that "conjecture and speculation" does not satisfy the sufficiency of the evidence standard)—there was no evidence that information about what the police knew about Turner, who had been incarcerated within ten days of the McPhatter murder, could have assisted him in avoiding detention or apprehension for that crime, which is the proof required for an AAF offense. *See Outlaw*, 632 A.2d at 411; *Butler*, 481 A.2d at 444. Accordingly, Jennings's AAF convictions must be reversed for insufficiency of the evidence.

IV. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE TECHNICAL LEGAL DEFINITION OF "ASSISTED" FOR PURPOSES OF AAF

The trial court erred in failing to instruct the jury on the definition of "assisted" for purposes of the AAF offenses, thereby allowing the jury to apply its own definition to a commonplace word that this Court has recognized is a term of art limited to historic common law concepts of accessoryship. This error permitted the jury to convict Jennings for conduct that is not, as a matter of law, a crime.

A. Standard Of Review

Jennings's trial counsel failed to object to the lack of a definition of "assisted" in the AAF jury instructions. *See* App. 631-632, 140-141, 639-640. Thus, this Court reviews those instructions for plain error. *Allen*, 495 A.2d at 1151-1152.

B. The Jury Instructions Did Not Define "Assisted," Which Is A Technical Term For Purposes Of The AAF Offense

The trial court's instructions to the jury on the AAF charges of which Jennings was convicted (Counts 15, 18, 21, and 36) stated that the government must prove that Jennings "assisted" Turner in his crimes. App. 139, 141-142, 144, 146, 210. But the instructions did not define the term "assisted." *See id.* This was plain error.

As noted above, a trial court is obligated to include in its instructions the definition of a term that "has a technical legal meaning so different from its ordinary meaning that the jury, without further explanation, would misunderstand its import in relation to the factual circumstances." *Griffin*, 850 A.2d at 318. Here, the commonplace word "assisted" has a technical legal meaning for purposes of an AAF charge. In *Outlaw*, this Court confronted the question, "What kind of conduct aids a principal to avoid detection or apprehension?," and answered that question by looking to Blackstone's historic (and narrow) definition as well as LaFave and Scott's slightly expanded definition. *See* 632 A.2d at 411-412. This Court then "decline[d] to construe the AAF statute expansively as reaching conduct which falls so far short of the illustrations of accessoryship provided by Blackstone more than two centuries ago and LaFave and Scott in more recent times." *Id.* at 413. The types of assistance recognized by those commentators falls into only three categories: (a) avoiding arrest or escaping from jail, (b) destroying evidence, or (c) silencing a witness. *See id.* at 411-412.

Since the scope of the term "assisted" has a technical and narrow legal meaning that is more limited than its everyday meaning, Jennings was entitled to an instruction that defined that term for the jury so as to prevent conviction on a legally invalid theory. The trial court's error in failing to do so was clear given this Court's precedents narrowing the term's meaning. And that error affected Jennings's substantial rights and worked a miscarriage of justice by allowing her conviction based on an understanding of the term that is not a crime. *See Wynn*, 48 A.3d at 188 ("'It would be both an obvious error and a miscarriage of justice for a defendant to stand convicted of an offense which the law does not make a crime.'"). Accordingly, while Jennings's AAF convictions should be reversed for insufficiency of the evidence, they should also be reversed for plain error in the jury instructions.

V. JENNINGS'S INVOLUNTARY INTERROGATION STATEMENTS INFECTED HER ENTIRE PROSECUTION

Jennings's interrogation statements were involuntary as a matter of law, both because Jennings knew she would be terminated from her MPD employment if she failed to cooperate and because the totality of the circumstances rendered her interrogation coercive. Thus, the trial court erred when it denied Jennings's motion to suppress her statements and further erred when it then failed to conduct a *Kastigar* hearing regarding the government's derivative use of Jennings's statements. These errors, individually and collectively, require reversal of all of Jennings's convictions.

A. Standard Of Review

Jennings timely moved to suppress her interrogation statements as involuntary. App. 126-129. The trial court denied the motion. App. 226-227. A fully decided motion to suppress need not be renewed at trial to preserve the issue for appeal. *Jenkins v. United States*, 284 A.2d 460, 463 (D.C. 1971). Whether interrogation statements were voluntary is a question of law this Court reviews *de novo*. *Little v. United States*, 125 A.3d 1119, 1127 (D.C. 2015).

B. The Fifth Amendment Precludes Prosecutorial Use Of Involuntary Interrogation Statements

The Fifth Amendment guarantees that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This "essential mainstay" of constitutional protection ensures that no one can be "compel[led] to answer questions that might incriminate him," *Malloy v. Hogan*, 378 U.S. 1, 7-8 (1964), whether in a formal proceeding or in an informal interview, *Carter v. United States*, 684 A.2d 331, 338 (D.C. 1996). This includes forcing government employees to make self-incriminating statements "where refusal to do so would cost them their jobs." *United States v. Anderson*, 450 A.2d 446, 449 n.1 (D.C. 1982) (citing *Garrity*, 385 U.S. at 497). Alternatively, statements are involuntary if, "under the totality of the circumstances, the will of the suspect was overborne in such a way as to render his confession the product of coercion.'" *Graham v. United States*, 950 A.2d 717, 735-736 (D.C. 2008). "By its literal terms, [the Fifth Amendment] precludes the prosecution's use at trial of a defendant's involuntarily made or 'compelled' statements." *White v. United States*, 68 A.3d 271, 276 (D.C. 2013).

C. Jennings's Interrogation Statements Were Involuntary

Jennings's interrogation statements were involuntary as a matter of law, both because she understood that she faced employment consequences as a police department employee if she failed to cooperate with the interrogation, *Garrity*, 382 U.S. at 497, and because, alternatively, the totality of the circumstances demonstrate that her statements were "'the product of coercion.'" *Graham*, 950 A.2d 735-736.

1. Jennings's Interrogation Was Coercive Because She Knew That She Faced Termination Of Her MPD Employment If She Failed To Cooperate With The Interrogation

As an initial matter, Jennings's interrogation statements were inadmissible because she understood that she faced termination of her MPD employment if she did not cooperate with the interrogation. The law has been clear for more than sixty years that government employees may not be put to the choice of either "forfeit[ing] their jobs or … incriminat[ing] themselves." *Garrity*, 382 U.S. at 497; *see also Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of New York*, 392 U.S. 280, 284-285 (1968) (applying *Garrity* protections to employees of city's Department of Sanitation); *see also Lefkowitz v. Turley*, 414 U.S. 70, 83 (1973) (same as to architects who were public contractors). Putting a person to that dilemma "'exert[s] such pressure upon an individual as to disable him from making a free and rational choice.'" *Garrity*, 382 U.S. at 497. Accordingly, any statements "infected by the coercion inherent in this scheme of questioning" are not voluntary and are thus inadmissible. *Id.*

In *Garrity*, police officers were questioned about alleged misconduct after being warned that (1) their statements might be used against them in a criminal proceeding and (2) they could invoke the privilege against self-incrimination, but (3) any refusal to answer would subject them to termination. 382 U.S. at 494. The Supreme Court held that the officers' subsequent statements were involuntary in violation of the Fifth Amendment, reasoning that the "option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent." *Id.* at 497. Any supposed waiver by the officers of their right to remain silent was ineffective because, "'[w]here the choice is between the rock and the whirlpool, duress is inherent in deciding to waive one or the other.'" *Id.* at 498.

Here, the lead interrogating detective made clear to Jennings that her job depended on her cooperation, precluding any real opportunity to invoke her Fifth Amendment rights. Detective Fultz pushed her to think about "the decisions that you're making about you and ... your future employment with the Metropolitan Police Department." Tr. Ex. RJ-1 at 1:35:30-1:36:00. Later, Det. Fultz reminded Jennings that she was a single mother with three kids to support, saying: "you may lose your job. How are you going to survive, dear?... That's why I need to make sure to have everything." *Id.* at 1:37:15-1:37:50; *see also id.* at 36:00-36:25 ("You have everything [to lose] … mouths to feed, a house you're trying to buy, bills and all of that is about to change because of what side of the fence you're really on."), 41:45-42:25) ("You're making detrimental decisions regarding … your employment … I'm not trying to make you do anything but tell the truth.").

Indeed, Det. Fultz, who interrogated Jennings, testified both in the grand jury and at the suppression hearing that, with regard to the interrogation, Jennings "knew" that "if she does not cooperate she is fired, she's gone." App. 214-215. And when Det. Fultz was asked if he confirmed with MPD Internal Affairs that interrogating Jennings would not violate her employee rights, he responded that he "wasn't concerned about their position" because he had a murder to investigate. App. 574. The Fifth Amendment, however, is concerned with Jennings's employee rights and precludes putting her to precisely the Hobson's choice with which she was presented here: answering the interrogation questions or, if she didn't cooperate, being "fired" and "gone" from her MPD job. App. 215; *Garrity*, 382 U.S. at 497. Accordingly, Jennings's interrogation statements were involuntary and thus inadmissible.

2. Jennings's Interrogation Was Coercive Under The Totality Of The Circumstances

Alternatively, Jennings's interrogation statements were involuntary and thus inadmissible under the totality-of-the-circumstances test. "The test for determining the voluntariness of specific statements 'is whether, under the totality of the circumstances, the will of the suspect was overborne in such a way as to render his confession the product of coercion.'" *Turner*, 761 A.2d at 854 (internal citations omitted). This requires assessing the "totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). This typically includes "the suspect's age, education, prior experience with the law, and physical and mental condition. The relevant details of the interrogation include its duration and intensity, the use of physical punishment, threats or trickery, and whether the suspect was advised of his rights." *Graham*, 950 A.2d at 736.

Here, Jennings was brought in an unmarked squad car to the Homicide Division—as opposed to the Seventh Division, where she worked—and kept there for nearly five hours. App. 176, 208-209, 221. Despite the availability of conference rooms, Jennings was placed in an interrogation room where officers would normally interview homicide suspects—something of which Jennings, a MPD employee, was well aware. *See* App. 210; Tr. Ex. RJ-1 at 8:40-8:55. The door was kept closed, and the room required a code to unlock the door to leave. App. 212-214, 217. She was interrogated by two detectives, who sat or stood in front of the doorway during questioning. App. 212-214. The only way Jennings could exit the room was if one of the two detectives or a member of the Homicide Division unlocked the door for her. App. 212-214. Detectives took her phone and did not return it. Tr. Ex. RJ-1 at 1:16:20-1:16:50. Detective Fultz made references to punishment and imprisonment, telling Jennings that Turner was "locked up" and that she "might be sitting next to him." *Id.* at 55:35-56:00. She was never given a *Miranda* or *Garrity* warning advising her of her right to remain silent. To the contrary, as discussed above, Det. Fultz testified that Jennings knew that, as a MPD employee, she was required to cooperate or she would be fired. *See* App. 215. Furthermore, they told her she needed to cooperate because she was "part of the police department," understood she was part of the "blue family," and knew she would be "fired" unless she answered questions. App. 212, 215, 221. In addition to the *Garrity* issue this raises, such tactics were "reasonably likely to elicit an incriminating response" from Jennings and render her will "over-borne." *Graham*, 950 A.2d at 731, 736.

D. The Prosecution's Use Of Jennings's Involuntary Interrogation Statements Was Reversible Error

Despite the fact that Jennings's interrogation statements were involuntary, the government used the statements in her prosecution. *Castellon v. United States*, 864 A.2d 141, 161 (D.C. 2004) (for error to be "harmless," government must prove "beyond a reasonable doubt that the alleged error did not contribute to the verdict of guilt); *Smith v. United States*, 529 A.2d 312, 318 (D.C. 1987) (reversal of the conviction is required unless "once the tainted evidence is excluded from consideration, there remains overwhelming evidence to support the jury's verdict.").

1. Jennings's Statements Were Inadmissible At Trial

Jennings's interrogation statements were inadmissible at trial because they were involuntary, either under the *Garrity* principle alone or under the totality of the circumstances (one of which was the employment consequence that would befall Jennings if she refused to cooperate). As discussed above, where a government employee is compelled to speak on pain of losing his or her job, the resulting statements are "infected by the coercion inherent" in questioning and are not "voluntary." *Garrity*, 382 U.S. at 497-498. Self-incriminating statements that are involuntary because they are the product of coercion are "'inadmissible at trial for any purpose.'" *Graham*, 950 A.2d at 735. The government bears the "burden of proving [the] statements were voluntary by a preponderance of the evidence." *Id.*[19]

Jennings moved for suppression of her interrogation statements on the ground that they were involuntary, and her trial counsel elicited during the suppression hearing testimony from Det. Fultz that during the interrogation Jennings "knows" she will be "fired" if she failed to cooperate. *See* App. 125-135, 215. Based on this evidence (not to mention the totality of the circumstances), Jennings's interrogation was involuntary as a matter of law and her statements should have been suppressed.

[19] "This court applies a *de novo* standard of review to the legal determination regarding voluntariness and reviews for clear error the factual findings supporting that determination." *Turner*, 761 A.2d at 853.

See Garrity, 385 U.S. at 500 (the Constitution's "protection of the individual ... against coerced statements prohibits use in subsequent criminal proceedings.").

This suppression should have extended not only to oral statements but also to communicative acts of production, *see In re Clark*, 311 A.3d 882, 890 (D.C. 2024); *cf. United States v. Brown*, 125 F.4th 1186, 1203 (D.C. Cir. 2025) (holding that Fifth Amendment act of production doctrine applies to act of unlocking cellphone, which communicates ownership), such as Jennings's act of producing her cellphone in response to Det. Fultz's request. App. 185, 521-522; Tr. Ex. RJ-1 at 1:16:30-1:16:35 (handing over cellphone), 1:21:40-1:21:50 (signing consent form), 1:21:50-1:22:00 (stating password). Jennings's act of handing Det. Fultz her phone, providing him with the password, and filling out the consent form combined to communicate her "control over the phone, [her] knowledge of how to access it, and the existence, authenticity, and ownership of documents within it." *See Brown*, 125 F.4th at 1204. Such acts are communicative and therefore should also have been suppressed as products of the coercive interrogation.

It is true that trial counsel did not expressly invoke *Garrity* in arguing that Jennings's statements and cellphone production were involuntary. *See* App. 125-135. But preservation for *de novo* review requires only that the trial court be "fairly apprised" of defense counsel's position. *Evans v. United States*, 304 A.3d 211, 222 (D.C. 2023). For example, in a case where "neither the counsel nor the trial judge mentioned *Edwards* [*v. Arizona*, 451 U.S. 477 (1981) (holding that suspects could not be questioned after invoking *Miranda*)]," this Court held that the issue was preserved because "the trial judge specifically articulated the essential legal principle stated in *Edwards*." *Tindle v. United States*, 778 A.2d 1077, 1082 (D.C. 2001).

Similarly, here, trial counsel elicited during the suppression hearing evidence regarding the employment consequences Jennings faced if she refused to cooperate in the interrogation. App. 215. And the "essential principle" of the voluntariness of Jennings's statements was raised by counsel through a motion to suppress and addressed by the court. App. 125-135, 224-231. Accordingly, the court was "fairly apprised" as to the question of voluntariness under *Garrity*, preserving the issue for *de novo* review. And, in any event, the question of voluntariness under the totality-of-the-circumstances test would require consideration of, as one circumstance, the employment-consequence evidence.

But even were this Court to apply the plain error standard of review with regard to the *Garrity* error, reversal is still required. The difference under plain error review is that Jennings, rather than the government, would bear the burden of proof with regard to prejudice. *Wheeler v. United States*, 930 A.2d 232, 246 (D.C. 2007); *see also United States v. Olano*, 507 U.S. 725, 732 (1993). An error that affects substantial rights is one that is "prejudicial" in that it "affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 734.

As discussed above, given Det. Fultz's testimony at the suppression hearing, *Garrity* clearly prohibited use of Jennings's interrogation statements at trial. Use of the statements at trial was prejudicial to Jennings because the government used them to argue that Jennings lied about her involvement with Turner and—more generally—used the statements to cast doubt on Jennings's credibility. App. 655-

656, 659-668, 677-681. The government even argued in closing—incorrectly—that the January 17 interview was inculpatory because it was given "voluntarily." App. 660. Moreover, the statements were used to get a search warrant on Jennings's cellphone. App. 52-53. This pervasive use impacted Jennings's substantial rights. *See, e.g.*, *United States v. Giddins*, 858 F.3d 870, 883 (4th Cir. 2017) (holding that *Garrity* statements were "unduly coercive" even where the defendant failed to preserve the issue, and reversing conviction where the "video [including statements] was played for the jury, and the government referred to the video and the statements … during both opening statement and closing argument"); *United States v. Morton*, 993 F.3d 198, 206-207 (3d Cir. 2021) (holding that district court "plainly erred" in admitting statements in violation of Fifth Amendment, that this "error affected her fundamental rights," and that "[f]ailing to correct that decision on appeal will harm the fairness, integrity, and public reputation of judicial proceedings"). The Court should thus reverse Jennings's convictions.

2. The Failure To Hold A *Kastigar* Hearing Was Error

Once a public employee's statements are deemed involuntary under *Garrity*, the prosecution may not make "use of h[er] compelled answers and evidence derived therefrom in any subsequent criminal case in which [s]he is a defendant." *Lefkowitz*, 414 U.S. at 78 (citing *Kastigar*, 406 U.S. at 441). The burden rests with the government to "affirmatively prove that the evidence upon which it … prosecute[d the speaker] was derived from a legitimate source wholly independent of [the speaker's] compelled testimony." *Anderson*, 450 A.2d at 450. This includes a prohibition on "knowledge and sources of information obtained from the compelled testimony." *Kastigar*, 406 U.S. at 454 (citation omitted).

Because the "prosecution cannot be based on" such information, *United States v. Rinaldi*, 808 F.2d 1579, 1582 (D.C. Cir. 1987), there must then be a "*Kastigar* hearing" to "enforce the 'proscription of any use, direct or indirect, of the compelled testimony,'" *Graves v. United States*, 472 A.2d 395, 399 (D.C. 1984) (quoting *Kastigar*, 406 U.S. at 460). This includes a "consideration of even 'the subtle ways in which the compelled testimony may disadvantage a witness,' thereby providing 'very substantial protection, commensurate with that resulting from invoking the privilege itself.'" *Id.* (quoting *Kastigar*, 406 U.S. at 459-461). "If the government is unable to carry its affirmative burden, with respect to either direct or indirect use, the trial court must dismiss the charges." *Id.* at 399-400.

Though Jennings's trial counsel failed specifically to request a *Kastigar* hearing, her counsel did timely raise the voluntariness issue, App. 125-135, and this Court's "precedents do not require counsel to press their positions until blue in the face" to preserve it for appellate review. *Evans*, 304 A.3d at 222. Because the trial court rejected Jennings's argument that her interrogation statements were involuntary, thus denying her motion to suppress, App. 226-227, it was "pointless" for Jennings's counsel to continue pressing the issue by requesting a *Kastigar* hearing. *See Graves v. United States*, 245 A.3d 963, 970 (D.C. 2021) (error is preserved for *de novo* review despite absence of objection where trial judge's prior ruling rendered objection "pointless").

Had the trial court correctly ruled that Jennings's statements were involuntary, the natural implication would have been to hold a *Kastigar* hearing in which the government would bear the burden of proving that it had not made any use of Jennings's compelled statements. It is inconceivable that the government could have carried that burden here given that Jennings's statements were presented to the grand jury, introduced at trial, argued in closing by the prosecutors, and used to obtain cellphone evidence. App. 52-53, 215, 552-615, 624-645, 655-656, 659-668, 677-681; *see United States v. Warren*, 373 A.2d 874, 877 (D.C. 1977) (government did not meet its *Kastigar* burden where statements were "instrumental in the government's decision to focus its investigation ... on appellee, and to subsequently initiate prosecution against him"); *Anderson*, 450 A.2d at 452-453 (Since "appellant had fully confessed his criminal activity to the state grand jury, it was reasonable to assume that the testimony might have been 'used' indirectly in focusing the investigation, deciding to prosecute or in planning trial strategy, such as cross-examination."); *see also United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973). Accordingly, the case against Jennings should have been dismissed. *Graves*, 472 A.2d at 399-400; *Warren*, 373 A.2d at 877.

CONCLUSION

For the foregoing reasons, Jennings respectfully requests that this Court reverse her convictions on all five remaining charges and order a judgment of acquittal based on insufficiency of the evidence. In the alternative, the Court should vacate Jennings's convictions and remand for a *Kastigar* hearing and, if permissible, re-trial with proper jury instructions on the five remaining charges.

Respectfully submitted,

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ADDENDUM: STATUTES CITED

D.C. Code § 22-721 (Definitions)

For the purpose of this subchapter, the term:

(1) "Court of the District of Columbia" means the Superior Court of the District of Columbia or the District of Columbia Court of Appeals.

* * *

(4) "Official proceeding" means any trial, hearing, investigation, or other proceeding in a court of the District of Columbia or conducted by the Council of the District of Columbia or an agency or department of the District of Columbia government, or a grand jury proceeding.

D.C. Code § 22-722 (Prohibited Acts; penalty)

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

* * *

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

D.C. Code § 22-1806 (Accessories after the fact)

Whoever shall be convicted of being an accessory after the fact to any crime punishable by death shall be punished by imprisonment for not more than 20 years. Whoever shall be convicted of being accessory after the fact to any crime punishable by imprisonment shall be punished by a fine or imprisonment, or both, as the case may be, not more than 1/2 the maximum fine or imprisonment, or both, to which the principal offender may be subjected.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-page limitations of D.C. Ct. App. R. 32(a)(5), (6).

1. Exclusive of the exempted portions of the brief, as provided in D.C. Ct. App. R. 32(a)(6), the brief contains 50 pages.

2. The brief, including footnotes, has been prepared in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of February, 2025, a copy of the foregoing Brief has been served electronically, through the Appellate E-Filing system, upon Chrisellen Kolb at Chrisellen.R.Kolb@usdoj.gov, and by mail upon the below counsel:

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