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

Reply Brief of Appellant Ronald Perry Berton

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I. The Court Should Reverse Mr. Berton's Conviction In The 2016 Case Because The Government Violated The IAD

The Government concedes that it procured Mr. Berton's presence in the District of Columbia to stand trial by requesting a writ for him *on its own initiative*, before it received or had knowledge of Mr. Berton's own request under Article III of the Interstate Agreement on Detainers ("IAD"). This means that the case is governed by Article IV of the IAD rather than Article III.

The Government knew, or should have known, that whenever it writs a defendant who is imprisoned in another jurisdiction, Article IV of the IAD applies and trial must commence within the 120-day time limit imposed by Article IV(c). "[T]he burden of bringing a defendant to trial within [120] days lies solely with the [Government]." *State v. Meadows*, --- A.3d ----, 2024 WL 1714666, at *10 (Md. App. April 22, 2024). The defense "has no obligation to remind the [Government] of its duty to bring the defendant to trial within the statutory deadline." *Id.* Accordingly, the Government should have brought the 120-day time limit to the attention of the court at the outset of the case and whenever pretrial proceedings or the trial were being scheduled. But the Government did not do so. Instead, inexplicably, it took no steps to obtain a trial date within the 120-day time limit.

The Government now seeks refuge through two separate, unpersuasive claims of waiver. First, it claims that Mr. Berton's request for final disposition of charges

pursuant to Article III of the IAD waived his right to the protections of Article IV. Second, it claims that Mr. Berton's initial agreement to a trial date beyond the IAD time limit waived his right to its protection notwithstanding that he later flagged the IAD issue before the time limit had expired. Both contentions fail.

A. The Government's Invocation Of The Article IV Procedure Mandates Adherence To The 120-Day Deadline

The Government asks this Court to ignore that it chose to bring Mr. Berton here for trial, which triggers Article IV, and instead hold that the Government's *subsequent receipt* of Mr. Berton's request for final disposition triggers the application of Article III. The Court should decline to announce such a rule.

Citing *Felix v. United States*, 508 A.2d 101 (D.C. 1986), the Government asserts that Mr. Berton's request for final disposition of the charges against him automatically subjected his case to Article III, even though it is not what caused the Government to have him transferred here for prosecution. But *Felix* stated no such rule.

The question addressed in *Felix* was which of Article III or IV applied where the defendant had made a request for final disposition of the pending charges, and then, "[a]cting immediately upon appellant's request," 508 A.2d at 102, the Government petitioned for and obtained a writ of habeas corpus *ad prosequendum* to facilitate the defendant's transfer. The issue was whether the use of a writ, instead of the extradition process envisaged in the IAD, made the transfer one that was

accomplished at the Government's initiative rather than based on the defendant's request. The Government explained "that as a matter of standard procedure they petition for and utilize writs of habeas corpus *ad prosequendum* in order to help accommodate a prisoner who has filed a written request under the IAD for final disposition of charges." *Id.* at 107. It was in that context that the *Felix* court held "that the 180-day limitation applies whenever the prisoner initiates the request for a final disposition of charges, irrespective of the means by which custody of the prisoner is obtained." *Id.* at 108. In short, *Felix* is completely inapposite here because Mr. Berton's transfer to the District of Columbia was initiated by the Government independent of Mr. Berton's request.

Equally inapposite is *United States v. Bailey*, 495 A.2d 756 (D.C. 1985). The Government asserts that the trial court applied Article III(a)'s 180-day limitation even where the U.S. Marshal Service never forwarded the prisoner's trial demand forms to the prosecutors, such that the prosecutor there (like here) sought a writ independently of the prisoner's demand. However, in that case, the trial had not commenced within 180 days, so the distinction between Article III's 180-day deadline and Article IV's 120-day deadline was immaterial. *Id*. at 758. The appeal concerned whether the IAD applied at all and the Court resolved the appeal without any analysis of the application of Article III versus Article IV.

The Government also musters support from several state appellate courts. But, "[b]ecause the IAD is a congressionally-approved interstate compact, it is a federal law subject to federal construction." *Grant v. United States*, 856 A.2d 1131, 1133 (D.C. 2004). Further, none of the state court decisions cited by the Government are persuasive.

The reasoning of *Fisher v. State*, 357 S.W.3d 115 (Tex. Ct. App. 2011) stands the applicable legal principles on their head. The decision asserts that the IAD's 180-day limit applies when a prisoner's detention is effectuated by both Article III and IV because to hold otherwise would nullify the 180-day period. *Id.* at 117. *Fisher* ignores the stated purpose of the IAD's time limits in Article III and IV, which Article V states is to facilitate a "speedy and efficient prosecution" and to return the prisoner to the sending state "[a]t the earliest practicable time . . . ." To hold that the longer of the two time periods always applies where Article III and Article IV have both been invoked is directly contrary to the IAD's stated purpose and remedial character. *See Carchman v. Nash*, 473 U.S. 716, 735 n.1 (1985) (Brennan, J., dissenting) ("Since the [IAD] is remedial in character, it should be construed liberally in favor of the prisoner.").

The other two decisions, *Hopkins v. LaFortune*, 394 P.3d 1283, 1286 (Ok. Ct. Crim. App. 2016) and *Matthews v. Commonwealth*, 168 S.W.3d 14, 18-19 (Ky. 2005), reason that a prisoner waives his rights under Article IV of the IAD by making

an affirmative request to be treated under Article III. But this reasoning also undercuts the purposes of the IAD.

"[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. Accordingly, other courts that have addressed the question of which time limit applies where Article III and IV's processes are initiated in parallel have construed the IAD to protect the defendant's interest in a prompt disposition of the charges against him. For example, in *Foran v. Metz*, the court considered which of Article III's 180-day time limit or Article IV's 120-day time limit would *expire first* in determining which applied, and thus, whether the defendant's speedy trial rights had been violated. 463 F. Supp. 1088, 1097 (S.D.N.Y. 1979). The court concluded that, because the Article IV 120-day period would expire first, it was the governing deadline. *Id.* Likewise, *State v. Willoughby* concluded that the shorter time limit governs, given "the purposes of the IAD." 927 P.2d 1379, 1386 (Haw. Ct. App. 1996); *see also State v. Burrus*, 729 P.2d 926, 932 (Ariz. Ct. App. 1986), *modified*, 729 P.2d 935 (1986) ("No provision in the act gives priority to simultaneous requests, though commentators have suggested that in such situations the shorter time limit applies.").

The notion that a defendant waives his rights under Article IV of the IAD by making a request under Article III finds no support in the language of the IAD or in traditional concepts of waiver. A defendant against whom a detainer is lodged is advised of his right under Article III to request a final disposition, but not about what the alternatives are if he does not make a request, or that he may be entitled to an even speedier trial if the prosecutor promptly initiates his transfer. Construing a defendant's request under Article III as a waiver of his rights under Article IV is hardly a liberal construction that promotes his best interests. Rather, it is a construction that favors the Government, which already "controls the procedural aspects of the Act." *Felix*, 508 A.2d at 109. The Government, unlike a prisoner, is fully aware of the IAD and the ramifications of seeking a defendant's transfer pursuant to Article IV. A reasonable construction of the IAD is that Article IV applies where the Government effectuates a defendant's transfer without knowledge that he has made a request under Article III.

Nor does this concept of implicit waiver find any support in the Supreme Court's decision in *New York v. Hill*, 528 U.S. 110 (2000). There the Court concluded that a defendant implicitly waived his IAD speedy trial right where his counsel had agreed to a trial date beyond the applicable deadline. The rationale of *Hill* is that a defendant cannot sandbag the prosecution and the court by agreeing to a trial date and then, after the IAD deadline has run, seek dismissal of the charges.

There is no comparable element of sandbagging here. A defendant who makes a request under Article III has not misled the Government when it independently arranges for his transfer pursuant to Article IV without knowledge of his request.

Here, it is undisputed that Mr. Berton was transferred to the District of Columbia pursuant to Article IV, and that Article IV's 120-day time limit expired first. That is the applicable deadline. His request pursuant to Article III had no operative effect and should not be treated as a waiver of his rights under Article IV.

B. Mr. Berton Did Not Waive His Right to the Protections of Article IV(c)

The Government contends that, even if the 120-day limit of Article IV applied, Mr. Berton implicitly waived that right when his counsel agreed to a trial date outside that period. This argument fails because Mr. Berton asserted his IAD claim well before the 120-day deadline expired and did not lull the Government until after a violation had occurred.

The Government argues that, under *New York v. Hill*, Mr. Berton waived his right to seek dismissal pursuant to the IAD by agreeing to a trial date outside the IAD time limit. *Hill* does not support this conclusion. In *Hill*, the defendant agreed to a trial date outside the applicable IAD time limits, then moved for dismissal after the deadline had passed. The Court refused to "enable defendants to escape justice by willingly accepting treatment inconsistent with the IAD's time limits, and then recanting *later on*." *Id.* at 118 (emphasis added). *Hill* does not hold that a defendant,

simply by agreeing to a particular trial date, thereby waives the protections of the IAD. It holds only that a defendant waives his right to invoke the IAD, after the fact, based on a delay to which he has consented. The Court pointedly noted that "[t]his case does not involve a purported prospective waiver of all protection of the IAD's time limits or of the IAD generally, but merely agreement to a specified delay in trial." *Id.* at 115.

Hill is inapplicable here because Mr. Berton (through counsel) did not agree to the July 5, 2017, trial date and then wait to raise an IAD claim until after the 120 days had expired. Instead, on June 2, 2017, Mr. Berton's counsel raised the IAD claim at a status hearing, asserting that "the Interstate Agreement on Detainers Act has been violated." (6/2/17 Tr. at 23:6-8.) At that point, a total of 102 days had elapsed, leaving more than two weeks before the deadline would expire.

The fact that Mr. Berton initially agreed to the July 5 trial date did not, by itself, constitute a waiver of the 120-day deadline. There is no implicit waiver under *Hill* unless the applicable IAD deadline has already run in reliance on the defendant's agreement to a trial date. Similarly, even where a defendant has explicitly waived a right in the course of his prosecution, he is entitled to withdraw the waiver so long as the withdrawal is timely and would not unduly interfere with or delay the proceedings. *See United States v. Mortensen*, 860 F.2d 948, 950 (9th Cir. 1988); *Zemunski v. Kenney*, 984 F.2d 953, 954 (8th Cir. 1993).

As explained above, the burden of bringing Mr. Berton to trial within the IAD time limit "lies solely with the [Government]." *Meadows*, 2024 WL 1714666, at *10. Here the Government knew or should have known that the 120-day time limit of Article IV applied. Once Mr. Berton invoked the IAD on June 2, 2017, the Government was obliged to take the requisite steps to ensure that his trial commenced within the applicable time limit. His invocation of the IAD left the Government and the trial court with sufficient time to avoid an IAD violation.[1] This was not an instance of "a defendant obscur[ing] Article IV(c)'s time prescription and avoid[ing] clear objection until the clock has run[.]" *Reed v. Farley*, 512 U.S. 339, 349 (1994).

Nonetheless, the Government ignored the IAD issue. Rather than seeking to advance the July 5 trial date, the Government moved on June 7, over defense objection, to continue the trial date in order to obtain the mental health treatment records of the complainant, contending there was "good cause" for a continuance pursuant to D.C. Code § 23-1322(h)(1) and said nothing about the IAD constraint.

On June 27, 2017, after the 120-day time limit had expired, Mr. Berton filed a written motion to dismiss his indictment due to the Government's failure to comply

[1] When the parties subsequently advised the trial court that the 180-day deadline—which the Government conceded was applicable—would expire the following day, the court arranged for a jury to be selected that very afternoon. (7/13/17 Tr. at 12:11-15:22.)

with Article IV of the IAD. Only then did the Government finally address the IAD, contending that Article III, rather than Article IV, governs this case and that Mr. Berton had waived his right to a trial within 120 days by agreeing to a trial date outside that period. Rather than take affirmative steps to comply with the IAD, the Government did nothing and then attempted to defend its inaction after the fact.

Now the Government brazenly argues that, "while the trial court theoretically could have adhered to Article IV(c) on June 2 by moving Berton's trial to June 20, neither Berton nor his counsel ever asked for that." (Gov. Br. at 24.) In other words, the Government suggests that Mr. Berton is somehow responsible for the violation of the IAD deadline. But, as a matter of law, the burden of complying with the IAD speedy trial limits lies solely with the Government. It cannot blame Mr. Berton for its own default.

The inescapable fact is that Mr. Berton was not brought to trial within the 120-day deadline imposed by the IAD. The responsibility for this default lies solely with the Government. The consequence of this violation is clear. The charges against Mr. Berton must be dismissed.

II. The Trial Court Erred By Admitting Evidence Of Other Crimes In The Trial Of The 2016 Case

The S.N. case was twice tried on the evidence that directly relates to it and resulted in hung juries on the sexual assault and kidnapping charges. When the S.N. case was tried for a third time, the trial court permitted the Government to pull out

all the stops and present evidence from twenty different witnesses about two separate crimes that were completely unrelated to the S.N. charges. By trying Mr. Berton for three offenses rather than the one at issue, the Government secured the convictions it so ardently sought. But this other crimes evidence was inadmissible and requires reversal of Mr. Berton's convictions. The Government's arguments to the contrary simply do not pass muster.

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

The court allowed the Government to present evidence about the daylight entry into Z.N.'s Arlington apartment to demonstrate that Mr. Berton knew how to defeat locked doors. This evidence consisted of two days of testimony from eight different witnesses, only a single sentence of which discussed unlocking doors. (3/9/2020 Tr. at 154:4-5.) "[W]here [an issue] is not controverted in any meaningful sense, evidence of other crimes to prove [that issue] is so prejudicial per se that it is inadmissible as a matter of law." *Thompson v. United States*, 546 A.2d 414, 423 (D.C. 1988). Although the Government now argues to this Court that the Z.N. evidence was properly admissible, the positions it took and the arguments it made during the course of the litigation demonstrate otherwise. The inescapable fact is that the Government did not contend that Mr. Berton entered S.N.'s apartment by overcoming the locks on the door. Nor could it. At all three trials, S.N. testified that she did not lock her wooden gate and could not remember locking her other doors.

In an unsuccessful motion to admit other crimes evidence made before the first trial, 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.) At the first trial, Mr. Berton was acquitted of entering S.N.'s apartment with the intent to commit a crime. At a pre-trial conference thereafter, the Government conceded that, because Mr. Berton was acquitted on his burglary charge, it would have to demonstrate that Mr. Berton's intent did not manifest until after he entered Z.N.'s house. (1/30/2019 Tr. at 77:3-12.) In other words, it could not contend that he entered with an unlawful intent, as it would by arguing that he defeated a locked door to gain entry. At the second trial, the government made no argument that Mr. Berton overcame locks to enter into S.N.'s apartment. Then, before the third trial, the Government flip-flopped and asserted for the first time, in its motion to admit the Z.N. evidence, that S.N.'s apartment was locked at the time of the encounter. Yet, at the third trial, the Government ultimately argued that it did not matter whether S.N. locked her door. (3/10/20 Tr. At 113:9-18.)

Under these circumstances, it is patent that Mr. Berton's ability to overcome locked doors was not a material issue in the S.N. trial, and that the trial court erred in admitting evidence related to the Z.N. offense. *See Robles v. United States*, 50 A.3d 490, 494 (D.C. 2012). Contrary to the Government's convenient posturing before the third trial, it was not material to the Government's case to prove that Mr.

Berton could defeat locked doors. The Government said so in its closing argument. Further, 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.

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. evidence was putatively admitted to prove Mr. Berton's intent to use force in the prior S.N. incident. But S.N.'s testimony was not equivocal on the issue of consent and Mr. Berton did not testify that he believed S.N. had consented. Moreover, the A.W. incident occurred three years after the S.N. incident and involved a sexual assault where consent was not at issue. This evidence served only to bolster the credibility of S.N. and show Mr. Berton had a propensity to commit sexual assaults. Such use of other crimes evidence is plainly improper and wrongfully diverts the jury's credibility determination away from S.N. *See Thomas v. United States*, 59 A.3d 1252, 1261 (D.C. 2013) (defendant's conduct four months after the last incident charged showed only that he was motivated to prey on intoxicated young white men in vulnerable positions and was inadmissible as mere propensity evidence); *People v. Weinstein*, No. 24, --- N.E.3d ----, 2024 WL

1773181, at *14 (N.Y. Apr. 25, 2024) (reversing conviction where other crimes evidence served only to "bolster[] complainants' testimony, thereby impacting the jury's credibility determination").

This prejudicial impact of the A.W. evidence was heightened by its sheer volume. Contrary to the Government's contentions, the trial court did not carefully tailor the A.W. evidence to avoid unfair prejudice. Rather, the court allowed the Government to present essentially its entire case regarding the A.W. offense within the confines of the S.N. trial. The evidence included issues of tenuous relevance such as the emotional injuries A.W. suffered and the theft of A.W.'s phone. (3/9/20 Tr. at 24:11-58:14.)

The prejudicial effect of the A.W. offense far outweighed its probative value on any material issue in the S.N. case. It enabled the Government to portray Mr. Berton as a sex offender with a propensity to break into young women's homes. But such propensity evidence is, and must remain, inadmissible in a criminal trial. As the New York Court of Appeals recently stated

> [J]ustice for sexual assault victims is not incompatible with well-established rules of evidence designed to ensure that criminal convictions result only from the illegal conduct charged. Indeed, just as rape myths may impact the trier of fact's deliberative process, propensity evidence has a bias-inducing effect on jurors and tends to undermine the truth-seeking function of trials. … the time-tested rule against propensity evidence … serves as a judicial bulwark against a guilty verdict based on supposition rather than proof.

Weinstein, 2024 WL 1773181, at *10.

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 improperly admitted at the third trial unquestionably prejudiced Mr. Berton and requires reversal of his convictions in the 2016 case.

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

As explained in his opening brief, Mr. Berton's detention in D.C. should have ended in 2017; the 2016 indictment should have been dismissed for violation of the 120-day speedy trial deadline, at which point the IAD required that he be promptly returned to Virginia. Instead, Mr. Berton was unlawfully detained in D.C. for the next 6 years awaiting disposition of the 2016 case.

The Government asserts incorrectly that Mr. Berton never raised an Article V claim below and so this Court's review is restricted to plain error. Mr. Berton prepared a pro se motion dated December 18, 2018, that was made part of the record on January 8, 2019, in which he sought dismissal of the indictment pursuant to Article V(c) & (e) of the IAD and argued that he was being prejudiced by the delay in receiving his prison treatment and rehabilitation programs in Virginia while he was being detained in D.C. After he was indicted in the 2019 case, he filed another pro se motion on January 22, 2020, in which he contended that

> The IAD forbade the addition of other charges that were not part of the Indictment on which the detainer was based; The government may not pursue the charges contained in the 2019 indictment against Mr. Berton

> in the 2016 trial nor on the Detainers temporary custody order. Only the charges contained in the indictment which formed the basis for the detainer may be prosecuted. Procedurally, Mr. Berton thus finds himself in an awkward position-process and he is informing the trial court of these issues so that he may preserve his rights and arguments for an appeal if needed.

(1/22/2020 Pro Se Motion at 3-4.) During a January 31, 2020 hearing the court advised Mr. Berton that it had considered his IAD arguments and would not hear any further argument on the issue, which the court stated had been preserved for appeal. (App. 082-84.)

Had Mr. Berton been accorded his rights under the IAD, he would have been returned to Virginia in 2017, and the Government would have been obliged to institute new proceedings under the IAD to bring Mr. Berton to trial on the 2019 charges. 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.

Instead, because the 2019 case trailed the still-pending 2016 case, Mr. Berton was not brought to trial for almost four years. "[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." *See Graves v. United States*, 490 A.2d 1086, 1091 (D.C. 1984) (en banc). In its brief, the Government devotes a footnote to addressing the delay in resolving the 2016 case (Gov. Br. at 28 n.34), but it does not justify the delay in

resolving the 2019 case. Accordingly, the 2019 charges should be dismissed.

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

Mr. Berton's convictions and sentences for assault with intent to commit first degree sexual abuse (Count III), attempted first degree sexual abuse (Count IV), first degree sexual abuse (Count V) merge because each of these convictions stems from the same offense. The Government contends that these duplicative convictions and sentences are proper because (1) Mr. Berton's attempted first degree sexual abuse was separated from his first degree sexual abuse by a "fork in the road," and (2) assault with intent to commit first degree sexual abuse requires an element of proof that is not required for first degree sexual abuse. Both assertions are without merit.

A. There Was No "Fork in the Road" Separating The Offenses At Issue

Recognizing that certain crimes are committed through a series of closely related actions, this Court has developed a "fork in the road" test to determine when acts should be treated as part of the same offense or as separate discrete offenses. Under this test, the Court "examines whether the defendant reached a stopping point and made a conscious decision to continue." *Bailey v. United States*, 10 A.3d 637, 645 (D.C. 2010). "In cases of sexual abuse such as here, the critical consideration in determining questions of merger is whether the defendant sought a 'new and different kind of sexual gratification,' with each act committed against the victim,

such that we are convinced that the defendant was acting 'in response to a fresh impulse,' each time." *Barber v. United States*, 179 A.3d 883, 895 (D.C. 2018).

Here, counts III, IV, and V arose out of the same continuous struggle and therefore constitute the same offense. There was no stopping point during this struggle. At trial A.W. testified that her assailant "intended to rape [her]" (1/30/23 Tr. at 71:10), but that she did not remember the exact sequence of events. (*Id*. at 71:12-15.) She testified that during her struggle her assailant, he at some point "was masturbating . . . trying to get an erection," and at another point "he put his fingers inside me, inside of my vagina. And I was still pinned." (*Id*. at 75:18-76:10.)

Notwithstanding A.W.'s testimony that these events occurred during the same continuous struggle, the Government contends that Mr. Berton reached a "fork in the road" when he failed to achieve an erection. (Gov. Br. at 49.) To support this argument, it relies on this Court's decisions in *Ellison v. United States*, 919 A.2d 612, 616 (D.C. 2007); *Jenkins v. United States*, 980 A.2d 421, 425 (D.C. 2009); *Bailey v. United States*, *supra*; and *Barber v. United States*, *supra*. In all of those cases, however, the offender committed one sexual offense, ceased that act, and then initiated a distinct sexual offense. In contrast here, the evidence does not establish any such segmenting of sexual acts. It is pure speculation for the Government to contend that the assailant attempted unsuccessfully to get an erection, stopped, and then made conscious decision to forego penile penetration and instead digitally

penetrate A.W. It is at least as likely that the masturbation and digital penetration were part of the same continuous, ultimately unsuccessful, effort to achieve penile penetration. The evidence simply does not support a finding that Mr. Berton committed two discrete offenses.

B. First Degree Sexual Abuse Encompasses An Assault with Intent To Commit First Degree Sexual Abuse

The Government also contends that, the conviction of assault with intent to commit first degree sexual abuse (Count III) does not merge into either § 22-3002 sexual-abuse conviction (Counts IV and V) because assault is not an element of the sexual-abuse offense. This contention does not survive scrutiny.

Assault is an element of first degree sexual abuse. D.C. Code § 22-3002(a)(1) requires that a defendant use force against another person to engage in a sexual act. The trial court instructed the jury that

> Force means the use or threatened use of a weapon, the use of such physical strength or violence as is sufficient to overcome, restrain or injure a person or the use of a threat of harm sufficient to coerce or compel submission by the victim.

(2/1/2023 Tr. 221:17-223:25.) The force element in D.C. Code § 22-3002(a)(1) is the same as the assault element in D.C. Code § 22-401. In other words, it is impossible for a person to accomplish a sexual act through use of force without thereby committing an assault. *See Maddox v. United States*, 745 A.2d 284, 294 (D.C. 2000) (an assault committed to effect a robbery is inseparable from the robbery

itself). Accordingly, the Government's argument that Count III cannot merge with Count IV and V, is unavailing.

Therefore, if this Court does not reverse Mr. Berton's convictions, it must remand this case to the trial court with instructions to vacate Mr. Berton's duplicative convictions and sentences.

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 May 22, 2024, a true and correct copy of the foregoing was served through the Court's e-filing system to Chrisellen R. Kolb and through email to David B. Goodhand.

s/ Sean Belanger
Sean Belanger