Appeal Nos. 23-CF-286 & 23-CF-287

DISTRICT OF COLUMBIA COURT OF APPEALS

RONALD PERRY BERTON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, CRIMINAL DIVISION

Nos. 2016-CF1-017914 & 2019-CF1-003141

Brief of Appellant Ronald Perry Berton

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JURISDICTIONAL STATEMENT

This consolidated appeal is from final judgments of conviction entered against Mr. Berton in Superior Court Case Numbers 2016-CF1-017914 ("2016 case") and 2019-CF1-003141 ("2019 case"). Mr. Berton was sentenced in both cases on March 17, 2023. Notices of appeal were timely filed on April 10, 2023.

ISSUES PRESENTED

1. Whether the Government violated Mr. Berton's speedy trial rights under the Interstate Agreement on Detainers ("IAD") when it waited 143 untolled days after his transfer to the District of Columbia to commence trial, exceeding the 120-day time limit established by Article IV(a) of the IAD.

2. Whether the trial court erred by admitting evidence of two unrelated offenses at the third trial of the 2016 case.

3. Whether the Government violated Article V(d) of the IAD and Mr. Berton's right to a speedy trial by continuing to detain Mr. Berton in the District of Columbia after the 2016 case should have been dismissed pursuant to the Article IV(a) of the IAD, and then bringing him to trial on the charges in the 2019 case in 2023.

4. Whether Mr. Berton's convictions for assault with intent to commit first degree sexual abuse and attempted first degree sexual assault in the 2019 case merge with his conviction for first degree sexual abuse.

STATEMENT OF THE CASE

This consolidated appeal involves two cases in which Mr. Berton was charged with sexual assaults that occurred in the complainants' apartments: the "2016 case" or "S.N. Case" and the "2019 case" or "A.W. Case."

Following his indictment in the 2016 case, Mr. Burton was brought to the District of Columbia for trial pursuant to the IAD. After an abortive trial in July 2017, the case was eventually tried to verdict three times. Following the first full trial, the jury acquitted Mr. Berton of first-degree burglary and robbery but hung on charges of sexual assault and kidnapping. The second trial again resulted in a hung jury on the assault and kidnapping charges. At the third trial, unlike the first two, the court permitted the Government to introduce evidence of two other offenses allegedly committed by Mr. Berton, and he was convicted.

Thereafter Mr. Berton was brought to trial on the 2019 case (which had been one of the other crimes admitted at the final trial of the 2016 case) and he was convicted.

Mr. Berton was sentenced in both cases to life imprisonment without parole.

STATEMENT OF FACTS

I. The 2016 Case

On November 1, 2016, Mr. Berton was indicted for one count of first degree sexual abuse, one count of first degree burglary, one count of kidnapping, and one count of robbery arising out of an incident that occurred in the early morning hours of October 6, 2007, and involved complainant S.N.

A. The IAD Issue

On November 11, 2016, the U.S. Attorney's Office for the District of Columbia ("USAO") lodged a detainer with Sussex II State Prison in Waverly, Virginia, where Mr. Berton was then being held. (App. at 001.) On November 15, 2016, Mr. Berton executed a Request for Disposition of the D.C. charges. (*Id.* at 010.) On November 21, 2016, Virginia's Department of Corrections ("DOC") sent a letter to the USAO notifying it of Mr. Berton's Request for Disposition. (*Id.*) The DOC's letter with Mr. Berton's Request for Disposition arrived and was x-rayed in the Department of Justice mailroom on December 5, 2016, and was stamped "received" by the USAO on December 6, 2016. (App. at 016; *id*. at 010) The USAO did not respond to the DOC's letter or Mr. Berton's Request for Disposition. (*Id*. at 037-51.)

Meanwhile, on December 5, 2016—one day before the USAO received Mr. Berton's Request for Disposition—the USAO petitioned the Superior Court for a

writ of habeas corpus *ad prosequendum* for Mr. Berton. (App. at 002.) On December 7, 2016, the Superior Court issued the requested writ. (*Id*. at 033.) Mr. Berton was thereafter transferred to the District of Columbia pursuant to the writ and delivered into the District of Columbia's custody on January 11, 2017. (App. at 002; *id*. at 037-51.)

Mr. Berton was arraigned on February 15, 2017, and agreed to toll the 100-day trial limit of D.C. Code § 23-1322 on February 17, 2017, for plea negotiations. (2/17/17 Tr. at 3:1-7.) The negotiations were unsuccessful, and at a status hearing on March 30, 2017, the parties agreed to a trial date of July 5, 2017. (3/30/17 Tr. at 2:19-3:2.) This trial date was selected to comply with D.C. Code § 23-1322; the IAD was not discussed. (*Id.*)

On June 2, 2017, at a status hearing, Mr. Berton's counsel specifically asserted his right to a speedy trial under the IAD, which imposes a 180-day time limit for prisoner-initiated transfers under Article III and a 120-day time limit for prosecution-initiated transfers under Article IV. (6/2/17 Tr. at 22:23-23:8.)

On June 7, 2017, the USAO requested a continuance of the trial, which the trial court granted over Mr. Berton's objection, setting trial for July 20, 2017. Once again, the focus was on complying with D.C. Code § 23-1322. (6/7/17 Motion to Continue Trial; 6/14/17 Tr. at 39:1-2.) On June 27, 2017, Mr. Berton

filed a motion to dismiss the indictment for failure to provide a speedy trial pursuant to the IAD. (App. at 001-10.)

On June 30, 2017, the trial court heard argument on Mr. Berton's motion and denied it. The court found that the 180-day time limit of Article III for prisoner-initiated transfers, rather than the 120-day limit of Article IV for prosecution-initiated transfers, governed the time to bring the matter to trial, that the time to commence trial had not expired under either Article, and that the continuance of the trial date (to July 20, 2017) granted on June 14, 2017, had been a "good cause" continuance under the IAD. (App. at 020-21.)

The case was thereafter transferred to another judge before whom the parties appeared on July 13, 2017, to discuss the IAD trial deadline. Counsel for both parties agreed that the 180-day deadline, if applicable, would expire the following day. (7/13/17 Tr. at 4:9-7:17.) In response, the court commenced trial that same day by selecting a jury. (*Id.* at 12:11-15:22.) However, after the USAO notified the defense of the existence of previously-undisclosed evidence containing biological material, trial was continued to allow time for DNA testing. (7/24/17 Consent Order.)

Thereafter Mr. Berton continued to press his IAD claim. On September 21, 2017, defense counsel filed a motion for the trial court to consider three *pro se* submissions by Mr. Berton relating to the IAD issue. (9/21/17 Motion for

Consideration of *Pro Se* Submissions.) On September 26, 2017, the trial court denied Mr. Berton's motion without prejudice. (9/26/17 Order.) Mr. Berton filed additional *pro se* motions for reconsideration of the IAD speedy trial issue and, on January 8, 2019, he filed (through counsel) a renewed motion to dismiss the indictment based upon the IAD. (12/18/18 Motion for Reconsideration; 1/8/19 Renewed Motion to Dismiss.) On January 31, 2020, the trial court indicated it "will not revisit or address the IAD motion any further due to it being preserved for appeal." (App. at 082-84.)

B. The First Full Trial

The first full trial occurred in May 2018. During that trial, the complainant S.N. testified that, in October 2007, she had returned to her apartment after a night out drinking with friends, had fallen asleep and awoke to a stranger in her apartment who sexually assaulted her. (5/8/18 Tr. at 51:6-70:15.) She could not identify her assailant. The Government presented DNA evidence that showed Mr. Berton had intercourse with S.N. that night. (*See, e.g.*, 5/10/18 Tr. at 536:19-20.)

S.N. testified that there were three doors/gates that needed to be opened to get into her apartment:

1. a wooden gate with an automatic locking mechanism,
2. a metal security gate with a manual lock, and

3. a door directly to her apartment which had a lock on the knob mechanism and a deadbolt lock.

(5/8/18 Tr. at 91:4-105:13.) S.N. testified that she could not close her wooden gate that night because it was raining. (*Id.* at 63:23-64:4.) She also stated: "I do remember wondering how he got in and wondering if I had not properly locked up that night." (*Id*. at 102:22-105:13.) In closing argument the Government stated: "[S.N.] forgot to lock her doors . . . ." (5/14/18 Tr. at 171:14-16.)

Mr. Berton presented no evidence. The defense did not contest the fact that Mr. Berton had intercourse with S.N. Instead, it argued that the evidence was consistent with a consensual encounter. (*Id.* at 117:22-148:12.) The defense argued that there was no evidence showing that Mr. Berton's entry into S.N.'s apartment was forced or unauthorized and insufficient evidence to prove that Mr. Berton's encounter with S.N. was forced. (*Id*.)

The jury acquitted Mr. Berton of burglary and robbery but was unable to reach a verdict on the sexual abuse and kidnapping charges.

C. The Second Trial

In February 2019, the Government retried Mr. Berton on the sexual abuse and kidnapping charges. It was a reprise of the first trial. The Government again relied primarily on S.N.'s testimony and DNA evidence. Again, S.N. testified that she couldn't close the wooden gate and she didn't remember if she locked the other

gates and doors. (2/6/19 Tr. at 178:5-12, 243:23-250:3; 2/7/19 Tr. at 42:8-46:6, 51:18-24.) Again, the Government argued in its closing that S.N. forgot to lock her doors that night. (2/12/19 Tr. at 184:9-16, 189:12-190:25.) Again, the defense presented no evidence and argued that the Government's evidence was consistent with a consensual encounter. (*Id*. at 150:16-178:10.) Again, the jury hung on the sexual abuse and kidnapping charges.

D. The Decision To Admit Other Crimes Evidence

The Government decided to change tack for the third trial after it indicted Mr. Berton in March 2019 for the sexual assault of complainant A.W., which had occurred in her D.C. apartment on June 12, 2010, approximately two-and-a-half years after the S.N. incident. It moved to admit evidence of the A.W. offense at the S.N. trial. It also moved to admit evidence of a September 10, 2008 daylight burglary of Z.N.'s Arlington, Virginia apartment during which the perpetrator touched Z.N.'s buttocks and masturbated into a condom. (3/29/19 Motion to Admit Other Crimes Evidence at 9.) The Government argued the A.W. evidence was admissible under the intent exception established by *Drew v. United States*, 331 F.2d 85 (D.C. Cir. 1964) because Mr. Berton's defense of consent placed his intent to use force at issue. (*Id*. at 11-19.) The Government argued that evidence of the Z.N. offense was admissible under the *Drew* knowledge and intent exceptions because, (1) it demonstrated Mr. Berton's intent to use force in

connection with a sexual act; and (2) "the defendant's act of unlocking Z.N.'s locked door demonstrates that he knows how to gain entry by stealth without leaving signs of forced entry." (*Id*. at 9; *see also id*. at 17-18.)

The defense opposed the admission of this evidence because, *inter alia*, (1) the A.W. and Z.N. offenses were subsequent to and factually dissimilar from the S.N. incident; (2) the Z.N. offense was not admissible under the knowledge exception because the Government could not establish that S.N.'s doors were locked; and (3) the probative value of the A.W. and Z.N. offenses was substantially outweighed by the risk of unfair prejudice. (*See generally* 7/26/19 Opposition to Motion to Admit Other Crimes Evidence; *see also* 11/18/19 Resp. to Motion in Limine Regarding Admission of Prior Crimes Evidence.)

The trial court ruled that the A.W. evidence was admissible to establish Mr. Berton's intent to use force against S.N. if he presented a consent defense. (App. at 056-58.) The court also ruled that Mr. Berton's statement regarding the Z.N. incident that "[t]he door was locked and I unlocked it" was admissible as proof that Mr. Berton was able to enter S.N.'s locked apartment without leaving signs of having done so through force. (*Id*. at 062-67.) The court, however, found that evidence regarding the touching of Z.N.'s buttocks and the masturbation was not admissible to show Mr. Berton's intent to use force in the S.N. incident. (*Id*. at 059-63.)

Thereafter, the Government filed a motion in limine seeking to admit all of its available evidence relating to the A.W. and Z.N. offenses. (11/4/19 Motion in Limine Regarding Admission of Prior Crimes Evidence.) The defense attempted to limit the amount of this evidence and the manner in which the Government could present it. The defense argued that the A.W. evidence should be limited to A.W.'s testimony and the DNA evidence linking Mr. Berton to that offense. It argued that testimony from witnesses to whom A.W. reported the assault and testimony that the assailant stole A.W.'s phone was irrelevant and highly prejudicial and should be excluded. The defense argued that the Z.N. evidence should be limited to establishing that "[o]n September 10, 2008 the defendant stated to a person: 'The door was locked and I unlocked it.' The lock at issue was a door-knob lock." (*See generally* 11/18/19 Resp. to Motion in Limine Regarding Admission of Prior Crimes Evidence; 1/21/20 Resp. to Motion in Limine Regarding Admission of A.W. Prior Crimes Evidence.)

The trial court rejected the defense's arguments. With respect to the Z.N. offense, it reasoned that the jury would need more context and ruled that the Government could present evidence that Mr. Berton's statement about being able to unlock doors came after he had entered Z.N.'s apartment without her authorization. (App. at 076.) With respect to the A.W. offense, it ruled that the Government could present testimony about A.W.'s report of the assault, the crime

scene investigation, and evidence that the assailant took A.W.'s phone, which was later used to call an acquaintance of Mr. Berton. (App. at 077-81.) Although the trial court acknowledged that A.W.'s credibility was not directly at issue and there was a risk of unfair prejudice, it permitted the introduction of the evidence regarding the telephone because the defense intended to challenge the reliability of the DNA evidence relating to A.W. (*Id*.)

E. The Third Trial

At the third trial, the Government reprised the evidence it had presented at the first and second trials. S.N. again testified that she couldn't close the wooden gate and she didn't remember if she locked the other gates and doors. (3/2/20 Tr. at 180:15-181:12, 204:5-21, 245:22-246:18, 247:23-248:14; 3/3/20 Tr. at 20:6-12, 24:12-25:10.)

In addition, the Government now presented a parade of twenty witnesses to testify about the other two offenses. It essentially presented its entire case about the A.W. sexual assault, calling twelve different witnesses:

1. A.W., who described her assault in detail, including her struggle with the assailant, the pain she suffered after the assault, and the fact that her phone was missing after the assault (3/9/20 Tr. at 24:11-58:14);

2. James Casar, a D.C. firefighter technician who testified S.N. came to the fire station to report an "assault and break in" (3/5/20 Tr. at 45:21-52:24);

3. Vandra Turner-Covington, a detective with the Metropolitan Police Department ("MPD") at the time of the A.W. assault, who was supposed to limit her testimony to the fact that A.W. reported a sexual assault but instead testified in detail that the assailant "pinned [A.W.] to the bed, a struggle ensued and at some point defendant's penis was out and he digitally penetrated her vagina with his fingers" (*Id*. at 53:16-65:25);

4. Thomas Coughlin, a MPD Detective who testified that they collected DNA from A.W. (*Id*. at 66:7-72:25);

5. Elbert Griffin, another MPD Detective who testified that they collected DNA from A.W. (*Id*. at 74:22-78:5);

6. Amy Jeanguenat, a DNA casework analyst at Bode Technology who examined the DNA test results pertaining to fingernail swabs taken from A.W. (*Id*. at 66:5-116:6);

7. Kimberly Freeman, a DNA technician at Bode Technology who examined the DNA test results pertaining to the fingernail swabs taken from A.W. (*Id*. at 116:20-126:9);

8. Daniel Watsula, a DNA casework analyst at Bode Technology who performed DNA testing on A.W.'s fingernail swabs (*Id*. at 126:19-130:25);

9. Lyndsey Sanney, a DNA casework analyst at Bode Technology who examined the A.W. known sample (*Id*. at 131:3-134:10);

10. Christina Nash, the reporting analyst on the testing of the known sample taken from A.W. (*Id*. at 134:18-140:24);

11. Carmela Caravello, an AT&T records custodian who testified that A.W.'s telephone called a telephone number belonging to one of Mr. Berton's acquaintances (3/10/20 Tr. at 27:17-36:12.);

12. Taylor Greer, the acquaintance, who confirmed that it was his phone number called from A.W.'s telephone (*Id*. at 36:23-41:23).

The Government also called eight witnesses to testify about the Z.N. offense:

1. Z.N. who testified that on September 10, 2008, at about 9:40 a.m., an uninvited stranger entered her apartment and informed her "he came in through the door, which was locked, and he unlocked it." She testified that after the man left, she called the police who investigated the break in (3/9/20 Tr. at 149:18-154:15);

2. David Avery, an Arlington County Police Detective who testified about his investigation of the break-in to Z.N.'s apartment (*Id*. at 154:23-158:10);

3. Michael Austin, an Arlington County police officer who collected buccal swabs in the Z.N. case (*Id*. at 158:15-161:19);

4. Jennifer Nelson, a forensic scientist for the Virginia Department of Forensic Science, who performed testing of evidence relating to the Z.N. case (*Id*. at 161:24-195:1);

5. Michael Pochatek, a laboratory specialist at the Virginia Department of Forensic Science, who performed testing on evidence relating to the Z.N. case (*Id*. at 197:15-202:8);

6. Kelly Loynes, a forensic scientist for the Virginia Department of Forensic Science who performed testing on evidence relating to the Z.N. case (*Id*. at 202:13-206:8);

7. Nathan Himes, a forensic scientist for the Virginia Department of Forensic Science who tested Ronald Berton's known DNA sample for the Z.N. case (*Id*. at 206:11-214:21);

8. Jieffa Jones, a forensic lab specialist at the Virginia Department of Forensic Science who tested Ronald Berton's known sample for the Z.N. case (3/10/20 Tr. at 23:8-27:2).

As in the first two trials, the defense did not present any evidence of its own.

During its closing argument, the Government made full use of the "other crimes" evidence to bolster its case. It highlighted the violent nature of the A.W. incident as proof that Mr. Berton intended to use force in S.N.'s case and the fact that the perpetrator stole A.W.'s phone after the encounter. (*Id.* at 88:3-91:8.)

And the Government initially sought to use the Z.N. evidence as proof that S.N. had, in fact, locked her doors and that Mr. Berton had overcome those locks, reversing the position it had taken in the first two trials that S.N. had forgotten to lock her doors that night:

> [Z.N.] came in here and told you that on that date in 2008, she woke up and found a man in her apartment. He said he came in through the door, which was locked, and he unlocked it. That's what he said to her. And so when you're in the back wondering how did the defendant get in, [S.N.] said she didn't remember whether she had locked her door, but it was her habit to lock it. And you would think that normally if you live in a ground level apartment you'd want to lock up. It's important to do that. That's why you have this evidence, to show that the defendant knew how to unlock locked doors.

(*Id.* at 91:9-21.)

In its closing, the defense again argued that the government did not present sufficient evidence that Mr. Berton's encounter with S.N. was not consensual, highlighting S.N.'s lack of injuries and S.N.'s inability to remember whether she had locked her doors. (*Id.* at 96:8-18-100:16.) As for the other crimes evidence, the defense noted the locks to S.N.'s apartment were very different from the locks

in Z.N.'s Arlington apartment. (*Id*. at 100:20-101:14.) And the defense argued that the DNA evidence was insufficient to tie Mr. Berton to the A.W. incident because the statistical analysis failed to meet certain accepted reliability thresholds. (*Id*. at 101:15-102:21.)

In rebuttal, the Government abandoned its argument that S.N.'s doors were locked and retreated to the position that it was uncertain whether she had locked up:

> So the question of did he unlock a locked door, did he pick a lock, or did she accidentally leave her door unlocked, which she doesn't have a memory of—she certainly blames herself, but she said she didn't remember whether she had locked up that particular night. We may never know which it was. It's not caught on a Ring doorbell camera in 2007. We may never know that.

(*Id.* at 113:9-18.)

Having heard all of this evidence, the jury found Mr. Berton guilty of kidnapping and first degree sexual abuse. The court sentenced Mr. Berton to 120 months in prison for the kidnapping conviction and life in prison without the possibility of parole for the sexual assault conviction. (*See* 3/17/23 Tr. at 23:10-29:4.)

II. The 2019 Case

On March 6, 2019, the Government indicted Mr. Berton for six offenses related to the assault on A.W.: (1) first degree burglary; (2) kidnapping; (3) assault with intent to commit first degree sexual abuse; (4) attempted first degree sexual

abuse (with aggravating circumstances); (5) first degree sexual abuse (with aggravating circumstances); and (6) robbery.

Because Mr. Berton was still incarcerated in D.C. with respect to the 2016 case and had not been returned to Virginia pursuant to the IAD to complete service of his sentence there, the Government did not invoke the IAD with respect to the 2019 case. Instead, after Mr. Berton was convicted at the third trial of the 2016 case in March 2020, the Government postponed his sentencing and continued to hold him in D.C. pending trial of the 2019 case. That trial ultimately occurred in January-February 2023, almost four years after his indictment.

At this trial, the Government presented evidence (discussed above in connection with the third trial of the 2016 case) that an assailant entered A.W.'s apartment (evidently because the lock on the door did not function properly) and struggled with her in an unsuccessful attempt to have sexual intercourse. During the course of that struggle, the assailant penetrated A.W.'s vagina with his fingers. The Government connected Mr. Berton to this offense through DNA evidence collected from A.W.'s fingernails and evidence that A.W.'s phone was taken during the incident and was subsequently used to make a call to an acquaintance of Mr. Berton. The defense did not present any evidence but instead argued the Government's evidence was insufficient to connect Mr. Berton to the assault. The

jury acquitted Mr. Berton of the robbery count but convicted him of the other five counts.

The court sentenced Mr. Berton to imprisonment on all five counts, including a sentence of life without parole for the sexual abuse count. (App. at 085-92.)

SUMMARY OF ARGUMENT

1. The 2016 case must be dismissed because Mr. Berton was not brought to trial within the 120-day period provided by Article IV of the IAD. The trial court erred in finding that Article III's 180-day time limit governed, and that good cause supported a continuance to enable the Government to obtain evidence it should have collected earlier.

2. The trial court erred and prejudiced Mr. Berton by admitting the "other crimes" evidence at the third trial of the 2016 case. The evidence of the 2008 daylight break-in of Z.N.'s Arlington apartment was inadmissible because Mr. Berton's ability to unlock locked doors was not a material, contested issue in the charged offense.

The probative value of the 2010 sexual assault involving A.W., which occurred two-and-a-half years after the charged crime, was weak and was far outweighed by its prejudicial impact. Moreover, the trial court allowed testimony multiple witnesses to corroborate A.W.'s unchallenged account of

the sexual assault, it permitted the Government to elicit testimony from A.W. about her emotional injuries and permitted the Government to establish that A.W.'s cellphone was stolen and used to make a call to an acquaintance of Mr. Berton.

Both the Z.N. and the A.W. episodes became distracting, highly prejudicial trials within the trial of the offense involving S.N.

3. The 2019 case should be dismissed because Mr. Berton's rights under Article V(d) of the IAD were violated and he was deprived of a speedy trial. The 2016 case should have been dismissed in 2017 because of the violation of the speedy trial provision into Article IV(a) of the IAD, and Mr. Berton should have then been promptly returned to Virginia pursuant to Article V. In that event, when he was indicted two years later in the 2019 case, he would have again been brought to D.C. pursuant to the IAD and would have had Article III or Article IV speedy trial rights with respect to that case. Instead, Mr. Berton was held continuously in D.C. for six years following his IAD transfer here in January 2017 and was not brought to trial on the 2019 case until 2023, four years after his indictment. Consequently, he was deprived of his constitutional and statutory right to a speedy trial and so the 2019 case should be dismissed.

4. Mr. Berton's convictions in the 2019 case for assault with intent to commit first degree sexual abuse and attempted first degree sexual assault must be vacated because they merge with his conviction for first degree sexual abuse. The evidence presented at trial demonstrated that these offenses were part of the same continuous sexual encounter. Accordingly, the convictions and sentences for assault with intent to commit first degree sexual assault and attempted first degree sexual assault must be vacated.

ARGUMENT

I. The 2016 Indictment Must Be Dismissed Because the Government Violated the IAD

Mr. Berton was not brought to trial on the 2016 case within the time limit established by the IAD. Accordingly, the charges against him must be dismissed.

A. This Case Is Governed by Article IV of the IAD

The IAD, codified at D.C. Code § 24-801, provides prisoners in other jurisdictions a right to a speedy trial on charges in D.C. that form the basis for a detainer against them. "The Act establishes two alternate and distinct mechanisms by which a prisoner against whom a detainer has been filed can be transferred to a second jurisdiction for expedited disposition of the outstanding charges." *Felix v. United States*, 508 A.2d 101, 104 (D.C. 1986). "Article III (a) of the IAD sets out terms by which a prisoner may request final disposition of outstanding charges connected with a detainer. It provides that after such a request is filed, the prisoner

must be brought to trial within 180 days." *Id.* Article IV(a) of the IAD provides a mechanism by which a prosecutor can have a prisoner in another jurisdiction made available for trial. "In such a case, the prisoner must be brought to trial within 120 days of the prisoner's arrival in the receiving state." *Id.* Whenever either of these speedy trial provisions is violated, the IAD mandates dismissal of the indictment with prejudice. D.C. Code § 24-801, at art. V(c).

The logic behind these two different time limits is readily apparent. When the prisoner initiates the transfer, the statute contemplates that the government may require time to prepare its case and so allows 180 days to commence trial. Conversely, when the government initiates the prisoner's transfer, the statute presumes the government's case is already prepared and so sets the more abbreviated 120-day time limit.

"[B]ecause the government, through its agents, controls the procedural aspects of the Act, and because the IAD's underlying purpose is to promote the best interests of the prisoner by preventing abuses in the detainer system, the Act's provisions must be liberally construed so as to effectuate its purposes." *Felix*, 508 A.2d at 109. This Court "review[s] the denial of a motion to dismiss an indictment under the IAD de novo." *Cooper v. United States*, 28 A.3d 1132, 1137 (D.C. 2011).

Here, both Mr. Berton and the USAO attempted to initiate his transfer pursuant to the IAD; however, it was the USAO's initiative that resulted in Mr. Berton's transfer to the District of Columbia. The USAO sought a writ of habeas corpus *ad prosequendum* for Mr. Berton before it received his request for final disposition of the charges against him. The USAO's writ petition was not prompted by, nor influenced by, Mr. Berton's request. By seeking the writ, the USAO triggered Article IV(a) of the IAD, and its 120-day time limit to commence trial. Mr. Berton's request under Article III(a) was superfluous; it is not what precipitated his transfer to D.C.

B. The 120-Day Time Limit of Article IV Was Exceeded

Mr. Berton arrived in the District of Columbia—thus commencing the 120-day speedy trial clock of Article IV—on January 11, 2017. Thereafter, the parties agreed to toll 41 days for plea negotiations. On June 2, 2017, Mr. Berton's counsel asserted his right to a speedy trial under the IAD at a status hearing. (6/2/17 Tr. at 22:23-23:8.) At this point, a total of 102 days had elapsed after deducting the tolled period.

Then the USAO filed a motion on June 7, 2017, to continue the trial to allow it time to investigate a purportedly newly-discovered fact, *i.e.*, that the complainant had received approximately 15 years of mental health treatment. (6/7/17 Motion to Continue Trial; 6/30/17 Reply ISO Motion to Dismiss, at 3.) At a hearing on June

14, 2017, the trial court granted the requested continuance, over Mr. Berton's objection, and set trial for July 20, 2017. (6/30/17 Reply ISO Motion to Dismiss, at 3-4.)

On June 27, 2017, Mr. Berton filed a written motion to dismiss the indictment, which spelled out his argument under the IAD. (6/27/17 Motion to Dismiss.) Three days later, on June 30, 2017, the trial court heard argument on this motion and denied it, finding that Article III, rather than Article IV, governed the case, that the time to commence trial had not yet expired under either Article, and that the previous continuance of the trial date to July 20, 2017, had been a "good cause" continuance under the IAD. (App. at 020-21.)

However, the court transferred the case to another judge, who commenced trial on July 13, 2017, in order to comply with the 180-day deadline of Article III. By this time, after deducting the 41 days that were tolled for plea negotiations, 143 days had elapsed since Mr. Berton's arrival in D.C., which far exceeds the 120-day time limit set by Article IV(a) of the IAD.

The remaining issue is whether the 120-day time limit was properly extended. The IAD allows its time limits to be extended for good cause shown in open court. *See Felix*, 508 A.2d at 104-05. The Superior Court retroactively found that there had been "good cause" to continue the trial date to July 20, 2017. It erred in so ruling.

Whether there was good cause for a continuance and the length of the continuance are each mixed questions of law and fact that this Court reviews de novo. *Birdwell v. Skeen*, 983 F.2d 1332, 1336 (5th Cir. 1993). "The 'good cause' provision in the IAD has been strictly construed." *Haigler v. United States*, 531 A.2d 1236, 1243 (D.C. 1987).

The USAO's stated "good cause" for continuing the trial date—adopted by the trial court in granting the continuance—was that the USAO had only just learned that complainant S.N. had received mental health treatment from various providers for the past 15 years. (6/30/17 Reply ISO Motion to Dismiss, at 3.) But the prosecutor told Mr. Berton's counsel that she had never previously (before June 5 and 6, 2017) asked S.N. about mental health treatment even though the USAO had long been on notice that this was a potential issue.

In a recorded interview with the MPD in 2015, S.N. mentioned two separate locations where she received mental health treatment. (6/30/17 Reply ISO Motion to Dismiss, at 7.) Nevertheless, the USAO did not investigate S.N.'s mental health treatment history until S.N.'s sister informed it on May 31, 2017, that after the offense in this case, S.N. was in a "fog" for a number of years and took medication. (*Id.* at 7-8.) Even then, with the IAD trial deadline looming, the USAO waited until June 5, 2017, to seek more information from S.N.'s attorneys, and then waited until June 14, 2017, to obtain subpoenas for those records from the

court. (*Id.* at 8.) That the USAO did not possess the records in time for trial was entirely due to its lack of preparation, rather than any circumstance amounting to good cause.

"Good cause" under the IAD requires "more than [a prosecutor's] lack of preparation." *Dennett v. State*, 311 A.2d 437, 442 (Md. App. 1973). Indeed, the federal Speedy Trial Act explicitly provides that "[n]o continuance … shall be granted because of … lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government." 18 U.S.C. § 3161(h)(8)(C) (2018). "Given the speedy trial provisions of the IAD, every trial counsel is pressed for time in preparing the case of a transferred prisoner." *Jenkins v. United States*, 483 A.2d 660, 663 (D.C. 1984). The very reason why the IAD establishes a shorter trial deadline for cases under Article IV is that the prosecutor has the opportunity to prepare her case before initiating the defendant's transfer for trial.

Further undermining any notion that there was good cause to extend the IAD deadline is the fact that the court ultimately commenced trial on July 13, 2017, a week in advance of the continuance date, after learning that the Article III 180-day deadline was imminent. Indeed, the trial court impaneled a jury the very same day. (7/13/17 Tr. at 12:11-15:22.) On July 13, 2017, the parties appeared for what was intended to be a pretrial motions hearing. When counsel for both parties advised

the court that the 180-day time period, if applicable, would expire the following day, the trial court arranged for a jury to be selected that afternoon, noting it would "have to muscle some of my colleagues out of their requests" for jury panels that day. (*Id*. at 14:5-8.) Once the court really focused on the IAD speedy trial issue, the USAO's need to obtain S.N.'s mental health records was no longer deemed sufficient cause to exceed the IAD time limit.

Moreover, the trial court's *retroactive* finding on June 30, 2017, that good cause supported the June 14, 2017, continuance was itself improper. By June 30, the 120-day time limit had already been exceeded (after deducting the forty-one tolled days, 135 days had elapsed since Mr. Berton's arrival in D.C.). Article IV(c) of the IAD provides that "trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance." This Court has ruled that "[t]he government has an affirmative duty to make a record on the question of whether continuances have been granted for good cause in keeping with Article IV(c)." *Haigler v. United States*, 531 A.2d at 1246. The statutory language indicates that court must either commence trial within 120 days or else grant additional time for good cause shown. It does not permit retroactive determinations of good cause. *See State v. Wilson*, 632 N.W.2d 225, 228 (Minn.

2001) (construing comparable speedy trial provision of the Uniform Mandatory Disposition of Detainers Act).

Because the 120-day time limit of Article IV was exceeded here, and because there was no good cause for extending that limit, the 2016 case must be dismissed with prejudice pursuant to Article V of the IAD. *See Haigler*, 531 A.2d at 1246.

II. The Trial Court Erred by Admitting Evidence of Other Crimes in the Trial of the 2016 Case

The trial court committed reversible error by allowing the Government to present prejudicial "other crimes" evidence at the third trial of the 2016 case.

Evidence of other crimes committed by a defendant is presumptively prejudicial and inadmissible. *See Johnson v. United States*, 683 A.2d 1087, 1090 (D.C. 1996) (en banc); *Thompson v. United States*, 546 A.2d 414, 418-420 (D.C. 1988). To guard against the danger of a conviction based upon the defendant's bad character and prior crimes, courts presume prejudice and exclude evidence of other misconduct unless it serves some substantial, legitimate purpose. *See Drew*, 331 F.2d at 89-90. The burden is on the Government to show that the evidence should be admitted. *Johnson*, 683 A.2d at 1101.

Generally, two requirements must be established to overcome the presumption of prejudice that attends other crimes evidence. First, the evidence must be offered for a "substantial, legitimate purpose," i.e., it must be (1) directed

to a genuine, material and contested issue in the case and (2) logically relevant to prove this issue for a reason other than its power to demonstrate criminal propensity. *Banks v. United States*, 237 A.3d 90, 98 (D.C. 2020); *Roper v. United States*, 564 A.2d 726, 731 (D.C. 1989) (per curiam) (internal citations omitted).

Second, the probative value of the evidence must outweigh the danger of unfair prejudice that it poses. *German v. United States*, 525 A.2d 596, 607 (D.C.), *cert. denied*, 484 U.S. 944 (1987). The factors a court should consider "include 'the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the two crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.'" *See Johnson*, 683 A.2d at 1095 n.8 (quoting John Strong, I McCormack on Evidence Section 190 (4th ed. 1992)).

A. The Entry Into Z.N.'s Apartment

The evidence about Mr. Berton's daylight entry into Z.N.'s Arlington apartment was inadmissible because it was not directed to a genuine, material and contested issue in S.N.'s case.

Mr. Berton's knowledge/ability to unlock locks was not a material, disputed issue because S.N. did not remember whether she locked her doors. At all three trials, S.N. testified that she did not lock her wooden gate and could not remember

locking her other doors. In a pretrial motion, the Government asserted that "[i]n both [the S.N. and L.Z.] cases, the victims had failed to lock their doors." (4/20/17 Motion to Admit Other Crimes Evidence at 12.) And at the first two trials the Government argued to the jury that S.N. had forgotten to lock her doors that night.

In light of this history, it is astonishing that the Government sought at the third trial to introduce evidence of the Arlington Z.N. offense to demonstrate that Mr. Berton knew how to defeat locked doors. The Government altered its theory of the case in its motion to admit the Z.N. evidence and asserted that S.N.'s apartment was locked at the time of the encounter in order to create an issue as to which the *Drew* evidence would be relevant. *See Morgan v. United States*, 47 A.3d 532, 537 (D.C. 2012) (due process requires a consistent prosecution theory where a defendant faces two proceedings concerned with the same offense). Yet, after it presented the inflammatory Z.N. evidence at the third trial, the Government ultimately argued that the issue of whether S.N. locked her door was not a material fact the jury needed to decide to reach a verdict. The prosecutor stated:

> the question of did he unlock a locked door, did he pick a lock, or did she accidentally leave her door unlocked, which she doesn't have a memory of—she certainly blames herself, but she said she didn't remember whether she had locked up that particular night. We may never know which it was. It's not caught on a Ring doorbell camera in 2007. We may never know that.

(3/10/20 Tr. at 113:9-18.)

Because Mr. Berton's ability to unlock locked doors was not a material issue in the S.N. trial, the trial court erred in admitting evidence related to the Z.N. offense. *Robles v. United States*, 50 A.3d 490, 494 (D.C. 2012), *as amended on denial of reh'g and reh'g en banc* (May 15, 2013) (holding trial court erred in admitting other crimes evidence when that evidence was not related to a genuinely disputed material issue).

Any minimal probative value that evidence of the Z.N. offense may have had was substantially outweighed by the risk of unfair prejudice to Mr. Berton that it created. This evidence enabled the Government to portray Mr. Berton as a deviant with a propensity to break into young women's homes. It served no purpose but to inflame the passions of the jury and divert their attention from the evidence relating directly to the S.N. episode. This Court has recognized that:

> [e]vidence of prior wrongful behavior is always prejudicial to a defendant. It not only risks that the jury may infer guilt simply on the basis that the accused has committed wrongful acts, but it diverts the jury's attention from the question of defendant's responsibility for the crime charged to the improper issue of his bad character.

Thomas v. United States, 59 A.3d 1252, 1262-63 (D.C. 2013) (quoting *Campbell v. United States*, 450 A.2d 428, 431 (D.C. 1982).

Furthermore, the trial court compounded the prejudicial impact of the Z.N. incident by allowing it to be presented through the testimony of eight different witnesses and in greater detail than necessary. Before trial, the defense argued that

the evidence should be limited to establishing that Mr. Berton told Z.N. that "[t]he door was locked and I unlocked it," and that the lock at issue was a door-knob lock (11/18/19 Resp. to Motion in Limine Regarding Admission of Prior Crimes Evidence at 3.) However, at trial the court permitted Z.N. to testify to additional facts that she was sleeping when she awoke to a stranger standing in front of her and that the police were called after the break in. (3/9/20 Tr. at 149:18-154:15.) The trial court then permitted the Government to call seven additional witnesses each of whom had some connection to law enforcement.

The prejudice caused by this evidence cannot be disputed. Given the sexual nature of the other two crimes that the Government offered evidence on, the jury was likely to conclude that the Z.N. incident was likewise of a sexual nature. Indeed, the trial court itself acknowledged that the Z.N. incident was "very terrifying" and likely to engender the sympathies of the jury. (1/31/20 Tr. at 10:21-11:3, 16:2-4.)

In sum, the Z.N. evidence inflamed the jury and unfairly prejudiced Mr. Berton while failing to shed light on any genuine, contested issue regarding the S.N. incident. Accordingly, the trial court erred in admitting this evidence.

B. The Sexual Assault on A.W.

The trial court also abused its discretion in admitting evidence of the A.W. sexual assault because the probative value of this evidence was substantially outweighed by its prejudicial effects.

The A.W. incident occurred two-and-a half-years after the S.N. incident. Courts have acknowledged that subsequent criminal activities are far less probative of a defendant's state of mind than criminal activities which predate the charged crime. *See, e.g., United States v. Boyd*, 595 F.2d 120, 126 (3d Cir. 1978) (subsequent criminal activities, particularly conduct that is substantially separated in time from the charged offense, is far less likely to shed light on a defendant's state of mind than a prior conduct would on a subsequent offense); *United States v. Watson*, 894 F.2d 1345, 1349 (D.C. Cir. 1990) ("The temporal (as well as the logical) relationship between a defendant's later act and his earlier state of mind attenuates the relevance of such proof…."); *United States v. Zak*, 46 F.3d 1134 (7th Cir. 1994) (Table), 1994 WL 712628, at *2 n.3 ("Although by its very terms, Rule 404(b) does not distinguish between prior and subsequent acts, … this court has acknowledged that subsequent criminal activities, particularly conduct that is substantially separated in time from the charged offense, is far less likely to shed light on a defendant's state of mind than a prior conduct would on a subsequent offense.").

The D.C. Circuit recently ruled that two incidents which occurred several years before the defendant's entry into a conspiracy "were too remote in time to qualify as legitimate Rule 404(b) [other crimes] evidence. They thus were irrelevant, serving only as forbidden propensity evidence." *United States v. McGill*, 815 F.3d 846, 938 (D.C. Cir. 2016). Here the evidence regarding the subsequent A.W. incident is equally irrelevant to proving Mr. Berton's intent in a different episode that occurred two-and-a-half years earlier.

The jury could not rely on the A.W. evidence to infer Mr. Berton's intent to use force in the prior S.N. episode unless it inferred that Mr. Berton harbored an intent to use force to engage in sexual acts whenever the opportunity arose for an indefinite, years-long time period before the A.W. incident. In other words, the jury was asked to infer from the A.W. incident that Mr. Berton had a propensity to commit sexual assaults. This inference is impermissible under *Drew* and would render the rule against propensity evidence meaningless. *See Harrison v. United States*, 30 A.3d 169, 178 (D.C. 2011) (evidence inadmissible if its relevance " 'depend[s] wholly or primarily' on the jury inferring that [the defendant] was predisposed or had a propensity to commit the charged crimes") quotation omitted).

Moreover, as it did with the Z.N. evidence, the trial court compounded the prejudicial impact of the A.W. evidence by allowing it to be presented through the

testimony of far more witnesses and in far greater detail than necessary to establish Mr. Berton's intent to use force.

Before the trial, the defense argued that because the A.W. evidence was only being offered to show Mr. Berton's intent to use force to engage in sexual contact, the Government's presentation of evidence should be limited to:

> A. The testimony of A.W. regarding the offense to establish the elements of a forced sexual act, and an attempted sexual act committed by force;
>
> B. The testimony of DNA experts and all necessary DNA witnesses involved in the testing and analysis of the evidence, as well as any necessary chain of custody witnesses;
>
> C. The testimony, potentially by stipulation, regarding the collection of the defendant's buccal swab.

(1/21/20 Resp. to Motion in Limine Regarding Admission of A.W. Prior Crimes Evidence at 1-2.) The defense argued that testimony from witnesses to whom A.W. reported the assault and testimony that the assailant stole A.W.'s phone should not be admitted because it was irrelevant to his intent to use force and was highly prejudicial. (*Id*. at 2.)

Nonetheless, the trial court allowed the Government to present virtually its entire case about the A.W. offense through the testimony of twelve different witnesses, including evidence that had nothing to do with Mr. Berton's intent regarding the sexual assault:

1. The trial court permitted the Government to introduce testimony from multiple witnesses to corroborate A.W.'s account of the sexual assault. And the MPD detective, who was supposed to limit her testimony to the fact that A.W. reported a sexual assault, instead testified in detail that the assailant "pinned [A.W.] to the bed, a struggle ensued and at some point, defendant's penis was out and he digitally penetrated her vagina with his fingers." (3/5/20 Tr. at 53:16-65:25.)

2. The trial court also permitted A.W. to testify in graphic detail about not only the nature of her sexual assault but also (1) the emotional injuries she suffered as a result (3/9/20 Tr. at 47:5-51:9), and (2) the fact that her phone was stolen during the incident (*Id.* at 46:3-5, 24:11-58:14.)

3. The trial court permitted the Government to present two other witnesses to establish that A.W.'s stolen cellphone was used to make a call to an acquaintance of Mr. Berton. While this evidence inferentially tied Mr. Berton to the offense, its probative value on that score was slight and its prejudicial impact was great because it highlighted the robbery offense that had no probative value with respect to the offense against S.N.

In sum, the court allowed the Government to present a "trial-within-a-trial" by introducing virtually its entire case regarding the A.W. offense within the confines of the S.N. trial. Indeed, the amount of evidence presented to the jury

about the A.W. assault almost equaled the evidence about the S.N. incident, itself. Such a "trial-within-a-trial" creates an unacceptable risk of confusing the jury and distracting it from the issue(s) actually to be decided. *See Howard v. United States*, 241 A.3d 554, 564 (D.C. 2020).

In order to avoid creating a "trial-within-a-trial," the trial court can "limit the number of witnesses and the extent of their testimony bearing upon the issue." *Winfield v. United States*, 676 A.2d 1, 5 (D.C. 1996). These limits are especially important when "other crimes" evidence is being presented. *See United States v. Han*, 962 F.3d 568, 573 (D.C. Cir. 2020) (affirming admission of Fed.R.Evid. 404(b) evidence where district court "took exemplary care to insist that testimony on this subject be 'brief' and 'very tailored'" (alteration omitted)); *United States v. Straker*, 800 F.3d 570, 591 (D.C. Cir. 2015) (affirming admission of Rule 404(b) evidence where district court "barred cumulative evidentiary presentations" and "strictly ration[ed] the trial time allowed for those evidentiary presentations"). Yet here the trial court effectively placed no limits on the presentation of the Government's evidence regarding the A.W. offense. This was an abuse of discretion that unfairly prejudiced Mr. Berton.

There is no question that the improper admission of the *Drew* evidence in this case prejudiced Mr. Berton and requires reversal of his conviction. The evidence relating solely to the alleged assault of S.N. had twice proved insufficient

to secure the conviction of Mr. Berton. The *Drew* evidence that was admitted at the third trial is what spelled the difference and its admission cannot be dismissed as harmless error.

III. The 2019 Indictment Should Be Dismissed Because Mr. Berton Was Deprived Of His Right To A Speedy Trial

As discussed above, the 2016 case should have been dismissed in July 2017 because of the Government's failure to bring Mr. Berton to trial within the time limit of Article IV of the IAD. At that point, the Government was obliged to return Mr. Berton to Virginia to resume the service of his sentence there. Article V(d) of the IAD states "[t]he temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations, or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction." D.C. Code § 24-801, at art. V(d). And Article V(e) provides that "[a]t the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending State." *Id.*, art. V(e). The usage of "shall" in both of these provisions indicates that they are mandatory. *See Alabama v. Bozeman*, 533 U.S. 146, 153 (2001) ("The word 'shall' is ordinarily 'the language of command.'") (quoting *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947)).

Instead, Mr. Berton was detained in D.C. for the next three years while the Government repeatedly tried him on the 2016 case until it finally obtained a conviction in March 2020. Toward the end of this prolonged, unlawful detention in D.C., the Government indicted Mr. Berton in the 2019 case. And when it obtained a conviction in the first case in March 2020, the Government postponed Mr. Berton's sentencing and continued to hold him in D.C. pending trial of the new case. That trial ultimately occurred in January-February 2023, almost four years after his indictment, and three years after he was convicted in the 2016 case.

Had Mr. Berton been accorded his rights under the IAD, he would have been returned to Virginia in 2017. When the Government indicted him for the 2019 case two years later, it would have been obliged to institute new proceedings under the IAD to bring Mr. Berton to trial on those charges. And the IAD would have imposed its time limit on bringing these charges to trial.

The Third Circuit has found that continuing to detain a prisoner on charges that did not form the basis of the original detainer violates the IAD. In *Cooney v. Fulcomer*, 885 F.2d 41 (3d Cir. 1989), a prisoner in New Jersey was returned to Pennsylvania pursuant to the IAD based on burglary charges. While in Pennsylvania, he was also charged with robbery charges that were unrelated to the burglary charges. Following the withdrawal of the burglary charges, Pennsylvania continued to detain him for trial on the robbery charges. The Third Circuit found

that Pennsylvania thereby violated the IAD. "[T]he Commonwealth did exactly what is expressly prohibited by Article V(d): It tried appellant on outstanding charges which were unrelated to the charges which formed the basis of the detainer." *Id.* at 44.

Mr. Berton cannot invoke the IAD speedy trial limit with respect to the 2019 case because "[o]nly those charges 'on the basis of which the detainer has been lodged' that are not tried within the prescribed time limit are subject to dismissal." *Grant v. United States*, 856 A.2d 1131, 1139 (D.C. 2004). And the 2019 charges did not exist at the time he was brought to D.C. pursuant to the IAD.

However, this cannot mean that Mr. Berton is without a remedy for the Government's violation of the IAD in failing to return him to Virginia in 2017. The Supreme Court has rejected the notion that a violation of the IAD can be "trivial." *See Bozeman v. Alabama,* 533 U.S. at 154-56. And the Court opined long ago that the laws must furnish a remedy for the violation of a legal right:

> [Our government] has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1802).

The purpose of the IAD is to "encourage the expeditious and orderly disposition of [] charges [outstanding against a prisoner] and determination of the proper status of any and all detainers based on untried indictments, informations,

or complaints." D.C. Code § 24-801, at art. I. The IAD imposes speedy trial requirements that go far beyond the constitutional minimum. Yet Mr. Berton languished in the D.C. Jail for more than six years before the 2016 charges against him were finally resolved and some four years before the 2019 charges were resolved. The Government's failure to return him to Virginia deprived him of the strict speedy trial limits that the IAD would have imposed with respect to the 2019 charges.

In the absence of an express statutory sanction for violation of the IAD's prompt return requirement, the Court must determine what sanction is warranted for this violation. The sanction for deprivation of the right to a speedy trial is dismissal of the indictment. *See McBride v. United States,* 393 A.2d 123, 129 (D.C. 1978) (finding that a dismissal with prejudice for violation of the IAD time limitations is "a prophylactic measure designed to induce compliance in other cases") (citing *Dennett v. State*, 19 Md.App. 376, 311 A.2d 437, 441 (1973)). Although the fixed time limits of the IAD may not apply to the 2019 charges, the policies of the Act require a more stringent approach in evaluating the delay here than in the typical case adjudged under the relatively lenient factors of the constitutional standard. A "prophylactic measure" is wholly appropriate in this case to induce compliance with the IAD's prompt return requirement through dismissing the 2019 charges. Without such a measure, the Government has no

incentive to comply with the strict requirements of the IAD and defendants would have no recourse.

"[D]elay of more than a year gives prima facie merit to a claim that an accused has been denied the right to a speedy trial, creates a presumption of prejudice, and shifts the burden to the government to justify the delay." *Graves v. United States*, 490 A.2d 1086, 1091 (D.C. 1984) (en banc). Here the Government cannot justify the four-year delay. Accordingly, the 2019 charges should be dismissed.

IV. Two Of The Convictions In The 2019 Case Must Be Vacated

Even if the 2019 charges are not dismissed, Mr. Berton's convictions and sentences for assault with intent to commit first degree sexual abuse and for attempted first degree sexual abuse must be vacated because they merge with his conviction for first degree sexual abuse.

"The Double Jeopardy Clause prohibits a second prosecution for a single crime and protects against multiple punishments for the same offense." *Cullen v. United States*, 886 A.2d 870, 872 (D.C. 2002) Where a defendant has been convicted of two violations arising from the same statutory elements, this Court employs a "fact-based" approach to determine whether the two convictions constitute multiple punishments for the same offense and thus must merge. *Sanchez-Rengifo v. United States*, 815 A.2d 351, 354 (D.C. 2002). Discrete acts

are only considered separate under this analysis "when there is an appreciable length of time between the acts that constitute the two offenses, or when a subsequent criminal act was not the result of the original impulse, but a fresh one." *Id.* at 355.

This Court has recognized that offenses of a sexual nature "tend to be committed in a single continuous episode rather than in a series of individually chargeable acts." *Gardner v. United States*, 698 A.2d 990, 1002 (D.C. 1997) (internal quotation marks omitted); *Cullen*, 886 A.2d at 873 (observing that "a single episode of sexual misconduct ordinarily involves the wrongdoer touching the victim more than once" (quoting *State v. Perillo*, 649 A.2d 1031, 1032 (Vt. 1994))). Thus, multiple sexual acts, "if committed in a single course of conduct, will not be converted into separate [offenses]." *Sanchez-Rengifo*, 815 A.2d at 356.

Here, Mr. Berton was charged with and convicted of assault with intent to commit first degree sexual abuse (Third Count) and attempted first degree sexual assault (Fourth Count), both of which were based on his alleged effort to penetrate A.W.'s vulva with his penis. In addition, he was charged with and convicted of first degree sexual assault (Fifth Count), which was based on his alleged penetration of A.W.'s vulva with his fingers. He was sentenced to 72 months' incarceration for Count Three and 108 months' incarceration for Count Four, to

run concurrently. He was sentenced to life imprisonment, without possibility of parole, for Count Five, to run consecutively to the other counts.

However, the evidence presented at trial demonstrated that Counts Three and Four were one and the same offense and merged with each other. Similarly, Count Five was part of the same continuous sexual encounter as Counts Three and Four. Like in *Cullen*, the evidence does not show any appreciable length of time between, or break in the sequence of, the relevant events. A.W. testified that she engaged in a constant struggle with Mr. Berton and "[she didn't] remember exactly the order of things . . . ." (1/30/23 Tr. at 71:12-15.) She then recounted the following:

> A. He had on jean shorts and he had -- they were still buttoned at the top but he had them unzipped and his penis was out of his pants.
>
> Q. All right. And did he do anything with his penis?
>
> A. And he was masturbating, but he was limp and unable to get an erection, so he was trying to get an erection.
>
> Q. And when you saw his penis out through the zipper while you were pinned on the floor, what did you think he was trying to do?
>
> A. I think he was trying to get hard so he could rape me.
>
> Q. What else did he do then with his hands or fingers?
>
> A. At some point, he -- he put his fingers inside me, inside of my vagina. And I was still pinned.

(*Id*. at 75:18-76:10.)

There is no indication that there was any appreciable time between the assailant unzipping his pants and his digital penetration of A.W. Nor is there any indication that his digital penetration of A.W.'s vulva was distinct from his efforts to penetrate A.W. with his penis. A.W. did not recount them as distinct events; she testified that her assailant "was trying to get hard so that he could rape me" and "[a]t some point, he – he put his fingers inside me." Both events were part and parcel of the same struggle. Accordingly, all three counts merge in the conviction for first degree sexual assault. The convictions and sentences for assault with intent to commit first degree sexual assault and attempted first degree sexual assault must be vacated.

CONCLUSION

For the foregoing reasons, Mr. Berton respectfully requests that this Court reverse his convictions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on December 11, 2023, a true and correct copy of the foregoing was served through the Court's e-filing system to Chrisellen R. Kolb.

s/ Sean Belanger
Sean Belanger

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

If you are incarcerated, are not represented by an attorney (also called being "pro se"), and not able to redact your brief, please initial the box below at "G" to certify you are unable to file a redacted brief. Once Box "G" is checked, you do not need a file a separate motion to request leave to file an unredacted brief.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21, amended May 2, 2023, and Super. Ct. Crim. R. 49.1, and removed the following information from my brief:

A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
(2) Taxpayer-identification number
(3) Driver's license or non-driver's' license identification card number
(4) Birth date
(5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)
(6) Financial account numbers

(7) The party or nonparty making the filing shall include the following:

(a) the acronym "SS#" where the individual's social-security number would have been included;
(b) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
(c) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and
(g) the city and state of the home address.

B. Any information revealing the identity of an individual receiving mental health services and/or under evaluation for substance-use-disorder services. *See* DCCA Order No. M-274-21, May 2, 2023, para. No. 2.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

Initial here

G. I certify that I am incarcerated, I am not represented by an attorney (also called being "pro se"), and I am not able to redact this brief. This form will be attached to the original filing as record of this notice and the filing will be unavailable for viewing through online public access.

Signature

23-CF-286 & 23-CF-287
Case Number(s)

Sean Belanger (Attorney for Randall Burton)
Name

12/11/2023
Date

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