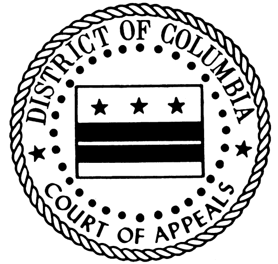
Nos. 23-CM-627, 24-CM-0408



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DISTRICT OF COLUMBIA COURT OF APPEALS

DEREK J. MORRIS

Appellant,

v.

UNITED STATES,

Appellee

Appeal from the District of Columbia Superior Court

Criminal Division, Misdemeanor Branch

BRIEF FOR
DEREK J. MORRIS

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LISTING OF THE PARTIES

Undersigned counsel hereby certifies that the only parties who appeared in the District of Columbia Superior Court were Mr. Derek J. Morris and the United States. Mr. Morris was represented by Mark Rollins, Esq. Assistant U.S. Attorneys Anthony Cocuzza and Mark Levy were represented the government.

Mr. Morris is represented in this court by attorney Thomas G. Burgess. The United States is represented by Assistant U.S. Attorney Chrisellen Kolb.

No interveners or *amici curiae* have appeared in this case.

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APPEAL FROM FINAL JUDGMENT

This appeal is from a final judgment sentencing Mr. Morris on April 21, 2023, and disposing of all parties' claims.

ISSUE PRESENTED

Did the trial court err when it failed to instruct the jury on the government's duty to prove the existence of an independent factor justifying Mr. Morris' arrest?

STATEMENT OF THE CASE

On January 15, 2020, Derek Morris was charged by information with two counts of unlawful entry in violation of D.C. Code §22-3302(b) (2001 ed.). R. 25. The first charge was styled as "Unlawful Entry (Public Property)" and the second as "Unlawful Entry (Public Property – Failure to Quit)." *Id.* On April 14, 2023, defense counsel motioned to dismiss the second count due to multiplicity. *Id.* 163 – 166. In a preliminary hearing, the government agreed to dismiss the first charge. Tr. 4/18/23 at 5-6.

A jury trial was held before the Honorable Errol Arthur. The jury was empaneled on April 19, 2023. Tr. 4/19/2023 at 108. The trial began that day and ended the next. On April 21, 2023, the jury

convicted Mr. Morris of unlawful entry. Tr. 4/21/23 at 16. Judge Arthur sentenced Mr. Morris to 30 days imprisonment, all of which he suspended. *Id*. at 26. He placed Mr. Morris on 6 months unsupervised probation. *Id*. And he ordered Mr. Morris to stay away from the United States Supreme Court unless he had lawful business with the Court. *Id*. Mr. Morris filed a notice of appeal.[1]

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[1] Mr. Morris' initial *pro se* notice of appeal was not timely filed. *Comp.* R. 355 *with* R. 356-357 (court staff represented that the timestamp on the notice of appeal was July 25, 2023). On April 18, 2024, undersigned counsel filed a motion for the trial court to vacate the Judgment and Commitment Order and issue a new one. The government did not oppose the motion. On April 23, 2024, the trial court granted the motion. On April 24, 2024, undersigned filed a new notice of appeal. In this Court, a second case number was assigned to the second notice of appeal. The second case was consolidated with the first.

Undersigned reached out to trial court's chambers on July 5, 2024 to locate the newly issued J & C, but has not heard back as of the time of filing. If a new J & C was not issued, Mr. Morris asks the court to not enforce the claim-processing rule against untimely notices of appeal (*see Deloatch v. Sessoms-Deloatch*, 229 A.3d 486, 487 – 88 (D.C. 2020)). Mr. Morris makes the same request if his initial *pro se* notice of appeal divested the trial court of jurisdiction to grant undersigned's 4/18/24 motion. *But* see *In re Est. of Derricotte*, 885 A.2d 320, 326 (D.C. 2005) ("A *timely* filed appeal divests the trial court of jurisdiction) (emphasis added)). The government does not oppose this request.

STATEMENT OF FACTS

A. Government's Case

i. Clerk's Office and Filing Rules

On January 14, 2020, Derrick Morris was arrested for unlawful entry in the clerk's office of the United States Supreme Court. Tr. 4/20/23 at 30, 50. Mr. Morris was in the clerk's office because he wanted to submit a petition for writ of certiorari to the clerk's office of the Court. *Id.* at 36-37. He was arrested around 11:15 AM. *Id.* at 27. The clerk's office was open to the public between 9 AM and 4:30 PM. *Id.* at 18.

In January, 2020, non-attorneys seeking to file a petition had two options: mail or hand deliver it. 4/19/23 at 131-32. Hand-delivered petitions had to be taken to a police-personned booth outside the building. Tr. 4/20/23 at 21. They were placed in a bag and tested for "hazardous material." *Id.* Then they were brought inside the building to the intended recipient. Tr. 4/20/23 at 21. Petitioners were given a receipt with the receiving officer's information and date and time of submission. *Id*. at 34-35. A sticker with the same information was

affixed to the bag. *Id*. Non-attorneys were not allowed to deliver petitions in and directly to the clerk's office.[2] Tr. 4/19/23 at 132.

On March 25, 2019, however, Mr. Morris had succeeded in delivering his petition in the clerk's office. Tr. 4/20/23 at 37-38, 43.

ii. March 25, 2019

On the 25th, Officer Eric Leamy, of the police department of the Supreme Court (*id*. at 12), encountered Mr. Morris in the clerk's office (*id*. at 23, 26). Officer Leamy arrived at the office around 9:20 AM to find Mr. Morris agitated but speaking in a calm tone. *Id.* at 24-25. Officer Leamy was with Mr. Morris for over three hours in the office. *Id.* at 24. He was listening to Mr. Morris and trying to understand what Mr. Morris wanted to accomplish. *Id*. at 25. Mr. Morris was protesting the procedures of the clerk's office for handling documents. Tr. 4/24/23 at 24. He wanted a "face to face meeting" with an employee of the clerk's office. *Id*. He wanted his case to be assigned a case number. *Id*.

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[2] There are signs at an unspecified entrance that say, "any filings will be submitted to the booth at the rear of the building." Tr. 4/20/23 at 35. Whether the signs existed at the date of Mr. Morris' arrest was not established.

Mr. Morris was unable to get a case number assigned. Tr. 4/20/23 at 25. But he did speak to a person in the office who gave him information on steps for filing his previous submission. *Id*. He was told what to expect for his petition to get "further processed." *Id*. Officer Leamy eventually "agreed to accept" Mr. Morris' petition. *Id*. at 38. Mr. Morris left the office "satisfied." *Id*. at 25. Officer Leamy took Mr. Morris' petition to the booth for testing. *Id*. at 38.

iii. Day of Arrest

On the day of Mr. Morris' arrest, the hallway to the clerk's office was open. *Id*. at 16 – 17. Its doors were not latched. *Id*. A sign stood in the hallway stating, "For business purposes only." *Id*. Mr. Morris entered the office for a business reason. Tr. 4/19/23 at 161-162. He had been sent a letter stating the defect in his petition, and he came to the clerk's office to follow up on his letter. *Id*. For this reason, his presence in the clerk's office was permissible. *Id*. at 161.

James Bolden was an office supervisor in the Information Department in the clerk's office. *Id*. at 121. He was at his desk in the office when Mr. Morris entered around 11:00 AM.[3] *Id*. at 136. Mr.

[3] Mr. Bolden recognized Mr. Morris from a previous encounter in 2017. Tr. 4/19/23 at 137.

Bolden could not recall his initial interaction with Mr. Morris. *Id*. at 138. Mr. Bolden did recall that after Mr. Morris entered the office, he (Mr. Bolden) fetched Mr. Barnes, a case analyst at the Supreme Court who made sure filed petitions complied with the rules. *Id.*

Mr. Barnes introduced himself to Mr. Morris. *Id.* at 139. But Mr. Barnes did not have a chance to ask Mr. Morris a question. *Id.* at 142. Mr. Morris "just came at [Mr. Barnes]." *Id.* In a raised, angry voice, Mr. Morris said to Mr. Barnes, "'You're not my attorney. You're not a attorney. Don't touch my shit.'" *Id.* at 139-140. Mr. Morris made clear that he did not want to talk to Mr. Barnes. *Id.* at 163. Mr. Barnes said, "[S]ir, I can't help you, I'm going to walk away," and did so. *Id.* Mr. Morris calmly remained in the office. *Id.* at 150. But Mr. Morris couldn't "just be there." *Id.* at 144. So Mr. Bolden "went and grabbed the officers." *Id.* at 143. At least five officers eventually arrived. *Id.* at 150. Mr. Bolden remembered that the name of one of the officers was "Eric." *Id.* at 144.

In uniform, Officer Eric Leamy came to the clerk's office because of his "previous rapport" with Mr. Morris from March of 2019. Tr. 4/20/23 at 47, 52. Mr. Morris said he wanted employees in the

office to be arrested. Tr. 4/20/2023 at 27-28, 88. He said he wanted to submit paperwork directly to the Clerk of the Court. *Id*. at 36-37.

Richard Bair, also of the Supreme Court Police Department (*id*. at 46) arrived at the office in plain clothes (*id*. at 52). He came to keep the peace. *Id.* at 47-48. Officer Bair stood by the door of the office. *Id.* at 48. Officer Bair was in the office for 30 minutes before Mr. Morris's arrest. *Id.* He heard Mr. Morris saying that the government was stealing his identity. *Id.* at 48-49. Mr. Morris was upset that his previously filed petition had not been accepted, and that the office could do nothing further with that petition. *Id.* at 48

Officers Blair and Leamy, and Mr. Bolden, told Mr. Morris that he would have to file a new petition at the police booth. *Id.* at 49. Officer Blair saw that Mr. Morris was not filing a petition. *Id*. at 48-49. He told Mr. Morris that if he was not filing, he would be arrested for unlawful entry. *Id.* Mr. Morris responded by taking out a petition and putting it on the desk. *Id.* at 49. "We'll see what happens after," he said. *Id.* The clerks did not want to accept the petition because it had not first been taken to the booth. *Id.* at 54-55. Mr. Morris was told at least five times to leave (Tr. 4/19/23 at 150) and was given many opportunities to do so (Tr. 4/20/23 at 58-59).

Eventually, the chief of police arrived in uniform. Tr. 4/2/23 at 50. He observed what was happening for at least five minutes. *Id*. at 52. The chief told Mr. Morris that if he didn't take his petition to the booth he would be arrested. *Id.* at 49. In response, Mr. Morris turned his back towards Officer Leamy, put his hands behind his back, and said, "'Arrest me then.'" *Id.*

B. Defense Case

On January 14, 2020, Mr. Morris came to the United States Supreme Court to file a petition for writ of certiorari at the clerk's office. Tr. 4/20/23 at 112. He had previously mailed a petition to the Court in 2017. *Id*. at 76. He had also given papers to someone at the booth sometime before January 14, 2020. *Id*. at 108. But he had never received a case number. *Id*. at 116. There were letters addressed to Mr. Morris from Mr. Barnes explaining that the petition was out of time. *Id*. at 98. One letter returned Mr. Morris's $300 check. *Id*. at 85. Mr. Morris received a letter that addressed him as "Ms." Morris. *Id*. at 80.

Mr. Morris was frustrated. *Id*. at 115. He had tried multiple times to get a case number, to no avail. *Id*. These attempts included multiple trips to the Supreme Court. *Id*. at 103. In March of 2018 or 2019, Officer Leamy took Mr. Morris's petition. *Id*. at 92. At the time,

this satisfied Mr. Morris. *Id*. Mr. Barnes had done the same thing on another occasion. *Id*. at 93. Still, Mr. Morris had not received a case number. *Id*. at 79.

When Mr. Morris came to the clerk's office right before lunchtime on the day of his arrest (*id*. at 83), he passed a sign that said, "official business only" (*id*. at 109-110). There was also a sign that said "Inquiry." *Id*. 89.

Mr. Morris had come because he wanted to see the Clerk of the Court, Scott Harris. *Id*. at 87. Mr. Morris did not want to deal with Mr. Barnes. *Id*. He was "done with [Mr.] Barnes." *Id*. at 85. Mr. Morris stood at the counter in the office. *Id*. at 116. When asked how he could be helped, Mr. Morris said he was there to file a petition. *Id*. at 84. When Mr. Barnes came, Mr. Morris said, "'Don't you even open your mouth.'" *Id*. at 85-86. Mr. Morris wanted to see the supervisor. *Id*. at 86. He wanted to see Scott Harris, the Clerk of the Court. *Id*. He wanted to "see [his petition] to the calendar." *Id*.

Officer Leavy arrived at the clerk's office and asked to see Mr. Morris's paperwork. *Id*. at 86. Mr. Morris took a letter sent by the Court from his brief case. *Id*. at 87-88 Someone tried to touch his papers. *Id*. at 87. Mr. Morris said, "hands off." *Id*. He said he wanted

to see the supervisor, Scott Harris. *Id.* He told Officer Leamy that he wanted "these two people arrested," but Officer Leamy refused. *Id.* at 87-88. Mr. Morris pulled out his petition and put in on the counter. *Id.* at 88. He was told to take it to the police booth. *Id.* But Mr. Morris had done this before and had still not received a case number. *Id.* at 88-89.

The Chief of Police eventually arrived. *Id.* at 90-91. He told Mr. Morris his "business [was] done here." *Id.* at 91. Mr. Morris said, "My business is done when I say it is." *Id.* The Chief told Mr. Morris that if he did not leave, he would be arrested. *Id.* at 91. Mr. Morris asked what he would be arrested for, and the chief said unlawful entry. *Id.* Mr. Morris asked about the elements of unlawful entry, but was again told that if he did not leave, he would be arrested. *Id.* Mr. Morris chose to be arrested. *Id.* He left the clerk's office in handcuffs. *Id.* at 120.

PRETRIAL RULING

On March 15, 2022, Mr. Morris handed a motion to the court entitled "'Rule 37 Motion in Limine for Back Pay and Supernumerary Relief Cause by Stolen Military Valor.'"[4] R. 110. In response, the

[4] Undersigned did not see this motion in the record but has obtained it from the government.

government filed a motion *in limine* to preclude reference to Mr. Morris's civil lawsuits. *Id*. The government also filed notice that it would seek to introduce evidence of prior bad acts. *Id*. at 106-09. Judge O'Keefe denied Mr. Morris' motion. *Id*. at 114 – 15.

The government's filings and Judge O'Keefe's ruling were discussed before Judge Eroll right before trial on April 18, 2023. The government had just agreed to dismiss the unlawful entering charge and proceed only on the unlawful remaining charge. Tr. 4/18/23 at 6. The trial court then asked about the government's motion *in limine* in light of the changed charge. *Id*. The government argued that the merits of the underlying filing were irrelevant, concluding that they "shouldn't come in." *Id*.

Defense counsel objected because he thought that Mr. Morris' acts of coming to the Court to file petitions were central to the case. Defense counsel explained that that the government had to prove "that additional element." *Id*. at 7. The government had to prove Mr. Morris' "lack of legal right to remain." *Id*. at 4. "Well," defense counsel explained, "his legal right to remain was the filing and the discussion of that filing with the clerk . . . and that goes to the crux of his entire case." *Id*. at 8. Defense counsel wanted the jury to know Mr. Morris's

purpose for being at the Supreme Court. *Id*. He wanted the jury to know "why [Mr. Morris] believed he had a legal right to be there." *Id*. This information went to "the additional element of the unlawful entry." *Id*.

Trial counsel then cited the court to "cases regarding that additional element." *Id*. Trial counsel handed "Burn v. United States" to the court. *Id*. "Burn" stood for the proposition that

> when public property is involved, this Court is required, in addition, to demand by the personal lawfully charged, some additional specific factors to establish the parties lack of legal right to remain. So, the Government would have to establish that he did not have a legal right to remain . . . It essentially adds on an additional factor to the unlawful entry element that the Government is required to show that he didn't have a legal right to remain.

Id. at 8-9. The filing of the civil suits gave context to why Mr. Morris believed he had the right to remain. "[T]hat goes to one of the elements of the – the additional element of the unlawful entry." *Id*. at 8.

The trial court asked defense counsel why Mr. Morris's reasons for coming to the Court were relevant now that the government was not proceeding on the theory of unlawful entering but on the theory of unlawful remaining. *Id*. at 9-10. Trial counsel said,

> So, that's exactly what those cases go to . . . And it's not just the Burn case, but there is actually the O'brien versus U.S., which is at 444 A.2d 946, D.C. 1982. And what they're basically saying is that because there's so much power in a public building, they don't want some individual to have this authority without someone saying, "Oh, you have to leave," because it gives this position that you didn't have a right to be there in the first place, and so you give this person, this agent . . . the ability to do that. And what the Court has basically said is that you have to – there has to be an additional specific factor establishing the party's lack of legal right to remain. And so the mere fact of you just asking him to leave – a public person saying, "You've got to leave," there has to be some legal factor that the Government has to prove that he did not have that ability to be there, and that person said that – I get it, the person said you had to leave . . . But according to these cases, basically, the Government has to show some additionally lack of legal right to remain. It's not just you ordered him to leave, but you also have to show that he did not have the legal right to remain. And I think that's what that kind of goes to.

Id. at 10.

The government responded:

> Your honor, this is a Supreme Court police officer telling Dr. Morris that he had to leave that day. You know, part of it being that he didn't have any business with the Supreme Court, but part of it being a police officer has a general responsibility to ensure safety and protection. If there's a disturbance

> happening at the clerk's office, regardless of whether someone has a valid filing, if they're acting inappropriately, they're allowed to ask somebody to leave, which really doesn't go to the merits of his case at all. It actually could even not involve anything at all about why he was there for his filing. You know, if he was there and not filing any case and a police officer had reason to believe that there could be a disturbance here and there was a safety threat, they could ask him to leave without going into the merits of the filing of that person.

Id.

Trial counsel rejoined:

> And that's exactly what I think the cases are trying to say you should not do, and the agent should not do that in public places as opposed to private where that would be permitted. But in a public place with a guard downstairs, says, "No, you're not allowed in this building," you're taking away the general authority of this is a public building. And one guard downstairs can tell someone you don't have the ability to come in, and now you've charge him with unlawful entry, when that guard did not necessarily have the authority to stop that person from coming in. Yeah, the court in itself, if the person doesn't have a legal reason to be here, that's one thing, but a guard just simply telling someone you can't be in this building is essentially what happened here. You can't be in this building and didn't have a legal reason why he could not be in the building.

Id. at 11-12.

The trial court ultimately allowed evidence that Mr. Morris was at the Supreme Court to make filings concerning a case, but disallowed evidence concerning the "substance of that case." *Id*. at 15.

DISCUSSION ON PROPOSED JURY INSTRUCTIONS

The trial court began to ask if trial counsel had reviewed the government's proposed jury instructions. Tr. 4/18/23 at 26. Defense counsel said, "I submitted my own, but theirs is fine." *Id*. He forecasted the need for instructions on a defense to unlawful entry. *Id*. After a sealed bench conference, the court asked if there were any other issues to address. Trial counsel stated, "I'm just going to give the Government – because I have a feeling we'll be fighting over these jury instructions on the unlawful entry statute, so I'll give them the cases that I've cited in terms of that additional element." *Id*. at 27. The government said, "Thank you. That's helpful." *Id*.

JURY INSTRUCTIONS

The jury instructions made no mention of the need to find an independent factor. Tr. 4/20/23 at 145 - 147.

CLOSING ARGUMENTS

A. Government's Closing

Much of closing argument revolved around the fourth element of the jury instructions. Mr. Morris was not on the steps of the Supreme Court protesting. 4/20/23 at 153. He was in the clerk's office. *Id*. The clerk's office was for "business purposes only." *Id*. at 151. One sign stated as much. *Id*. at 156. Another explained the filing procedures. *Id*. So the public was on notice that "the clerk's office is actually not for filing documents . . . ." *Id*. Additionally, the government said Mr. Morris did not have authority to be in the office because his "behavior was . . . disruptive." *Id*. at 153. "That alone," the government told the jury, "is a legitimate reason for the officers to eject Dr. Morris." *Id*.

B. Defense Closing

Defense counsel paired element 4 with the good-faith defense instruction. *Id*. at 162. Counsel compared a public place where one has "the First Amendment right" with a private place. *Id*. at 163-64. In the private place, someone telling you to "Get out . . ." was enough. *Id*. at 163. But in a public area, the Government "has to take one step further . . . You have to provide me something great [sic.] than just someone on a whim telling me I have to leave." *Id*.

C. Government's Rebuttal

In rebuttal, the government offered three reasons why the police were not acting on a whim. First, Mr. Morris had stopped asking questions. *Id*. at 167. The government acknowledged that Mr. Morris was allowed to be in the clerk's office to "help facilitate . . . [his] case." *Id*. But at one point, he was only "refusing to leave." *Id*. Second, he was trying to submit a filing in the clerk's office instead of at the police booth. *Id*. And third, "he caused a disruption." *Id*. at 168. "[O]fficers . . . [are] allowed to eject him at that point." *Id*.

SUMMARY OF ARGUMENT

The trial court, government, and defense counsel knew and accepted that the government needed to prove an independent factor. The trial court erred when it failed to instruct the jury that it needed to find that the factor existed to convict. The error was not harmless. Reasonable doubt exists that, had the jury been properly instructed, it would have found the existence of the factor.

ARGUMENT

I Failure To Instruct The Jury On The Independent Factor Was Error

A. Independent Factor is an Element

To be found guilty of remaining on public grounds, the government must prove beyond a reasonable doubt "(1) that a person lawfully in charge of the premises expressly order[ed] the party to leave, and (2) that, in addition to and independent of the evictor's wishes, there exist[ed] some additional specific factor." *O'Brien v. United States*, 444 A.2d 946, 948 (D.C. 1982). "The requirement of an independent factor is not satisfied simply by an articulable reason for restricting a person's First Amendment rights." *Wheelock v. United States*, 552 A.2d 503, 505 (D.C. 1988). Without the requirement of an independent factor, a person's otherwise lawful presence to exercise her First Amendment right would be conditioned "upon the mere whim of a public official." *Leiss v. United States*, 364 A.2d 803, 806 (D.C. 1976). This factor may consist of "regulations, signs or fences and barricades regulating to the public's use of government property, or other reasonable restrictions." *Carson v. United States*, 419 A.2d 996, 998 (D.C. 1980).

B. Independent Factor Element Required for Supreme Court Clerk's Office

Proof of the independent factor is required for unlawful entry in the clerk's office of the United States Supreme Court. "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people to . . . petition the Government for a redress of grievances." U.S. Const. amend. I. "In more than twenty Supreme Court cases over the past five decades, one or more Justice has asserted or assumed that a lawsuit is a petition, without a single colleague disputing the premise." Benjamin P. Cover, First Amendment Right to a Remedy, 50 UC Davis L. Rev. 1741, 1745 n.11 (2017) (collecting cases) (last accessed at https://digitalcommons.law.uidaho.edu/cgi/viewcontent.cgi?article=1127&context=faculty_scholarship on June 22, 2024). The office of the Supreme Court facilitates the exercise of the First Amendment right to petition the government.

This Court accepted that the independent factor was required for a conviction based on remaining at the Library of Congress. *Simon v. United States*, 570 A.2d 305, 305-06 (D.C. 1990). The Library aligns more with offices than streets. Nevertheless, the Court required the

independent factor. *A fortiori*, the factor should be required for the clerk's office of the Supreme Court. No one exercises the First Amendment right of petitioning an arm of his government at the Library of Congress.

In *Hemmati v. United States*, 564 A.2d 739 (D.C. 1989), the Court held that First Amendment rights were not implicated. 564 A.2d at 742. There, the defendant went to a senator's office and would not express his message until meeting with the senator. *Id*. at 740. He remained when asked to leave. *Id*. The court noted that the defendant's visit concerned "private issues." *Id*. at 742. *But see Abney v. United States*, 534 F.2d 984, 985 (D.C. Cir. 1976) (First Amendment implicated where veteran protests Veterans Affairs' handling of his disability benefits). The court reasoned that the First Amendment does not preclude the government from managing its property for its intended use. *Hemmati,* 564 A.2d at 742 (citing *United States Postal Service v. Breenburgh Civic Associations*, 453 U.S. 114, 129 (1981) and *Adderley v. Florida*, 385 U.S. 39, 47 (1966)).

However, Mr. Morris was using the clerk's office for its intended purposes. He was filing a petition. Tr. 4/20/23 at 36, 38, 84. He wanted to speak to the Clerk of the Court in the clerk's office about his petition.

Id. at 87. *Cf. Adderley*, 385 U.S. at 40, 47 (rejecting First Amendment challenge where defendants protesting on grounds of a jail). *Cf. also United States v. Nicholson* 97 Daily Wash. L. Rptr. 1213, 1216 (July 17, 1969) *aff'd*. 263 A.2d 56 (D.C. 1970) (distinguishing offices of government workers from fora not normally closed to public "for reasonable use."). The independent factor is required in the clerk's office where a person seeks to petition the highest Court of the nation.

C. Independent Factor to be Found by Jury

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). By requiring proof of an independent factor, the Court narrowed the sweep of the unlawful entry statute on public grounds. *Wheelock*, 552 A.2d at 505. This was done to ensure the statute would be constitutionally applied. *Id*. The government was required to prove that an independent factor existed that justified Mr. Morris' arrest.

> Where a narrowing construction . . . has been placed by a court upon a statute . . . that narrowing construction . . . upon request and where supported by the evidence, must be the subject of proof at trial and should be

> submitted to the trier of fact for its determination.

Hasty v. United States, 669 A.2d 127, 133 (D.C. 1995).

Mr. Morris was entitled to have the determination concerning proof of the independent factor determined by the jury. *Alleyne v. United States*, 570 U.S. 99, 104 (2013) (Sixth Amendment and Due Process Clause require "each element of a crime to be proved to the jury beyond a reasonable doubt.").

D. Error

"A challenge as to the correctness of a jury instruction is a question of law which this court reviews de novo." *Crews v. United States*, 263 A.3d 128, 139 (D.C. 2021). The jury needed to be instructed that to convict Mr. Morris, it had to find that the government proved the existence[5] of the independent factor beyond a reasonable doubt. The

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[5] For the independent factor to "exist[ ]" (*O'Brien*, 444 A.2d at 948 (D.C. 1982), the government must prove two facts. First, when the independent factor is the violation of some rule or policy, the government must prove the existence of the rule or policy. Second, it must prove that the defendant's conduct violated the rule or policy. Support for these criteria is found in *Abney v. United States*, 451 A.2d 78 (D.C. 1982) (*Abney II*).

Abney II consolidated several cases arising from a defendant's protest in an alcove on Capitol grounds. 451 A.2d at 79. In one case, the defendant was convicted of violating a regulation that prohibited sleeping or lying down on portions of Capitol Grounds when doing so

instructions in Mr. Morris's case could not have been the same as those for unlawful entry on private grounds. But they essentially were. *Comp*. Criminal Jury Instructions for the District of Columbia, N. 5401 (6th ed. 2021) *with* Tr. 4/20/23 at 145 - 147. It was error not to instruct the jury that it needed to find the existence of the independent factor beyond a reasonable doubt.

E. Harm

"An improper jury instruction on an element of an offense is subject to harmless-error review . . . ." *Crews*, 263 A.3d at 139. In determining whether the error is harmless, it must be "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error[ ]." *Neder v. United States*, 527 U.S. 1, 11 (1999). No such clarity exists in Mr. Morris' case.

The government posited three factors to justify Mr. Morris' arrest: the sign inviting the public to the clerk's office for business

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impeded movement of cars and pedestrians. *Id*. The trial court made a finding that the defendant had in fact violated the regulation. *Id*. at 84. The jury could and did find the defendant guilty of unlawful entry, presumably because of the trial court's predicate, factual finding. On appeal, the Court reversed this predicate finding and therefore reversed the unlawful entry conviction. *Id*. at 84.

purposes only (Tr. 4/20/23 at 151), the policy of requiring non-attorneys to file petitions at the police booth (*id*. at 156), and behavior the government characterized as "disruptive" (*id*. at 153). There is reasonable doubt that a jury would have found that an independent factor existed had it been properly instructed.

i. Business Purpose

A reasonable jury could have concluded that when Mr. Morris was instructed to leave, he was in the office for a business purpose. There was ample evidence of this fact. Mr. Morris was in the clerk's office to file a petition. Tr. 4/20/23 at 36, 38, 84. Relatedly, he was there to speak to the clerk, Scott Harris. *Id*. at 87. Mr. Bolden stated that he called the police because Mr. Morris remained in the office after Mr. Barnes told Mr. Morris he couldn't help him. Tr. 4/19/23 at 144. But a jury could have concluded that Mr. Morris was persisting in his business-related goals and was therefore still in the office for business reasons. A reasonable jury could have disagreed that by "just be[ing]" in the clerk's office (*id*.), Mr. Morris was no longer present for businesses purposes.

ii. Police Booth Procedure

The government argued that the policy of requiring non-lawyers to file at the police booth could serve as the independent factor. Tr. 4/20/23 at 156. But the jury could have reasonably rejected this argument. Mr. Bolden conceded that a person could be in the office to ask about his case. Tr. 4/19/23 at 141, 161. Mr. Morris testified to seeing the words "Clerk's office inquiry" before entering. Tr. 4/20/23 at 83. Moreover, Mr. Morris had previously succeeded in delivering his petition in the clerk's office and not at the booth. Tr. 4/20/23 at 38.

iii. "Disruptive behavior"

The government argued that Mr. Morris's presence was no longer lawful because his behavior was "disruptive." Tr. 4/20/23 at 153. The government told the jury that this "alone [was] a . . . legitimate reason for the officers to eject Dr. Morris . . . ." *Id*. But this is exactly the type of "articulable reason" that *Wheelock* said was insufficient to support a conviction. 552 A.2d at 505. In any event, a government witness described Mr. Morris' behavior as "calm." Tr. 4/19/150-151. A jury could have been of the reasonable view that anything not in perfect sync with the system is, to the operators of the system, disruptive. The jury could have concluded that Mr. Morris remained in

the office for business reasons that were not, from the standpoint of the citizenry, disruptive.[6]

The error was not harmless. *Cf. Neder*, 527 U.S. at 10. ("[W]here a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless."). The conviction must be reversed. *Smith v. United States*, 809 A.2d 1216, 1223 (D.C. 2002).

F. Plain Error Review

Whether to apply plain error review is a question "of discretion rather than jurisdiction." *Abdus-Price v. United States*, 73 A.2d 326, 332 n.7 (D.C. 2005). The Court does not "seek to apply plain error review in a rigid fashion which elevates form over the practical dynamics of trial litigation." *Brown v. United States*, 726 A.2d 149,

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[6] Judges evaluating harm on appeal are particularly ill-suited to evaluate Mr. Morris' behavior in the clerk's office of a courthouse. They work in the courthouse and with clerks. Mr. Morris respectfully suggests that special pause should be taken before reaching a conclusion beyond a reasonable doubt on how a properly instructed jury would have decided this issue.

154 (D.C. 1999). Mr. Morris asks the Court to consider the dynamics of this case and the need for clarity in the law. He asks the Court to withhold plain error review.

At trial, the need to prove the independent factor was brought into the open, much discussed, and never disputed. Pre-trial, counsel for Mr. Morris alerted the trial court to "the additional element" for unlawful entry cases on public grounds. Tr. 4/18/23 at 7. Counsel cited the trial court to two cases, *Byrne v. United Sates*, 578 A.2d 700 (D.C. 1990) (*id*. at 8, transcribed as "Burn") and *O'Brien v. United States*, 444 A.2d 946 (D.C. 1982) (*id*. at 10). Both cases articulate the independent factor as an element of unlawful entry on public grounds. 578 A.2d, at 701-02; 44 A.2d at 948. Defense counsel articulated this element for the Court. "[Byrne] essentially adds on an additional factor for the unlawful entry element that the Government is required to show that he didn't have a legal right to remain." 4/18/23 at 8-9. Counsel again told the court that "there has to be some legal factor that the Government has to prove . . . ." *Id*. at 10.

The government disputed none of this. It accepted that its burden of proof was greater in this case than it would be for remaining on private property. It did not claim that the quasi-public nature of the

clerk's office relieved the government of the burden of proving the independent factor. *See In re D.A.J.*, 694 A.2d 860, 864 (D.C. 1997) (government's argument that excessive force not basis for exclusionary rule waived because not raised at trial). What happened in Mr. Morris's trial went beyond waiver. The government's great lengths to prove the independent factor was a concession. It conceded that the factor was required for the circumstances of Mr. Morris' case.

At the close of evidence, Mr. Morris' counsel again raised the government's added burden of proof for unlawful entry on public grounds. Anticipating that the parties would disagree over the independent factor, defense counsel handed the government the cases he had cited. He even identified the factor as an element. "I'll give [the government] the cases that I've cited in terms of that additional element." Tr. 4/18/23 at 27. The government said, "Thank you. That's helpful." *Id.*

Closing arguments centered on the independent factor. The government's closing identified rules that could serve as the factor. Tr. 4/20/23 at 151, 153, 156. Mr. Morris' counsel focused the jury on the factor. The government, counsel said, "has to take one step further . . . You have to provide me something great [sic.] than just someone on a

whim telling me I have to leave." *Id*. at 163. On rebuttal, the government again recited the facts that could serve as the independent factor. *Id*. at 167-168.

The comment to the jury instructions for unlawful entry would also have put the parties and trial court on notice of the issue Mr. Morris raises. The comment states at paragraph six that the additional specific factor is required for "public or semi-public building[s]." Criminal Jury Instructions for the District of Columbia, N. 5401 (6th ed. 2021) (comment). The preceding sentence states that a trial judge may not declare that the complainant is the lawful occupant of the premises. "[T]his is an element of the offense which must be proved by the government." *Id*. It should have been plain that if the statute requires an independent factor, then the existence of the factor must be proved by the government.

Finally, Mr. Morris asks this Court to consider the extent to which the legal issue Mr. Morris raises has evaded review, on the merits or otherwise. In 1969, *Nicholson (supra* at 21) established the need for the independent factor. In 1982, the Court decided an unlawful entry case involving the inside of the White House and an adjoining patio. *Smith v. United States*, 445 A.2d 961, 962-63 (D.C. 1982). Chief Judge

Newman said, "[T]he day has passed when the government could argue convincingly that appellants were obliged to leave the grounds simply on the request of the officer in charge." *Id*. at 970 n.4 (D.C. 1982) (Newman, C.J., dissenting). That was more than 40 years ago. *See also O'Brien v. United States*, 444 A.2d 946, 948 (D.C. 1982). But jury instructions in the Red Book, apart from the comment, make no mention of the independent factor. No case directly addresses whether the jury must receive an instruction on the independent factor.

Bench and bar need guidance from this Court. Without it, whether the independent factor needs to be found and who makes the finding will depend on happenstance, not law. *Comp*. *Berg v. United States*, 631 A.2d 394, 399 (D.C. 1993) (trial court "correctly instructed the jury that" particular laws could serve as independent factor) *with Abney v. United States*, 451 A.2d 78, 81-82 (D.C. 1993) (trial court made finding that defendant's conduct in fact violated rule relied upon as independent factor), *and* Tr. 4/20/23 at 145 – 47. (no reference to independent factor in jury instructions).

In these circumstances, Mr. Morris asks the Court to withhold plain error review in analyzing whether the jury was properly instructed. Trial counsel was not participating in gamesmanship when

he did not object to the instructions as given. He was not making a strategic decision based on facts known only to him. All parties were aware of the controlling law. When the time for instructing the jury arrived, it was not trial counsel's duty alone to ensure an accurate instruction on an element at the heart of the case. *Cf. Celanes Corp. of America v. Vandalia Warehouse Corp*., 424 F.2d 1176, 1181 (7th. Cir. 1970) (defendant's proposed instruction inaccurate but "it became the trial court's duty" to correctly instruct jury on law of burden of proof at "the heart of [the case]."). A statement on the law of the elements from this Court is necessary to ensure the right to have a jury decide each element of the offense.

CONCLUSION

WHEREFORE, for the reasons set forth, Mr. Morris asks that his conviction be vacated.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief for Appellant were served electronically on the office of counsel for Appellee, Chrisellen Kolb, Esquire, Appellate Division, U.S. Attorney's Office, this 9th day of July, 2024.

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