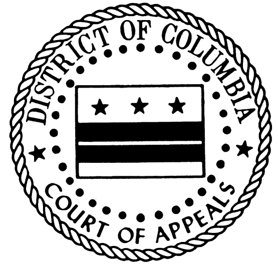

Clerk of the Court
Received 05/02/2024 10:28 AM
Resubmitted 05/02/2024 11:47 AM
Filed 05/02/2024 11:47 AM

BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

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

RONALD PERRY BERTON, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

MATTHEW M. GRAVES
United States Attorney

CHRISELLEN R. KOLB
AMY ZUBRENSKY
STUART ALLEN
KATHLEEN A. KERN
* DAVID B. GOODHAND, D.C. Bar #438844
Assistant United States Attorneys

* Counsel for Oral Argument
601 D Street, NW, Room 6.232
Washington, D.C. 20530
david.goodhand2@usdoj.gov
(202) 252-6829

Cr. Nos. 2016-CF1-17914 & 2019-CF1-3141

Table of Contents

Counterstatement of the Case 1

The Sexual Assault of SN in No. 2016-CF1-17914 2

The Other-Crimes Evidence in No. 2016-CF1-17914 5

Berton's Sexual Assault of AW 5

Berton's Unauthorized Entry into ZN's Apartment 7

The Defense Case in No. 2016-CF1-17914 7

Summary of Argument 8

Argument 9

I. The Trial Court Properly Adhered to the IAD's Mandates 9

A. The Interstate Agreement on Detainers 9

B. Relevant Procedural History 11

1. Berton's IAD Request 11

2. The Post-Arraignment Proceedings 12

3. The Government's Continuance Motion, Berton's Opposition, and his Motion To Dismiss 14

C. The Trial Court Properly Concluded that Article III(a)'s 180-Day Limitation Applied to Berton's Case. 16

D. Even If Article IV(c)'s Limitation Applied, Berton Waived It By Agreeing to a Trial Beyond 120 Days. 20

E. The Trial Court Did Not Plainly Err in Failing *Sua Sponte* To Find a Violation of Article V. 25

II. The Trial Court Properly Exercised Its Discretion in Admitting the Other-Crimes Evidence. 28

A. Applicable Legal Principles 29

B. Relevant Procedural History 29

1. Berton's Forcible Sexual Assault of AW 30

2. Berton's Unlawful Entry into ZN's Apartment 33

C. Analysis 35

1. The Highly Sanitized ZN Evidence Addressed a Material, Disputed Issue and Did Not Unfairly Prejudice Berton. 36

2. The Trial Court Properly Concluded the Probative Value of the AW Evidence Wasn't Substantially Outweighed by Its Prejudicial Impact. 41

III. None of the Convictions in Berton's 2019 Case Merge. 47

A. Relevant Procedural History 47

B. Analysis 48

CONCLUSION 50

TABLE OF AUTHORITIES[*]

Cases

Bailey v. United States, 10 A.3d 637 (D.C. 2010) 49

Barber v. United States, 179 A.3d 883 (D.C. 2018) 49

Brooks v. United States, 993 A.2d 1090 (D.C. 2010) 24

Carchman v. Nash, 473 U.S. 716 (1985) 11

Christian v. United States, 394 A.2d 1 (D.C. 1978) 9, 10

Commonwealth v. Jones, 886 A.2d 689 (Pa. Super. Ct. 2005) 21

Cooney v. Fulcomer, 886 F.2d 41 (3d Cir. 1989) 27

Cooper v. United States, 28 A.3d 1132 (D.C. 2011) 10

Ellison v. United States, 919 A.2d 612 (D.C. 2007) 49

* *Felix v. United States*, 508 A.2d 101 (D.C. 1986) 17, 19

Fex v. Michigan, 507 U.S. 43 (1993) 10

Fisher v. State, 357 S.W.3d 115 (Tex. Ct. App. 2011) 18

Gonzalez v. United States, 553 U.S. 242 (2008) 21

Grant v. United States, 856 A.2d 1131 (D.C. 2004) 10, 11

Hopkins v. LaFortune, 394 P.3d 1283 (Ok. Ct. Crim. App. 2016) 19

* *Jenkins v. United States*, 980 A.2d 421 (D.C. 2009) 49

---

* Authorities upon which we chiefly rely are marked with asterisks.

Kirvin v. State, 394 S.W.3d 550 (Tex. Ct. App. 2011) 21

* *Legette v. United States*, 69 A.3d 373 (D.C. 2013) 29, 39, 40, 41, 43, 44

Matthews v. Commonwealth, 168 S.W.3d 14 (Ky. 2005) 19

McGautha v. California, 402 U.S. 183 (1971), *overruled on other grds by Crampton v. Ohio*, 408 U.S. 941 (1972) 39

* *New York v. Hill*, 528 U.S. 110 (2000) 20, 21, 22, 23

Parker (William) v. United States, 590 A.2d 504 (D.C. 1991) 27

Parker (Willie) v. United States, 751 A.2d 943 (D.C. 2000) 40

Parks v. Commonwealth, 89 S.W.3d 395 (Ky. 2002) 21

People v. Hill, 92 N.Y.2d 406 (N.Y. Ct. App. 1998) 20

Prince v. United States, 825 A.2d 928 (D.C. 2003) 22

* *Reed v. Farley*, 512 U.S. 339 (1994) 21, 22, 24

Reyes v. People, 195 P.3d 662 (Colo. 2008) 24, 25

Sanchez-Rengifo v. United States, 815 A.2d 351 (D.C. 2002) 48

Shewan v. State, 396 So.2d 1133 (Fla. Ct. App. 1980) 19

Sparks v. United States, 358 A.2d 307 (D.C. 1976) 25

State v. Almly, 162 P.3d 680 (Az. Ct. App. 2007) 20

State v. Webb, 570 N.W.2d 913 (Iowa 1997) 19

State v. Willoughby, 927 P.2d 1379 (Haw. 1996) 20

Thompson v. United States, 546 A.2d 414 (D.C. 1988). 29

Toro v. State, 479 So.2d 298 (Fla. Ct. App. 1985) 21

United States v. Echeverri, 854 F.2d 638 (3d Cir. 1988) 44

United States v. Armstrong, 517 U.S. 456 (1996) 27

United States v. Bailey, 495 A.2d 756 (D.C. 1985)... 17, 18

United States v. Bergrin, 682 F.3d 261 (3d Cir. 2012)...44

United States v. Boyd, 595 F.2d 120 (3d Cir. 1978)..43

United States v. Dowdell, 595 F.3d 50 (1st Cir. 2010).............................. 24, 25, 26

United States v. Hassanshahi, 195 F. Supp. 3d 35 (D.D.C. 2016)..........................37

United States v. Latney, 108 F.3d 1446 (D.C. Cir. 1997)..36

United States v. Mares, 441 F.3d 1152 (10th Cir. 2006)..44

United States v. Mauro, 436 U.S. 340 (1978)...25

United States v. McIntosh, 514 Fed. App'x 783 (10th Cir. 2013)...........................21

United States v. Thomas, 593 F.3d 752 (8th Cir. 2010) 42, 44

United States v. Torrez, 869 F.3d 291 (4th Cir. 2017) 44, 45

United States v. Watson, 894 F.2d 1345 (D.C. Cir. 1990).......................................43

Statutes and Other References

D.C. Code § 22-401 .... 47, 48

D.C. Code § 22-2001 1

D.C. Code § 22-3002 1

D.C. Code § 22-3002(a)..47

D.C. Code § 22-3018 47

D.C. Code § 22-3020(a)(5) 1

D.C. Code § 23-1322(h)(1).. 12, 14, 23, 25

D.C. Code § 24-801 9

2 Jack B. Weinstein, *et. al., Weinstein's Federal Evidence* § 404.22[1][a] (2d ed. 2016) 37

ISSUES PRESENTED

I. Whether the trial court properly declined to dismiss Berton's two first-degree sexual-abuse indictments (Nos. 2016-CF1-17914 & 2019-CF1-3141) with prejudice where the court adhered to the mandates of the Interstate Agreement on Detainers (IAD)?

II. Whether the trial court properly exercised its discretion in admitting other-crimes evidence concerning Berton's other forcible sexual assaults where he claimed consent at his trial?

III. Whether three of Berton's convictions in his 2019 case merge where the jury convicted him of violating two separate statutes and, further, the evidence showed he reached a fork in the road?

DISTRICT OF COLUMBIA
COURT OF APPEALS

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

RONALD PERRY BERTON, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

After unlawfully entering 27-year-old SN's apartment, appellant, Ronald Perry Berton, raped her. In November 2016, a D.C. Superior Court grand jury charged him with: First-Degree Sexual Abuse (with aggravating circumstances), in violation of D.C. Code §§ 22-3002, 3020(a)(5); and kidnapping, in violation of D.C. Code § 22-2001 (No. 2016-CF1-17914) (Record on Appeal (R1.) 1). Following two trials and two hung juries (in May 2018 and February 2019), a jury convicted Berton in March 2020 and, on March 17, 2023, the Honorable Juliette McKenna sentenced him to life without the possibility of release on the sexual-abuse count and 120

months on the kidnapping count (3/10/20:123-25; 3/17/23:27).[1] Additionally, before Berton's third trial in the 2016 case involving SN, the grand jury charged him with sexually abusing a second woman (AW) (No. 2019-CF1-3141) (Record on Appeal (R2.) 1). A jury convicted Berton of that charge (Count 5) in early 2023 and, on March 17, 2023, the Honorable Marisa Demeo sentenced him to another life term (2/6/23:30-32; 3/17/23:32-33).[2] On April 10, 2023, Berton appealed in both cases (R1.247; R2.126).

The Sexual Assault of SN in No. 2016-CF1-17914

After a night socializing with friends, SN returned to her one-bedroom apartment in the 1800 block of T Street, NW, at approximately 2 a.m. on October 6, 2007 (3/2/20:165-66, 172-75).[3] To access her apartment – which was in the

[1] The grand jury had also charged Berton with robbery and burglary, but the jury acquitted him of those charges at his first trial (see 3/17/23:25).

[2] The jury also convicted Berton of several other offenses and, as to those, Judge Demeo sentenced him to: 108 months for first-degree burglary (Count 1); 108 months for kidnapping (Count 2); 72 months for assault with intent to commit first-degree sexual abuse (Count 3); and 108 months for attempted first-degree sexual abuse (Count 4) (3/17/23:32). In the AW case, Judge Demeo ordered all sentences but the assault to run consecutive to one another and to Berton's life sentence for raping SN (*id.* at 33). The jury acquitted Berton of robbing AW (2/6/23:31).

[3] Though SN acknowledged she was "buzzed," she wasn't slurring her words or stumbling and her friends were unconcerned about her ability to get home (3/2/20:176-77; 3/5/20:32-33, 40-41; see 3/2/20:74 (SN didn't appear drunk to police officer who took her report at 6 a.m.)).

basement of a single-family rowhouse – SN first had to enter the back-patio area through a locked wooden gate (*id.* at 166, 168). On that night, however, SN couldn't fully shut (and thus lock) the back gate because the wet wood was swollen (*id.* at 180). SN then entered her apartment through two doors – a metal security gate (with one deadbolt lock) and an interior wooden door (with a deadbolt and doorknob lock) – and went to bed (*id.* at 168, 170-71, 181-82; see 3/3/20:98-99).[4]

At approximately 4:45 a.m., Berton awakened SN,[5] who was asleep in her bed nude (3/2/20:183, 253). Berton was on top of SN and had her "completely" and "totally pinned down" (*id.* at 183-84). Berton was "trying to rape" SN (*id.* at 183). SN initially tried to prevent Berton from penetrating her by "covering [her] genitals" with her hands (*id.* at 184). SN also tried to push Berton off but couldn't because his "whole body weight was pressing down" on her (*id.* at 184-85). SN – who was "completely alone," "powerless," and "[t]otally terrified" – thus tried to "connect" with Berton by asking him to have "mercy" on her (*id.*). Instead, Berton told SN to

---

[4] SN had "no memory of whether [she] locked or didn't lock" these two doors upon her entry (3/2/20:181; see 3/3/20:114). Because it was her "habit," "practice," and "routine" to lock her doors and there were otherwise no signs of forced entry, however, she later told police that she "feared" she hadn't locked them (3/2/20:204-05, 244-48; 3/3/20:20, 24, 204, 209).

[5] Although Berton was a stranger to SN, DNA recovered from the semen in SN's vaginal and rectal areas matched Berton's (see 3/10/20:84-88 (government closing argument); n.6 infra). Indeed, Berton did not challenge this identification but claimed he'd had "consensual sex" with SN (3/2/20:57-58; see 3/10/20:96 (defense closing: "There's DNA because Mr. Berton and [SN] had sex.")).

act as if she "liked" it, which, he said, would let him finish "faster" (*id.* at 185-87). SN ultimately stopped resisting because she was "terrified" and didn't know if Berton was going to "strangl[e]" or "beat[ ]" her (*id.* at 187). Berton then raped SN by forcibly "penetrat[ing] [her] vagina" with his penis (*id.* at 188).

After raping SN, Berton left her bedroom and SN "curled up into a fetal position" (3/2/20:188-89). When Berton returned, he asked SN about her iPod (*id.* at 189). SN said she had left it at work and Berton again exited the bedroom (*id.* at 190-91). After SN hadn't heard anything "for a while," she got up and looked for her cellphone but it and her driver's license were missing (*id.* at 191-92). Accordingly, SN – who was in "survival mode" – entered her landlord's upstairs home and phoned her ex-girlfriend, telling her, "'I think I was raped'" (*id.* at 192-93; see 3/3/20:146, 163).

SN thereafter reported the rape to several law-enforcement and medical personnel,[6] and, following six weeks' counseling at a Rape Crisis Center, left D.C.

---

[6] Specifically, SN told Officer Brian Hungarter that her assailant had "vaginally penetrate[d] her with his penis against her will" (3/2/20:70-71). Further, on her hospital intake form, SN declared she "'got raped in [her] apartment'" and told the doctor a stranger had "sexual[ly] assault[ed]" her (*id.* at 196; 3/3/20:43-44). Similarly, SN told Sexual Assault Nursing Examiner Mary Pinn that she had been forcibly "penetrated" (3/3/20:58-60). SN had "injuries in the vaginal [and] anal area[s]," including abrasions and a .6-millimeter tear (*id.* at 63-70; see 3/2/20:127-28 ("tear into the perineum"); Exhs. 5, 6A-D (diagram and photos of SN's injuries)). Later on the day she had been raped, SN also submitted to a sexual-assault exam, where swabs of her external- and internal-vaginal areas and her rectal area ultimately (continued . . .)

(3/2/20:212-17). While in California in 2015 – i.e., eight years after Berton had raped her – SN read a news article about untested rape kits (*id.* at 217-18). SN thus contacted D.C. police, whose reinvestigation led to "a match in a DNA database that identified Ronald Berton as a possible suspect" (3/3/20:219-20).

The Other-Crimes Evidence in No. 2016-CF1-17914[7]

Berton's Sexual Assault of AW

After attending a small party on June 11, 2010, 29-year-old AW returned to her English-basement apartment in D.C.'s Adams Morgan neighborhood (3/9/20:26-27, 33-34). AW's windows had bars, while her door had a deadbolt (*id.* at 29-31, 36). Sometimes, when the wooden door swelled in humid conditions, it was difficult to "align" the deadbolt pins but, on June 11, AW "believe[d]" she had locked it before going to bed naked (*id.* at 30-34).

---

revealed Berton's semen (3/3/20:75, 167, 171, 185-87; 3/4/20:70, 75-77, 86-88, 188-90 ("major contributor" of DNA on SN's three swabs "match[ed]" Berton's known sample).

[7] Because Berton claimed SN had consented, the trial court admitted evidence of his subsequent sexual assault of AW for the "limited purpose" of demonstrating his intent to "engage in a sexual act with [SN] by force" (3/5/20:44-45; see Part II.B.1 infra). Similarly, because Berton had claimed at his first two trials that SN had "opened" her doors and "invited" him in (5/14/18:130-34; 2/12/19:150), the court also admitted evidence of his unauthorized entry into another victim's (ZN's) apartment for the "limited purpose" of demonstrating his "knowledge of how to unlock locked doors" (3/9/20:148-49; see Part II.B.2 infra).

Berton – whom AW didn't know – awakened AW early the next morning,[8] said, "'This will just take a minute,'" and "pinned" her down in her bed (3/9/20:34-35, 43). Berton had his elbow on AW's chest and his hands on her throat (*id.* at 37-38). AW tried "everything [she] could to get him off" (*id.* at 44). As AW struggled, Berton asked her, "'Are you going to be a good girl?'" (*id.* at 35). AW then feigned relaxing before "thr[owing] him as hard as [she] could against [her] bookshelf" and crawling around the bed's other side (*id.* at 35-37). Berton, however, "came after" AW, "pinned" her again, and "put his hand inside [her] vagina" (*id.* at 37).[9] Berton also took his penis out and masturbated (*id.*). Berton's assault ended when he "couldn't get an erect penis" and "walked out" (*id.* at 44). AW then hurriedly dressed and looked for her cellphone, but it was gone (*id.* at 45). Accordingly, she went to a nearby firehouse, reported the assault, and a firefighter called police (*id.* at 46-47).[10]

---

[8] Law-enforcement personnel swabbed AW's fingernails and found Berton's DNA (3/5/20:70-73; 3/9/20:78-79; see 3/10/20:89-90 (government closing argument)). Additionally, via a records custodian and the testimony of one of Berton's acquaintances (Taylor Green), the government "corroborated [Berton's] identity" by demonstrating that, soon after his assault of AW, a phone call was placed from her "stolen phone" to Mr. Green's number (3/10/20:90-91 (government closing argument); see 3/10/20:27-36 (AT&T custodian); *id.* at 37-42 (Mr. Green)).

[9] Berton's attack left AW with a scraped elbow and scratches on her neck (3/9/20:47-50; see Exhs. 66-70 (photos)). Further, AW's bedroom was in disarray (3/9/20:38-43; see Exhs. 60, 65 (photos)).

[10] The court admitted this entry from the firehouse journal: "'citizen reporting assault and break in'" (3/5/20:46-52; see Exh. 50A). Additionally, Detective Vandra Turner-Covington explained that AW reported a "sexual assault" on June 12

(continued . . .)

Berton's Unauthorized Entry into ZN's Apartment

In 2008, ZN lived in an apartment in Arlington, Virginia, with her mother and a roommate (3/9/20:150-51). On September 10, after those two had left, ZN awoke to find Berton in her apartment (*id.* at 151). ZN did not know Berton, had not authorized him to enter, and knew of no reason why he might've had her apartment key (*id.* at 151-52). When ZN asked Berton how he had gotten in, he "said he came in through the door, which was locked, and he unlocked it" (*id.* at 154; see Exhs. 92-93 (photos of locks)). While inside, Berton handled an "object" more than once, which he left behind (3/9/20:152). ZN called the police after Berton left and showed them "the object" (*id.*).[11]

The Defense Case in No. 2016-CF1-17914

Berton argued that he and SN had had "consensual sex" (3/2/20:58; see 3/10/20:96 ("consensual encounter")). Specifically, he claimed, SN "was drinking" on October 6 and had a "one-night stand" with him (3/2/20:58). Berton thus argued

---

(3/5/20:55-56). AW told the detective she was awakened by a man who "[p]inned her down on the bed" and "placed his hands over her mouth" (*id.* at 57-58). AW said a "struggle ensued," the man exposed his penis, and "digitally penetrated her vulva" (*id.* at 61). AW provided a description of the man (*id.* at 62-64).

[11] An Arlington County police officer responded to ZN's apartment, took photos, and collected "the object" (3/9/20:155-58). Subsequent analysis revealed that the DNA profile developed from "the object" was consistent with Berton's known DNA profile (see *id.* at 158-214).

that he did "not break into [SN's] apartment," emphasizing there was "a gate, two doors, and four locks that ha[d] to be opened" but "no evidence that any of those locks had been broken or tampered with" (*id.* at 58-59). "Why not?," Berton asked, before answering his own question: "[b]ecause [SN] opened the doors for him" (*id.* at 60; see 3/10/20:98 ("So we've got three doors or gates, four locks. Somehow Mr. Berton makes his way in without any indication of forced entry.").[12]

SUMMARY OF ARGUMENT

Berton does not contest that, *if* the IAD's 180-day limitation applied to his 2016 case, his trial occurred within that period. As we show, the 180-day limitation applied because he initiated the request for a final disposition of his D.C. charges. Even if the IAD's 120-day limitation applied, Berton waived that right when his counsel agreed to a trial date outside that period.

Given Berton's claim that SN invited him into her apartment for consensual sex, the trial court properly exercised its discretion in admitting evidence in his 2016 case that he: (i) committed a forcible sexual assault of AW; and (ii) admitted to ZN that he had gained unauthorized entry to her apartment by unlocking her locked door.

[12] In addition to introducing evidence of Berton's sexual assault of AW as other-crimes evidence in No. 2016-CF1-17914, the government charged him with that crime in a separate indictment (No. 2019-CF1-3141) and tried him on that charge in 2023 (see Part III.A infra (describing indictment and trial)).

Finally, none of Berton's convictions in his 2019 case merge. Counts Three and Four are violations of separate statutes and each requires proof of a fact that the other does not. Further, Counts Four and Five do not merge because the evidence showed that Berton reached a fork in the road when his inability to maintain an erection precluded his penetration of AW's vagina with his penis but he nonetheless did so with his fingers.

ARGUMENT

I. The Trial Court Properly Adhered to the IAD's Mandates.

Berton claims (at 18, 20-27) his "2016 case must be dismissed because [he] was not brought to trial within the 120-day period provided by Article IV of the IAD." Additionally, he asserts (at 19, 37-41), his "2019 case should be dismissed" for a violation of Article V's temporary-custody provisions. Neither claim has merit.

A. The Interstate Agreement on Detainers

Congress adopted the IAD on behalf of the United States and the District of Columbia in 1970 "as a response to the growing problems of the detainer system whereby authorities notified prison officials that charges were pending against a prisoner in another jurisdiction." *Christian v. United States*, 394 A.2d 1, 34 (D.C. 1978); see D.C. Code § 24-801 (codifying IAD). Article III permits a prisoner "to clear detainers by initiating proceedings designed to dispose of charges pending in

other jurisdictions," while Article IV "provides a method whereby prosecuting authorities may secure a prisoner serving a term of imprisonment in another jurisdiction for trial on an outstanding indictment." *Christian*, 394 A.2d at 34.[13] If a prisoner initiates the request for final disposition of charges pursuant to Article III – i.e., "cause[s] to be delivered . . . written notice of the place of his imprisonment and his request for a final disposition," Art. III(a) – the 180-day period for trial in the receiving State starts when his request "'has actually been delivered to the court and prosecuting officer of the jurisdiction.'" *Cooper v. United States*, 28 A.3d 1132, 1137 (D.C. 2011) (quoting *Fex v. Michigan*, 507 U.S. 43, 52 (1993)). In contrast, if a prosecutor initiates final disposition by filing with the sending State a request for transfer of custody pursuant to Article IV, that provision's 120-day limitation begins running upon the prisoner's "physical arrival in the receiving jurisdiction." *Grant v. United States*, 856 A.2d 1131, 1134 (D.C. 2004).

[13] Article III(a) states: "[w]henever a person has entered upon a term of imprisonment . . . and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment . . . on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court . . . written notice of the place of his imprisonment and his request for a final disposition[.]" Article IV(c) states: "[i]n any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State[.]"

B. Relevant Procedural History

1. Berton's IAD Request

Soon after Berton was indicted in early-November 2016 for raping SN, the U.S. Marshals Service lodged a detainer against him on November 11 at the Virginia facility (Sussex II) where he was imprisoned on unrelated charges (R1.70 (Exh. A)). Four days later, using IAD Form II, Berton identified his place of imprisonment and "request[ed]" final disposition of his untried D.C. indictment (R1.70 (Exh. B)). On November 21, 2016, the Virginia Detainer Coordinator forwarded Berton's request to the U.S. Attorney's Office for the District of Columbia (DC-USAO) and D.C. Superior Court, each of which received his IAD demand two weeks later, on December 5, 2016 (R1. 71 (Exh. A); R1.75 (Exh. A)).

On that same date, the DC-USAO delivered a Petition for Writ of Habeas Corpus Ad Prosequendum to D.C. Superior Court, which the Honorable Jose Lopez signed two days later, on December 7 (R1.71 at 2-3; R1.191 at 13).[14] Thereafter, on December 8, the U.S. Marshals Service forwarded the writ to Virginia's Office of

[14] Such a writ "command[s] the immediate removal of a prisoner from incarceration so that he or she may be transferred into the jurisdiction from which the writ issued to stand trial on charges for crimes committed within that jurisdiction." *Grant*, 856 A.2d at 1135. In contrast, a "detainer is a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking the institution either to hold the prisoner for the agency or to notify the agency when release of the prisoner is imminent." *Carchman v. Nash*, 473 U.S. 716, 719 (1985).

Attorney General, which received it on December 12, 2016 (R1.75 (Exh. B)). The writ directed Virginia's Governor, the Sussex II Warden, and the U.S. Marshals Service to produce Berton "on or about January 31, 2017" for a D.C. Superior Court arraignment, but Berton arrived in D.C. on January 11 (R1.191 at 13; R1.71 at 3).

2. The Post-Arraignment Proceedings

Berton was arraigned on the D.C. indictment on February 15, 2017 (2/15/17:2-5). The prosecutor explained that Berton had been brought to the District "on a writ serving a sentence in Virginia that goes through May of 2020" (*id.* at 4). At a hearing two days later, defense counsel announced that Berton had "agree[d] to toll the 100-day clock" of D.C. Code § 23-1322(h)(1) until a March 30 status hearing (2/17/17:3-4).[15] The prosecutor reiterated that Berton was "serving a sentence in Virginia" and the court confirmed that D.C. would be "keep[ing] him" until his case was "resolved" (*id.* at 3-4).

At the March 30 hearing, defense counsel declared that Berton was no longer "tolling the 100-day clock" and asked the court to set a trial within § 23-1322(h)(1)'s limitation, which counsel "calculated" as July 5 (3/30/17:2-3). Specifically, counsel "ask[ed] to start [any pretrial] motions on July 5th . . . understanding that the Court

[15] Pursuant to § 23-1322(h)(1), a person detained pretrial "shall have trial of the case commence before the expiration of 100 days."

d[id] not anticipate doing jury selection until Tuesday, July 11th" (*id.* at 5).[16] Once again the prosecutor noted that Berton was "serving a sentence through May of 2020 from Virginia," adding that that did not "affect the 100-day calculation" (*id.* at 6).

On April 13, the parties convened and the defense announced it would be conducting its own DNA testing (4/13/17:9). But, counsel emphasized, the defense "anticipate[d] having the testing back in time" for the July 5 trial and was "not in any way seeking to continue the trial date" (*id.*). Indeed, when the prosecutor suggested it did "not seem realistic to keep the July 5th trial date" given the defense's testing, defense counsel reiterated that that testing would not "compromise our trial readiness whatsoever" (*id.* at 10-11).

At the start of the June 2 hearing, the court inquired about the government's readiness for the "July 11th" trial (6/2/17:3).[17] When defense counsel "clarif[ied]" that "the start of our trial is actually July 5th," the court agreed its calendar reflected

---

[16] In addition to scheduling Berton's trial on July 5, the court set a trial-readiness hearing for June 2, 2017, at which time the parties would litigate any other-crimes motion (3/30/17:8). All other motions, the court explained, "would be done on July 5th" (*id.*). Further, in a colloquy with the court, Berton personally affirmed that he was "satisfied" with his counsel (*id.* at 9-12). For its part, the government inquired if Berton planned to conduct his own DNA testing pursuant to the Innocence Protection Act (IPA) or was "waiv[ing]" that right (*id.* at 12). In response, the defense asked for an IPA hearing in two weeks, on April 13 (*id.* at 12-13).

[17] The government responded that it would be ready, affirming that its DNA witnesses were "aware of the trial date" and it would get its chain-of-custody witnesses "under subpoena" (6/2/17:5-8).

that date (*id.* at 9-10). After further discussion about scheduling matters (*id.* at 15-22), defense counsel sought the court's "brief indulgence," presumably to confer with Berton (*id.* at 22). Following a "[p]ause" in the proceeding, counsel then "ask[ed]" the following "[o]n behalf of Mr. Berton":

> I'd ask the Court to consider releasing him or dismissing the indictment at this time. Mr. Berton believes he has been held outside of the 100 statutory days that are required to bring him to trial, even notwithstanding the defense's waiver of time, so we are asking the Court to grant relief on that issue.
>
> We are also asking the Court to grant him relief because the Interstate Agreement on Detainers Act has been violated. (*Id.* at 22-23.)

The court acknowledged counsel's requests ("Very well") but said it would "like to see a written motion" (*id.* at 23).

3. The Government's Continuance Motion, Berton's Opposition, and his Motion To Dismiss

On June 7, the government moved to continue the July 5 trial because it had recently learned SN had received mental-health treatment, which necessitated the issuance of provider subpoenas (R1.50 at 1-2; see 6/14/17:5-8). Based on this new information, the government contended, there was "good cause" for a "continuance pursuant to D.C. Code § 23-1322(h)(1)" (R1.50 at 2). Berton objected, noting the defense had "been working very hard to maintain th[e July 5] trial date" (6/14/17:8-

11). The court, however, granted the continuance, scheduling a motions hearing on July 14 and jury selection on July 20 (*id.* at 38-39).[18]

On June 27, 2017, Berton asked the court to dismiss his indictment "with prejudice, due to the government's failure to provide [him] with a speedy trial" pursuant to Article IV of the IAD (R1.70 at 1). Not counting the 41 days between February 17 (when Berton "agreed to toll the speedy trial clock") and March 30 (when he "stopped tolling"), Berton argued that Article IV(c)'s 120-day limitation had expired one week before, on June 20 (R1.70 at 3). The government opposed, contending Berton had triggered Article III(a)'s 180-day limitation when, on December 5, 2016, he caused his IAD demand to be delivered to the DC-USAO and D.C. Superior Court (R1.71 at 2-4; R1.75 at 1-2).[19] At any rate, even if Article IV(c)'s 120-day limitation applied, Berton had waived that IAD right when, three months before (on March 30), he agreed to a trial date outside that period (R1.71 at

[18] The court also rejected Berton's claim that the government had failed to timely disclose any purportedly exculpatory material, concluding, as the government had averred, that no "red flag" would've suggested SN had previously received mental-health treatment (6/14/17:27-28).

[19] And, the government explained at a subsequent hearing, "180 days from December 5th, plus those 41 toll days gets us to July 14th, 2017" (6/30/17:16.)

4). The court denied Berton's motion, agreeing that Article III's 180-day limitation applied (6/30/17:37-38).[20]

C. The Trial Court Properly Concluded that Article III(a)'s 180-Day Limitation Applied to Berton's Case.

Berton does not contest that, four days after the DC-USAO lodged its detainer and three weeks before the DC-USAO prepared a writ for his transfer to D.C., he invoked Article III(a) by identifying his place of imprisonment and "request[ing]" a "final disposition" of his then-pending first-degree sexual abuse charge (R1.70 (Exh. B)). Nor does he contest that on December 5 – i.e., the same day the DC-USAO sent its writ to Superior Court for Judge Lopez's signature – Virginia prison officials

[20] The court thereafter empaneled a jury on July 13, 2017, but Berton's trial did not begin then because he requested a continuance after receiving notice of two hairs recovered from SN's bedsheets (7/18/17:19, 41-53; see 7/17/18:115). And, as the court explained before Berton's third trial (in March 2020) – his first two trials (in May 2018 and February 2019) having resulted in hung juries – "every continuance" thereafter was a "defense request for additional time" (1/31/20:47-48; e.g., 10/11/19:5-7 (continuance granted over government objection)). Additionally, before this third trial, a D.C. Superior Court grand jury charged Berton with sexually abusing AW (R2.1 (2019-CF1-3141)). Berton's trial on *those* charges was due to start immediately after his third trial on the SN charges, but he asked that it be continued due to the then-unfolding pandemic (3/16/20:4-6). Over the government's objection, the trial court granted Berton's motion, noting D.C.'s Mayor had "declared a state of emergency" (*id.* at 6-7). Finally, although the parties had originally agreed that Berton's sentencing on the SN charges would "trail" his trial on the AW charges, the postponement of the AW trial prompted the government and Berton to request a July 10, 2020, sentencing date on the SN-related charges (*id.* at 9-10). Ultimately, however, Berton's trial on the AW charges did not occur until January 2023, and he was thereafter sentenced on *both* the SN and AW charges on March 17, 2023.

effected delivery of his IAD demand on the DC-USAO and D.C. Superior Court. Without citing *any* authority, Berton nonetheless asserts (at 22) that Article IV(c)'s 120-day limitation applied because the DC-USAO "sought" its writ "before it received his request for final disposition of the charges against him" and his November 15 IAD demand thus did not "precipitate[ ] his transfer to D.C."

"[N]otwithstanding the mechanism used to obtain a prisoner's custody in the receiving state," however, "where a prisoner files the proper written notice or certificate requesting final disposition of charges, the 180-day speedy trial period contained in Article III is the operative time provision." *Felix v. United States*, 508 A.2d 101, 107 (D.C. 1986) (citing, inter alia, *United States v. Bailey*, 495 A.2d 756, 757-58 (D.C. 1985)). In *Felix*, the "sequence of events leading up to appellant's transfer under the IAD" was this: (1) the DC-USAO lodged a detainer; (2) "appellant then filed a request for a final disposition"; and (3) the DC-USAO "obtained custody of [him] by means of a writ." *Id.* at 106. "Under the plain language and structure of the Act," *Felix* reasoned, "since appellant was the one who filed a request for a final disposition, it would seem that his case is controlled by Article III." *Id.* at 106-07. Indeed, *Felix* held, "the 180-day limitation applies whenever the prisoner initiates

the request for a final disposition of charges, irrespective of the means by which the custody of the prisoner is obtained." *Id.* at 108.[21]

Felix's holding is consistent with the IAD's plain terms. Article III(a)'s 180-day limitation "is triggered simply by the accused's request for a final disposition of pending charges; the language does not insinuate that his presence in the foreign state must have been gained through his own efforts." *Fisher v. State*, 357 S.W.3d 115, 117 (Tex. Ct. App. 2011); see Art. III(a) ("he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting authority and the appropriate court . . . written notice of the place of his imprisonment and his request for final disposition"). In contrast, a "fair reading" of Article IV(c)'s "made possible" language, see n.13 supra, "suggests it contemplates a situation wherein the accused's presence in the forum was garnered through the unilateral actions of the requesting state or 'appropriate officer.'" *Fisher*, 357 S.W.3d at 117. "So, when the accused also invokes the procedures made available

---

[21] In *Bailey*, for example, 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 United States Attorney for the District of Columbia, the Superior Court of the District of Columbia, or any other official in the District" but the prisoner was "later brought to the District of Columbia on a writ of habeas corpus *ad prosequendum*, issued by the Superior Court on the [DC-USAO's] petition." 495 A.2d at 757-58. In *Bailey*, like here, it thus appears that the DC-USAO acted independently of the prisoner's IAD demand when it sought a writ. Nonetheless, the trial court applied "the 180-day time limit of Article III." *Id.* at 758.

to him under the statute, it is not necessarily true that his presence in the receiving state was 'made possible' by the prosecutor's conduct for purposes of Article IV." *Id.*

Berton triggered Article III(a)'s 180-day limitation when – by means of his IAD trial-demand form – he gave "notice of his place of imprisonment," "request[ed]" final disposition of his D.C. charges, and then "caused" Virginia authorities to deliver his demand to the DC-USAO and D.C. Superior Court on December 5. Art. III(a). In contrast, though the DC-USAO – apparently without knowledge of Berton's IAD demand – prepared its writ on the same date, it was not signed by Judge Lopez (i.e., made operative) until two days later. Accordingly, the trial court properly concluded, Article III applied. *See Felix*, 508 A.2d at 107 (rejecting appellant's claim Article IV "applicable because it was the government which ultimately procured [appellant's] presence by means of a writ").[22]

---

[22] Consistent with *Felix*, *Bailey*, and *Fisher*, several courts have held that "the defendant's Article III filing implicitly and automatically waives those Article IV procedures favorable to the defendant." *Hopkins v. LaFortune*, 394 P.3d 1283, 1286 (Ok. Ct. Crim. App. 2016); *see also Matthews v. Commonwealth*, 168 S.W.3d 14, 18-19 (Ky. 2005) (same). Indeed, both *Hopkins* and *Matthews* held Article III(a)'s 180-day limitation applied even though, in each case, the State's temporary-custody request *predated* the defendant's IAD demand. *See Hopkins*, 394 P.3d at 1285; *Matthews*, 168 S.W.3d at 19. Yet other courts have held the determinative factor is which Article was invoked first, an approach that would similarly mandate affirmance here. *See State v. Webb*, 570 N.W.2d 913, 915 (Iowa 1997); *Shewan v. State*, 396 So.2d 1133, 1134 (Fla. Ct. App. 1980). Finally, some courts have "used the limitations period which terminated first to determine the defendant's speedy

(continued . . .)

D. Even If Article IV(c)'s Limitation Applied, Berton Waived It By Agreeing to a Trial Beyond 120 Days.

Alternatively, a defendant – such as Berton – waives his right to a speedy trial under the IAD by agreeing to a trial that comes after the expiration of the applicable IAD period. *See New York v. Hill*, 528 U.S. 110 (2000). In *Hill*, an Ohio prisoner invoked his Article III right under the IAD by delivering to the New York prosecutor and court his request for disposition of a murder charge. *Id.* at 112; *see People v. Hill*, 92 N.Y.2d 406, 408 (N.Y. Ct. App. 1998). Defendant's counsel thereafter filed several motions that tolled the 180-day limitation and, by the time the parties met to set a trial date, "167 nonexcludable days" had elapsed. *Hill*, 528 U.S. at 112-13; *see Hill*, 92 N.Y.2d at 410. Nonetheless, defendant's counsel agreed to a trial date, which, if the "subsequent time period was chargeable to the State," was beyond the IAD's 180-day limitation. *Hill*, 528 U.S. at 113. When the defendant thereafter moved to dismiss his indictment because the "IAD's time limit had expired," the trial court thus declined, reasoning that "'counsel's explicit agreement to the trial date set beyond the 180-day statutory period constituted a waiver or abandonment of defendant's rights under the IAD.'" *Id.* (citation omitted).

---

trial right under the IAD." *State v. Willoughby*, 927 P.2d 1379, 1386 (Haw. 1996); *see also State v. Almly*, 162 P.3d 680, 684 (Az. Ct. App. 2007). For the reasons outlined at pp. 16-19 supra, however, this Court should reject this minority position, which conflicts with the IAD's text.

The Supreme Court agreed. "What suffices for waiver depends on the nature of the right at issue." *Hill*, 528 U.S. at 114. "'Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has – and must have – full authority to manage the conduct of the trial.'" *Id.* at 114-15 (citation omitted). Because "[s]cheduling matters are plainly among those for which agreement by counsel generally controls," *Hill* held that "defense counsel's agreement to a trial date outside the time period required by Article III of the [IAD] bar[red] the defendant from seeking dismissal because trial did not occur within that period." *Id.* at 111, 115.[23]

Per *Hill*, Berton's counsel's agreement to a trial outside the 120-day period waived his statutory right to a speedy trial pursuant to the IAD.[24] As Berton concedes (at 22), excluding the "41 days for plea negotiations" between February 17 and

---

[23] *See also Gonzalez v. United States*, 553 U.S. 242, 249 (2008) (*Hill* held that an "attorney, acting without indication of particular consent from his client, could waive his client's statutory right to a speedy trial pursuant to the [IAD]"); *Reed v. Farley*, 512 U.S. 339, 342 (1994) ("We hold that a state court's failure to observe the 120-day rule of IAD Article IV(c) is not cognizable under § 2254 when the defendant registered no objection to the trial date at the time it was set, and suffered no prejudice attributable to the delayed commencement.").

[24] Though *Hill* found a waiver of Article III's 180-day limitation, its reasoning applies equally to Article IV and numerous courts have so held. *See*, *e.g., United States v. McIntosh*, 514 Fed. App'x 783, 795 (10th Cir. 2013); *Kirvin v. State*, 394 S.W.3d 550, 557 (Tex. Ct. App. 2011); *Parks v. Commonwealth*, 89 S.W.3d 395, 397 (Ky. 2002); *Toro v. State*, 479 So.2d 298, 299 (Fla. Ct. App. 1985); *Commonwealth v. Jones*, 886 A.2d 689, 698 (Pa. Super. Ct. 2005).

March 30, 2017, 36 days had already elapsed by the time the parties met on March 30 to schedule Berton's trial. Nonetheless, Berton's counsel proposed a July 5 trial date, which was outside the 120-day period.[25] Moreover, at several hearings thereafter, Berton's counsel expressly reaffirmed the defense's desire for a July 5 trial (see 4/13/17:9-11; 6/2/17:9; 6/14/17:8-11). Berton thus "had [three] clear chances to alert the trial court in open court if he indeed wanted his trial to start on or before" June 20, 2017 (i.e., within Article IV(c)'s 120-day limitation), but he "let [those] opportunities pass by." *Reed*, 512 U.S. at 350. Berton was thus barred from later "seeking dismissal because trial did not occur within that period," *Hill*, 528 U.S. at 111, and the trial court properly denied his motion to dismiss.[26]

Nor did Berton adequately preserve his IAD demand when counsel "orally raised his IAD rights on June 2nd," as Berton suggested below (6/30/17:27-28). Indeed, at that June 2 trial-readiness hearing, Berton's counsel – that is, the person

[25] That is, even assuming – as Berton suggests (at 22-23) – the entire period following March 30 was chargeable to the government, the 120-day clock expired on June 20, 2017. See Berton Br. at 23 ("By [July 13, 2017], after deducting the 41 days that were tolled for plea negotiations, *143 days had elapsed* since Mr. Berton's arrival in D.C. [on January 11, 2017], which far exceeds the 120-day time limit set by Article IV(a) [sic] of the IAD.") (emphasis added).

[26] Though the trial court did not rely on Berton's waiver when it denied his motion, "it has long been held that an appellate court may uphold a trial court decision for reasons other than those given by that court." *Prince v. United States*, 825 A.2d 928, 931 (D.C. 2003). Moreover, there is no procedural unfairness because the government argued waiver below (R1.71 at 4; 6/30/17:20-22), and Berton responded (6/30/17 Reply at 6-7; 6/30/17:27-28).

with "'full authority to manage the conduct of the trial,'" *Hill*, 528 U.S. at 114-15 (citation omitted) – not only reaffirmed the defense's desire for a July 5 trial but detailed the defense's readiness. Counsel thus noted "we are preparing for trial on July 5th," assured the court that the defense's DNA testing would not delay that trial, and indicated the defense would call three-to-six witnesses at the July 5 trial (6/2/17:9-12, 25).

Moreover, although Berton himself apparently asked his counsel to raise the IAD at the June 2 hearing, even he did not suggest the July 5 trial should be moved up. Instead, through counsel, he "ask[ed] the Court to grant him relief because the [IAD] *has been violated*" (6/2/17:23 (emphasis added)).[27] But as Berton's counsel essentially conceded when simultaneously raising his separate § 23-1322(h)(1) claim, the 41 excludable days meant the 120-clock hadn't run by June 2 and the IAD thus hadn't "been violated" (6/2/17:23).[28] Further, when the government thereafter moved to continue the July 5 trial, once again neither Berton nor his counsel asked the court to move his trial up. To the contrary, Berton's counsel reiterated that the defense would be "ready to go" on July 5 (6/14/17:11). It was only "on the *12[7]th*

---

[27] Berton thus did not – as he now contends (at 4, 22) – "assert[ ] his right to a speedy trial under the IAD at the status hearing." Rather, he claimed only that his right had *already* been "violated" (6/2/17:23).

[28] As defense counsel explained, "*Mr. Berton believes* he has been held outside of the 100 statutory days that are required to bring him to trial, *even notwithstanding the defendant's waiver of time*" (6/2/17:23) (emphasis added).

day, when it was no longer possible to meet Article IV(c)'s deadline," that Berton finally "produced his meticulously precise" Motion To Dismiss Indictment with Prejudice for Failure to Provide a Speedy Trial Pursuant To Interstate Agreement on Detainers, *Reed*, 512 U.S. at 350-51; see R1.70 (dated: June 27, 2017); *see generally Reed*, 512 U.S. at 349 ("When a defendant obscures Article IV(c)'s time prescription and avoids clear objection until the clock has run, cause for collateral review scarcely exists."); *United States v. Dowdell*, 595 F.3d 50, 64 (1st Cir. 2010) ("We do not look favorably on IAD arguments that are not raised until the trial judge is no longer in a position to avoid a violation.").

In sum, 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. Instead, Berton's counsel reiterated a desire for a July 5 trial and Berton claimed only that the 120-day clock had already expired. Contrary to Berton's suggestion below, then, his June 2 statement did not constitute a revocation of the IAD waiver his counsel had effected two months earlier when she proposed a trial date outside Article IV(c)'s 120-day limitation.[29]

---

[29] In any event, "even waivers of fundamental trial rights are typically not subject to revocation as a matter of right." *Reyes v. People*, 195 P.3d 662, 666 (Colo. 2008); *see also Brooks v. United States*, 993 A.2d 1090, 1093-95 (D.C. 2010) (same). "For no other reasons than scheduling and orderly administration of the proceedings, once a right has been effectively waived, that waiver can be revoked and the waived right reclaimed only in the discretion of the court." *Reyes*, 195 P.3d at 666; *see also Sparks*
(continued . . .)

E. The Trial Court Did Not Plainly Err in Failing *Sua Sponte* To Find a Violation of Article V.

Finally, Berton claims (at 19, 37-41), his 2019 case should be dismissed because of a separate IAD violation. Specifically, in a rather convoluted claim – which we liberally quote to ensure its accuracy – Berton asserts (at 19) his "2016 case should have been dismissed in July 2017 because of the violation of the speedy trial provision in[ ] Article IV(a) [sic: IV(c)] of the IAD, and [he] should have then been promptly returned to Virginia pursuant to Article V."[30] And, his argument continues (at 19), "[i]n that event, when he was indicted two years later in the 2019

---

v. United States, 358 A.2d 307, 311 (D.C. 1976) (same). And "[w]hether or not a court might, under some set of circumstances, be held to have abused its discretion in refusing to permit a defendant to reclaim the protections of the [IAD], it is enough here that such an abuse could not occur in the complete absence of a motion to revoke the defendant's prior waiver and an adverse ruling by the court." *Reyes*, 195 P.3d at 666. Moreover, Berton's demands for a speedy trial pursuant to D.C. Code § 23-1322(h)(1) did not preserve his IAD claim. Those statutes prescribe different time limitations with different triggering mechanisms. *See Dowdell*, 595 F.3d at 65-66 (distinguishing *United States v. Mauro*, 436 U.S. 340, 364-65 (1978), where the Court held a pro se defendant's failure to invoke the IAD in "'specific terms'" in his speedy-trial motions didn't waive his Article IV(c) claim because of the "precise identity" between the prejudice he claimed in his motions – *viz.*, the negative effects on his rehabilitation attributable to his outstanding detainer – and the "prejudice that the IAD targets").

[30] Article V(d) states that "temporary custody . . . 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." Additionally, Article V(e) states that, "[a]t the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending State."

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," his argument finally concludes (at 19), "he was deprived of his constitutional and statutory right to a speedy trial and so the 2019 case should be dismissed."[31] Berton never raised an Article V claim below and this Court's review is restricted to plain error, *Dowdell*, 595 F.3d at 64, which he has not demonstrated.

To begin, as shown at pp. 16-24 supra, the trial court properly declined to dismiss Berton's 2016 case. Accordingly, Berton's argument about his 2019 case – which depends on his claim (at 19) that his "2016 case should have been dismissed in July 2017" – necessarily fails.[32]

---

[31] This is Berton's sole reference to a purported "constitutional" violation. He elsewhere argues (at 19, 39, 40) only that the IAD was violated. He has thus failed to properly raise a constitutional challenge.

[32] Berton does *not* claim the government violated Article V by failing to return him to Virginia at the end of his March 2020 trial on the 2016 charges. This omission is understandable because, when that trial ended, Berton agreed to continue his sentencing on those charges until – at the earliest – July 2020, a date that *followed* the May 2020 expiration of his Virginia sentence. Thus, by the earliest date Berton could've been sentenced on the 2016 charges (but for the lengthy delay ultimately attributable to the pandemic), there would've been no reason to return him to Virginia.

Even if Berton's "2016 case should have been dismissed in July 2017," he cannot show the government would have thereafter violated Article V by failing to return him to Virginia. As Berton correctly posits, had the trial court agreed with his IAD claim and dismissed his 2016 case, the government would have been obliged to return him to Virginia: because the detainer the DC-USAO caused to be lodged against Berton in 2016 referenced only the charges stemming from his rape of SN, the basis for his "temporary custody" would have been extinguished and the government would've had an "obligation" to return him to Virginia. *(William) Parker v. United States*, 590 A.2d 504, 509 (D.C. 1991). In such circumstances, however, the government would not have "continue[d] to detain [Berton] on charges that did not form the basis of the original detainer," as he wrongly assumes (at 38). *See United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("'presumption of regularity'" means courts must assume prosecutors have "'properly discharged their official duties'") (citation omitted).[33]

[33] This fact distinguishes *Cooney v. Fulcomer*, 886 F.2d 41 (3d Cir. 1989), which Berton cites (at 38-39). In *Cooney*, after the prisoner had been transferred to Pennsylvania from New Jersey "pursuant to the IAD" for trial on burglary charges, Pennsylvania "charged him with two counts of robbery which were unrelated to the burglary charges." *Id.* at 42. When Pennsylvania thereafter withdrew the burglary charges and tried the prisoner on the robbery charges, *Cooney* held that Pennsylvania had violated Article V(d) by trying the prisoner "on outstanding charges which were unrelated to the charges which formed the basis of the detainer." *Id.* at 44. Had the trial court dismissed Berton's 2016 case in July 2017, however, there would've been
(continued . . .)

Accordingly, this Court must reject Berton's claim (at 39) that his 2019 case should be dismissed because of "the Government's violation of the IAD in failing to return him to Virginia in 2017." Had the trial court dismissed Berton's 2016 case at that time, the government would have returned him to Virginia, lodged a new detainer when it thereafter indicted him in 2019 on the AW charges, and either Berton or the government would have then invoked the IAD anew.[34]

II. The Trial Court Properly Exercised Its Discretion in Admitting the Other-Crimes Evidence.

Berton next asserts (at 27-37) the trial court "committed reversible error by allowing the Government to present prejudicial 'other crimes' evidence." He is wrong.

---

no "outstanding" charges and, as explained, this Court must presume the government would have adhered to the IAD and returned Berton to Virginia.

[34] Berton also generally claims (at 38) that he suffered a "prolonged, unlawful detention" in D.C. as the government repeatedly tried his 2016 case. As detailed supra, however, Berton's 2016 case was initially due to be tried on July 13, 2017 – i.e., within the IAD's 180-day limitation – but Berton himself requested that that trial be continued. And, as the trial court declared in advance of Berton's third trial in the 2016 case, "every continuance" thereafter was a "defense request for additional time" (1/31/20:47-48), a finding he does not challenge. Moreover, though Berton additionally claims (at 38) "the Government postponed [his] sentencing" in the 2016 case, as explained at n.20 supra, both parties agreed to a sentencing continuance once the pandemic hit.

A. Applicable Legal Principles

"[I]in the case of sex crimes as well as other crimes, 'evidence of one crime is inadmissible to prove disposition to commit crime, from which the jury may infer that the defendant committed the crime charged.'" *Legette v. United States*, 69 A.3d 373, 379 (D.C. 2013) (citation omitted). "The propensity rule does not, of course, preclude the admission of evidence of other crimes when such evidence is relevant to issues other than the defendant's predisposition to commit the crime." *Thompson v. United States*, 546 A.2d 414, 418 (D.C. 1988). Before a court may admit other-crimes evidence, the government thus must "establish (1) by 'clear and convincing evidence that the defendant committed the other offense' . . .; (2) that the other crimes evidence is 'directed toward a genuine, material and contested issue in the case'; (3) that the evidence is 'logically relevant to prove this issue for a reason other than its power to demonstrate criminal propensity'; and (4) 'the evidence must be more probative than prejudicial.'" *Legette*, 69 A.3d at 379 (citation omitted).

B. Relevant Procedural History

At Berton's first and second trials, SN explained that, after returning to her apartment, she remembered she couldn't close the back gate but couldn't recall if, once inside, she had locked her other two doors (5/8/18:63-64, 177; 2/6/19:178, 246). Berton, however, argued "there's no way that [SN] left all three doors unlocked," asserting that did "not make sense" (5/14/18:132, 134). And, since there

was "no evidence of any forced entry," this meant SN "chose to bring [him] home and she chose to have sex with him" (*id.* at 118, 133).[35] Before Berton's third trial, the government thus sought to admit evidence that he had committed forcible sexual assaults on two other women: AW (in June 2010) and ZN (in September 2008) (R1.167 at 3-8). In both cases, Berton had gained entry to the victims' locked apartments but there were no signs of forced entry (*id.* at 4, 7). Indeed, in ZN's case, Berton had bragged that "'[t]he door was locked but I unlocked it'" (*id.* at 6).

1. Berton's Forcible Sexual Assault of AW

Relying on *Legette*, the trial court agreed that Berton's assault of AW was admissible to show his intent to force a sexual act on SN (7/26/19:14-15). Given the two assaults' "substantial similarities," the court found Berton's assault of AW had "independent" probative value "separate and apart" from mere "propensity":

> ● each assault occurred "in the early morning hours" in neighborhoods "in relative close proximity to one another";
>
> ● in each, Berton entered an "English basement-style apartment[ ]";
>
> ● in each, the evidence suggested, Berton entered "through locked doors without leaving any signs of forced entry";

[35] See also 5/8/18:25 ("[t]his was a hook up" and SN "opened those doors"); *id.* at 29 ("Mr. Berton didn't break into door after door."); 2/6/19:48 ("[t]his was not a rape it was a hookup"); *id.* at 47 ("He did not break into her home."); 2/12/19:150 ("Berton was there because she invited him in").

- in each, Berton "climbed into bed" with the victim when she was nude;
- in each, Berton "spoke words" to the victim "directed at trying to convince" her "simply to submit"; and
- in each, Berton stole "electronics" after his assault (*id.* at 19-21).

Berton's forcible assault of AW was also "highly prob[ative]" of his intent to use force in light of SN's lack of "significant injury," her failure to complain of "overwhelming pain," and her "composed" demeanor after the assault, (*id.* at 36). Further, there was "minimal" risk of unfair prejudice given: the "very similar nature" of the two assaults; no weapons were used; and neither SN nor AW "suffered any pervasive or longstanding injury" (*id.* at 37). And even that "minimal" risk would have been reduced by the pretrial voir dire, which could ensure no sitting jurors "act[ed] on emotion simply based upon hearing evidence of a forcible sexual assault" (*id.* at 37-38; see also 3/10/20:64-65 (instruction: "you must not allow the nature of a charge to affect your verdict")). Finally, the court concluded that the AW assault had significant probative value even where Berton had assaulted AW approximately 3 years *after* he attacked SN (7/26/19:21-22).

Per the court's suggestion, the government took the first "stab" at identifying how best to "sanitize" the AW assault in SN's trial (7/26/19:38). The government proposed calling: two witnesses who would testify about the sexual assault (AW and a friend to whom she had reported it); three witnesses pertaining to Berton's post-

assault use of AW's cellphone (two experts and the recipient of Berton's call); AW's landlord, who would describe her door locks; and several DNA witnesses (R1.180 at 3-4). Berton objected to any witnesses other than AW, the "DNA experts," and any "necessary" testing-and-analysis witnesses, contending "AW's testimony and the DNA evidence" were all that was necessary (R1.190 at 1-2; see also 1/31/20:19 ("testimony should be limited only to AW's own testimony and the testimony of the DNA experts that would establish the identity of Mr. Berton")).

Given Berton's objection, the court "preclude[d]" the government from calling any civilian report-of-rape witnesses (1/31/20:35-36).[36] But, because the relevance depended "largely" on the "highly probative" DNA evidence (which "match[ed]" Berton), the court held the government could elicit testimony from the firefighter to whom AW first reported the assault and the officer "who responded to AW's home," reasoning this testimony was necessary to put the DNA evidence in an "understandable context" (*id.* at 23, 32-36). This, the court explained, struck an

[36] The court also forbid any testimony about Berton's apparently intoxicated state during the AW assault: "all of that has no b[e]aring on intent to use force and is arguably prejudicial as it[would] inject[ ] drug usage or alcohol usage" (7/26/19:38-39). The court similarly forbid evidence that, two months after the attack, the police – based on AW's description – had stopped Berton one-half mile from her apartment, concluding it had "very minimal probative value" (3/2/20:20-23; see 1/31/20:27-28). And, "to limit undue prejudice," the court prohibited the government from mentioning any other-crimes evidence in its opening statement (2/21/20:30; see 3/2/20:9-12).

"appropriate balance" and was the "least prejudicial way" to present the evidence (*id.* at 37). And, although the court initially forbid the government from eliciting any evidence pertaining to AW's stolen cellphone, it ultimately permitted the introduction of a redacted cellphone record (which reflected a post-assault call from AW's phone to Berton's acquaintance (Mr. Green)) and Mr. Green's testimony (3/9/20:14-17; see 1/31/20:23-24, 40). The court reasoned this evidence was probative of identity and not unfairly prejudicial because: (i) the jury would "already" know of AW's missing phone since it explained her walk to the firehouse; and (ii) the redaction would eliminate any suggestion of a SIM-card swap, thus precluding an inference that Berton had "experience" in "stealing cellphones" (3/9/20:16-17).[37]

2. Berton's Unlawful Entry into ZN's Apartment

The government also sought to introduce evidence of Berton's forcible assault of ZN: On September 10, 2008, ZN awoke and found Berton "crouched beside her bed" (R1.167 at 6). He was holding a butcher knife that ZN recognized as hers (*id.*). Berton was also masturbating while wearing a condom on his exposed penis (*id.*). When ZN asked Berton how he had gotten in, he said, "'the door was locked but I

---

[37] Consistent with the court's rulings, the government ultimately elicited testimony from: AW, seven DNA witnesses, the firefighter, an MPD detective, Mr. Green, and an AT&T records custodian. See pp. 5-7 & nn. 8-10 infra.

unlocked it'" (*id.*). ZN tried to run but Berton "grabbed her by the arm" (*id.*). Berton told ZN, "'I could have raped you but I'm not going to do that'" (*id.*). Instead, Berton instructed ZN to expose her breasts and "grabbed [her] buttocks" (*id.*). After ejaculating, Berton left, taking his used condom (*id.*).

The trial court declined to admit evidence of Berton's assault of ZN, concluding there were "insufficient similarities" between it and SN's assault (7/26/19:22). Moreover, the "sheer cumulative nature" of admitting *two* sexual assaults "to prove one charged crime" would be "unduly prejudicial" (*id.* at 22-23). But, the court contingently ruled, if the government could show ZN's and SN's locks were similar, it would admit "a very narrow set of facts" indicative of "Berton's knowledge of how to unlock residential locks" (8/21/19:8).[38] Such knowledge, the court reasoned, was "highly relevant" to Berton's "intent to use force" because it demonstrated his ability "to access the apartments of [SN] and AW by breaking in without showing signs of force" (7/26/19:27-28, 32). Further, so long as the government "sanitized" the incident "down to basically an unlawful entry" – e.g., "no reference[s]" to the knife or sexual assault – it would not be unfairly

[38] The government subsequently satisfied this prerequisite, explaining that a locksmith had reviewed photos of the relevant locks and concluded that "anyone who could pick one of those types of locks could pick any" (10/11/19:17-18).

"prejudicial" (*id.* at 27-28).[39] Thus, the court ruled, the government could elicit only that Berton "invaded [ZN's] home and picked up an object in the apartment, held the object for a period of time, and made the statement about knowing how to unlock locked doors" (1/31/20:10).[40]

C. Analysis

As the foregoing demonstrates, the trial court exercised considerable caution in admitting the other-crimes evidence. Though correctly recognizing that Berton's assault of AW was "highly" probative evidence in light of his consent defense (7/26/19:36), the court forbid testimony about: AW's report to her friend; law enforcement's subsequent stop of Berton; and his intoxicated state during the assault. The court also precluded *any* evidence about Berton's forcible assault of ZN, paring

---

[39] Indeed, the court suggested, any such minimal prejudice could be further reduced by a "stipulation of facts" (10/11/19:18-19), later adding that it would "require" the government to proceed by a stipulation if Berton agreed to one (1/31/20:9-10). Counsel thus "reached" agreement on the following stipulation: "['][I]f called to testify as a witness in this case, ZN . . . would testify to the following: That on or about September 10, 2008, the defendant who was . . . a stranger to ZN, entered ZN's locked residential apartment located in Arlington, Virginia, to which he did not have a key. The apartment had a bottom thumb lock and a top cylinder deadbolt. When asked how he gained entry, the defendant responded the door was locked but I unlocked it.[']" (3/5/20:85-86.) This stipulation was ultimately abandoned, however, because, contrary to his counsel's advice, Berton objected (1/31/20:3-4). Berton "persist[ed] in his unwillingness to stipulate" though counsel explained to him that it would mean ZN and a "parade" of DNA "scientists" testified (*id.* at 3-5, 9-10).

[40] ZN and seven DNA witnesses thus testified at Berton's trial. See p.7 & n.11 supra.

that crime down to simply a "benign" unlawful entry (11/21/19:11). "[T]he judge's treatment of this issue was a model of discretion soundly exercised." *United States v. Latney*, 108 F.3d 1446, 1450 (D.C. Cir. 1997).

1. The Highly Sanitized ZN Evidence Addressed a Material, Disputed Issue and Did Not Unfairly Prejudice Berton.

Despite the trial court's significant curtailment of the ZN evidence, Berton asserts (at 28) it was still "inadmissible," contending his "knowledge/ability to unlock locks was not a material disputed issue because SN did not remember whether she locked her doors." Berton is mistaken.[41]

As the trial court correctly reasoned, Berton's consent defense asked the jury to draw the "natural" inference that, "given the absence of any signs of forced entry," SN "must have invited [him] into the apartment" (7/26/19:32-33). Moreover, although SN said she couldn't specifically recall if she had locked her doors, Berton argued she must have. Defense counsel's cross-examination, for example, led SN to acknowledge that it was her "habit," "practice," and "routine" to lock her doors, and culminated in this exchange:

> Q: And, of course, you live by yourself. A young female in the District, it was your habit to lock the doors, right?

[41] As the trial court noted, Berton's assault of ZN "result[ed]" in a Virginia conviction for breaking and entering with intent to commit rape (7/26/19:8-10), and he does not challenge the court's finding that he committed that offense.

A: Correct. (3/2/20:244-45.)

Consistent with SN's admissions, in his closing argument, Berton highlighted the "three doors" and "four locks" he would've had to circumnavigate if SN hadn't invited him in (3/10/20:98). And, in contesting SN's testimony about forcible sex, Berton noted that, despite these numerous doors and locks, "[s]omehow [he] ma[de] his way in without any indication of forced entry" (*id.*). Given this defense, the ZN evidence plainly addressed a material, disputed issue. If SN had acted in conformance with her practice and locked her doors that night (as Berton maintained), then Berton's admission to ZN – *viz.*, he had entered her locked apartment without a key – made it more probable that he had similarly entered SN's apartment and had not been invited in for a "one-night stand" (3/2/20:58). Accordingly, the trial court properly concluded, Berton's "knowledge and ability to access a locked residential door [wa]s highly relevant to the issue of the intent to use force" (7/26/19:32). *See United States v. Hassanshahi*, 195 F. Supp. 3d 35, 44 (D.D.C. 2016) ("'[E]vidence of another crime that tends to undermine [the] defendant's innocent explication for his or her act will usually be admitted.'") (quoting 2 Jack B. Weinstein, *et. al., Weinstein's Federal Evidence* § 404.22[1][a], at 404-100–400-102 (2d ed. 2016)).[42]

---

[42] Berton suggests (at 29) it's "astonishing" the government introduced this evidence given it had "argued to the jury" at his first two trials that "SN had forgotten to lock

(continued . . .)

Separately, Berton claims (at 30-31), any "minimal" probative value attributable to the ZN evidence was "substantially outweighed" by the risk of unfair prejudice because – "through the testimony of eight witnesses" and in "greater detail than necessary" – it "enabled the Government to portray [him] as a deviant with a propensity to break into young women's homes." Again, he is mistaken.

To begin, Berton's decision to forego a stipulation precludes him from now complaining that the jury heard from eight witnesses and, indeed, learned ZN was – like SN – a young woman. After determining the admissibility of the ZN evidence, the trial court declared it would "require" the government to proceed by stipulation (1/31/20:9). Accordingly, the parties hammered out a three-sentence stipulation that, as defense counsel emphasized, "d[idn't] even identify ZN as a female" (*id.* at 11; see n.39 supra). Nonetheless, despite defense counsel's "length[y]" discussion with Berton about the advantages of such a stipulation and counsel's "strong, strong view" that one "need[ed] to be entered," Berton rejected it (1/31/20:3-9). "[B]ecause

---

her doors that night." Indeed, he maintains (at 29), the government "altered its theory of the case" in order to "create an issue as to which the [other-crime] evidence would be relevant." But, as explained supra, *Berton* made the ZN evidence relevant when he argued at his first two trials that SN "lock[ed] up her doors as a matter of habit" (5/14/18:132-34; see 2/12/19:159). In light of this argument, it made perfect sense for the prosecutor to introduce the ZN evidence at Berton's third trial and suggest – consistent with SN's description of a forcible rape – that either SN had forgotten to lock her doors (as she posited to the police) or Berton had unlawfully bypassed her locked doors (as the ZN evidence suggested) (see 3/10/20:113 (government closing)).

Mr. Berton w[ould] not stipulate," the trial court explained at the bench, "we will be hearing from ZN" (3/9/20:63).

"The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow." *McGautha v. California*, 402 U.S. 183, 213 (1971) (citation omitted), *overruled on other grds by Crampton v. Ohio*, 408 U.S. 941 (1972). Having chosen to forego the stipulation with a full understanding of that decision's ramifications – *e.g.*, ZN's first-hand testimony and a "parade" of DNA witnesses (1/31/20:5) – Berton has waived his present claim of unfair prejudice. But for his decision, the jury would never have seen ZN, let alone heard her testimony. Further, the other seven witnesses all addressed DNA and were only necessary because Berton's decision required the government to link him to the DNA recovered from ZN's knife.

In any event, this Court generally owes a "great degree of deference" to the trial court's "'evaluation of evidence for prejudice,'" *Legette*, 69 A.3d at 689, and that deference is particularly appropriate here given the court's careful consideration of the governing other-crimes law, its assiduous pruning of the government's proffered evidence, and the numerous steps it took "to limit undue prejudice," including, for example, forbidding the government from opening on the other-crimes evidence and, sua sponte. reinstructing the jury about its "limited purpose" following a lengthy recess (2/21/20:30-31; 3/5/20:82; 3/9/20:22-23; see Part II.B supra). As to

the ZN evidence in particular, the court insisted that the government carefully scrub out those details that might have aroused the jury's emotions, including *any* references to Berton's sexual assault of ZN and his use of the butcher knife. Accordingly, by dint of the prosecutor's cautious leading questions, the jury learned only these facts: ZN woke up to Berton in her locked apartment; he was not authorized to be in ZN's apartment; he handled an "object" more than once; and he told ZN he had unlocked her door (3/9/20:151-52, 154).[43]

Finally, any error was harmless. *See Legette,* 69 A.3d at 389-90; *(Willie) Parker v. United States*, 751 A.2d 943, 949-50 (D.C. 2000). SN's wrenching description of her forcible rape was corroborated by numerous reports to law-enforcement and medical personnel. Further, Berton's sexual assault of AW was almost a carbon copy of his assault of SN. The significant similarities between *those* two violent crimes devastated Berton's consent defense; ZN's sterile description of an unauthorized man holding an object in her apartment did not carry as much weight. Moreover, the prosecutor only mentioned the ZN evidence in her initial

---

[43] Though Berton claims (at 30-31) the government presented "greater detail than necessary," he identifies only two "additional facts": ZN "was sleeping when she awoke to a stranger standing in front of her" and "the police were called after the break in." But the latter was a necessary part of the DNA evidence since the police collected DNA from the knife. Moreover, the former was minimally prejudicial given that the other crime's relevance already depended on the jury learning that Berton broke into ZN's apartment.

closing argument and properly emphasized its narrow purpose: "you have this evidence to show that the defendant knew how to unlock locked doors" (3/10/20:91).

2. The Trial Court Properly Concluded the Probative Value of the AW Evidence Wasn't Substantially Outweighed by Its Prejudicial Impact.

Berton additionally asserts (at 32-36) the trial court "abused its discretion in admitting evidence of the AW sexual assault because the probative value of this evidence was substantially outweighed by its prejudicial effect." "'In deciding whether the danger of unfair prejudice and the like *substantially outweighs*' probative value, 'a variety of matters must be considered, including [1] the strength of the evidence as to the commission of the other crime, [2] the similarities between the crimes, [3] the interval of time that has elapsed between the crimes, [4] the need for the evidence, [5] the efficacy of alternative proof, and [6] the degree to which the evidence probably will rouse the jury to overmastering hostility.'" *Legette*, 69 A.3d at 388-89 (citation omitted). Contrary to Berton's claim, the court properly weighed these factors and correctly concluded the danger of unfair prejudice didn't substantially outweigh the evidence's probative value.[44]

---

[44] Berton understandably does not challenge the court's conclusion that the AW evidence addressed a material disputed issue. *See Legette*, 69 A.3d at 382. Nor does he contest the court's finding that he had assaulted AW. See 7/26/19:10-11 (trial court reviewed grand-jury testimony of AW and several report-of-rape witnesses).

As for the strength of the evidence, not only did a Superior Court grand jury indict Berton for sexually assaulting AW, but a petit jury subsequently found beyond a reasonable doubt that he had committed that offense. Further, as the trial court correctly concluded, there were "substantial similarities" between the SN and AW assaults (7/26/19:19-20). In each, Berton gained access early in the morning to a locked ground-level apartment and then sexually assaulted his victim – each of whom was sleeping in the nude – by "pinn[ing]" her down and reassuring her the forcible sex would be quick (3/2/20:184, 187; 3/9/20:34-35). Berton also stole electronics from each victim. Moreover, "[w]here the extrinsic act evidence is extremely similar to the crime at issue," as is the case here, "evidence of the act will usually be rendered irrelevant only by 'an enormous lapse of time.'" *United States v. Thomas*, 593 F.3d 752, 758 (8th Cir. 2010). Certainly, the two-and-three-quarters years between Berton's October 2007 assault of SN and his June 2010 assault of AW is not an "enormous" time period.

Further, as the trial court correctly determined, there was a "great" need for the AW evidence and "minimal" other efficacious proof of Berton's intent to use force (7/26/19:36-37). As in *Legette*, "the evidence in this case pertinent to whether [Berton] intended to engage in sexual acts with [SN] by force was essentially [SN's] word that he did so," 69 A.3d at 389, versus Berton's claim that she consented. Specifically, Berton argued: SN was "intoxicated"; she didn't "scream for help" or

"call 911"; in her phone call to her ex-girlfriend, SN said, "'I *think* I was raped'"; and "nothing about" her injuries suggested she "was raped" (3/10/20:96-100 (emphasis added)). In light of these arguments, "there was no more efficacious proof of [Berton's] intent in his encounter with [SN] than [AW's] testimony describing [Berton's] similar encounter with her, which ended with [Berton] sexually assaulting her." *Legette*, 69 A.3d at 389. Finally, the trial court reasonably concluded, the "risk" that the AW evidence would "inflam[e] the passions of the jury" was "minimal" in light of, among other things, the assaults' similarities, the lack of any weapon, and neither SN nor AW suffered any "pervasive or longstanding injury" (7/26/19:37).

Despite *Legette*'s admonition that this Court must "accept the trial court's assessment of prejudice 'except under the most extraordinary of circumstances,'" 69 A.3d at 389, Berton contends (at 18) the "prejudicial impact" of the other-crime evidence "far outweighed" its "weak" probativeness. He first maintains (at 32-33) that "[c]ourts have acknowledged subsequent criminal activities are far less probative of a defendant's state of mind than the criminal activities which predate the charged crime" (citing *United States v. Watson*, 894 F.2d 1345 (D.C. Cir. 1990); *United States v. Boyd*, 595 F.2d 120 (3d Cir. 1978)). But, since *Watson*, the D.C. Circuit has "join[ed] the Eleventh Circuit and other courts of appeals in holding that 'the principles governing what is commonly referred to as other crimes evidence are the same whether the conduct occurs before or after the offense charged.'" *Latney*,

108 F.3d at 1450 (citation omitted). Further, *Latney* explained, the *Watson* language that Berton quotes (at 32) means "merely that the more distant the time between two events the less likely the events are connected," not that any "special rule" applies to subsequent other-crimes evidence. *Id.*[45] Contrary to Berton's suggestion, the courts of appeals thus generally agree that, like prior acts evidence where the two crimes are similar, "[s]ubsequent acts evidence is particularly relevant when a defendant's intent is at issue." *United States v. Mares*, 441 F.3d 1152, 1157 (10th Cir. 2006); *see also United States v. Torrez*, 869 F.3d 291, 302 (4th Cir. 2017); *Thomas*, 593 F.3d at 759.

Berton also asserts (at 33) the jury couldn't have relied on the AW evidence without improperly concluding he had "a propensity to commit sexual acts," namely, that he "harbored an intent to use force to engage in sexual acts whenever the opportunity arose for an indefinite, years-long period." But this argument ignores the significance of the substantial similarities between the SN and AW assaults. As *Legette* reasoned, "'if a person acts similarly in similar situations, he probably harbors the same intent in each instance.'" 69 A.3d at 385 (citation omitted); *see*

---

[45] As *Latney* also explained, the Third Circuit decision that Berton relies on (*Boyd*) is no longer followed in even that circuit. *See* 108 F.3d at 1449 (citing *United States v, Echeverri*, 854 F.2d 638, 645 (3d Cir. 1988)). Indeed, since *Echeverri*, the Third Circuit has distanced itself even further from *Boyd. S0ee United States v. Bergrin*, 682 F.3d 261, 281 n.25 (3d Cir. 2012).

also Torrez, 869 F.3d at 302. Thus, it's not *when* the other crime was committed that matters, but the degree of similarity.

Additionally, Berton contends (at 33-36), the "prejudicial impact of the AW evidence" was "compounded" by the fact that the trial court "effectively placed no limits" on it. The record belies Berton's suggestion that the court simply opened the other-crime floodgate. Though Berton repeatedly highlights (at 11, 34) that "twelve" witnesses testified, seven addressed only the DNA evidence and even Berton acknowledged those witnesses were necessary.[46] Further, although the government sought admission of a civilian report-of-rape witness to "corroborate[ ]" AW's testimony (R1.180 at 3), the court forbid this, concluding it was inadmissible to corroborate AW's testimony that an assault occurred and would be admissible only to show AW had "made a prior report," which would be "cumulative" of AW's own testimony (1/31/20:32-35). And, as to law-enforcement witnesses, the trial court properly reasoned that Berton's identification "rest[ed] largely on the DNA match," which had "to be put in some sort of understandable context" (*id.* at 32). Accordingly, the court confined the law-enforcement testimony to only that which was "necessary in order to explain how it came about that [AW's] fingernails were

---

[46] See R1.190 at 1-2 ("The defense submits that at most what should be admissible is . . . [t]he 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.").

swabbed" (*id.* at 34). A lone fireman thus explained that the relevant log recorded a "'citizen reporting assault and break in'" (3/5/20:52). Further, to "ensure" the jury understood that the subsequent police call Detective Turner-Covington responded to was the "same" assault that AW would thereafter describe, the court permitted the detective to identify only these facts: a "struggle ensued"; "at some point, [the intruder's] penis was out"; and he "digitally penetrated her vagina" (*id.* at 58-61).[47]

Finally, Berton complains (at 35), the court permitted two witnesses "to establish that AW's stolen cellphone was used to make a call to an acquaintance" of his, asserting this evidence "had no probative value with respect to the offense against SN" and only "highlighted the robbery offense." But, as the trial court rightly found, this evidence had significant value in establishing Berton's "identity [as] the assailant" (3/9/20:16-17). Moreover, as described in Part II.B.1 infra, the court carefully circumscribed it, distilling this evidence down to just a redacted cellphone record – which ensured the jury did not learn of Berton's more sophisticated SIM-

---

[47] Before counsel objected, Detective Turner-Covington described how AW's assailant "was standing over top of her, he pinned her down to the bed, [and] placed his hand over her mouth" (3/5/20:57). However, following counsel's objection, the court admonished that the detective could not "go into a great level of detail" and the prosecutor then used "leading questions" to elicit only that AW reported: "a struggle ensued" between herself and the intruder; the intruder "had his penis exposed"; and, at some point, the intruder "digitally penetrated her vulva" (*id.* at 60-61). Moreover, immediately after the detective's description of the assault, the court admonished the jury that it had been admitted for the "limited purpose" of establishing that AW made the report, not for its "truth" (*id.* at 61-62).

card switch – and Mr. Green's testimony that he received a call from Berton. Further, the court correctly reasoned, the jury had to hear about AW's missing cellphone anyway because it explained the necessity of her post-assault walk to the firehouse.

III. None of the Convictions in Berton's 2019 Case Merge.

Berton additionally contends (at 41-43) Counts Three and Four of his 2019 case – assault with intent to commit first-degree sexual abuse and attempted first-degree sexual abuse – merge because they "were one and the same offense." Further, he asserts (at 43-44), Count Five – first-degree sexual abuse – "was part of the same continuous sexual encounter" and thus "all three counts merge." This is inaccurate.

A. Relevant Procedural History

Count Three charged Berton with violating D.C. Code § 22-401 by assaulting AW with the intent to engage in a sexual act with her, namely, the forcible penetration of her vulva with his penis (R2.1 at 2). Count Four charged him with violating D.C. Code §§ 22-3002(a) and 22-3018 by attempting to engage in that sexual act with AW (R2.1 at 2). And Count Five charged Berton with violating § 22-3002(a) by engaging in a sexual act with AW, namely, the forcible penetration of her vulva with his fingers (R2.1 at 2).

At trial, AW described Berton's assaults: While standing in her doorway, Berton told AW, "[']This is only going to take a minute,[']" which she understood to mean he "intended to rape [her]" (1/30/23:71). Berton then "pinned" AW down

on her bed (*id.*). As Berton was "fumbling with his belt buckle," AW "waited and then pushed him as hard as [she] could into the bookshelf" (*id.* at 71-72). AW "scrambled" off the bed and tried to crawl "around the side of the bed to the door," but she got "caught" in the bedspread (*id.* at 72-73). "Then [Berton] came over and pinned [AW] again[,] next to the bed" (*id.* at 73). Berton's "penis was out" but it was "limp" and he was "trying to get an erection" by masturbating so, AW believed, he "could rape" her (*id.* at 75-76). When the prosecutor asked, "[w]hat else did [Berton] do then with his hands or fingers," AW explained that, "[a]t some point, he -- he put his fingers inside [her], inside of [her] vagina" while she "was still pinned" on the floor (*id.* at 76). Ultimately, because Berton "couldn't get it up" he "gave up and kind of stumbled out of the room" (*id.* at 82).

B. Analysis

"In determining whether multiple convictions are constitutionally permissible for criminal conduct which violates two distinct statutory provisions," this Court asks "'whether each provision requires proof of a fact which the other does not.'" *Sanchez-Rengifo v. United States*, 815 A.2d 351, 354 (D.C. 2002). "On the other hand, a 'fact-based approach remains appropriate where a defendant is convicted of two violations of the same statute.'" *Id.* (citation omitted).

Berton's § 22-401 assault-with-intent-to-commit-sexual-abuse conviction (Count Three) does not merge into either § 22-3002 sexual-abuse conviction (Counts

Four and Five). Assault is not an element of the sexual-abuse crime, and a sexual act (or an attempt to commit one) is not an element of the assault crime. See 2/1/23:220-23 (relevant jury instructions).

Nor do Berton's two sexual-abuse convictions (Counts Four and Five) merge. When Berton failed to get an erection (and thus couldn't rape AW vaginally), he reached a "fork in the road." *Jenkins v. United States*, 980 A.2d 421, 425 (D.C. 2009). "Rather than release [AW] and end his abuse of her, [Berton] decided to attempt to have a different kind of sexual contact with her," *Ellison v. United States*, 919 A.2d 612, 616 (D.C. 2007), one that didn't depend on an erect penis. Accordingly, Berton penetrated AW's vagina with his fingers. "The insertion of [Berton's] finger[s] into the victim's vagina was 'a new criminal act, the product of a new impulse, "punishable separately from the earlier act."'" *Jenkins*, 980 A.2d at 426 (citations omitted). Berton's "two convictions of sexual abuse therefore do not merge." *Id.; see also Barber v. United States*, 179 A.3d 883, 895 (D.C. 2018); *Bailey v. United States*, 10 A.3d 637, 645 (D.C. 2010).[48]

---

[48] Though Berton asserts (at 44) there was no "appreciable time between [him] unzipping his pants and his digital penetration of AW," the "requirement of an appreciable period of time between the acts 'has no application' if [Berton's] decision to penetrate [AW] with his [fingers] was the product of a 'fresh impulse,'" *Jenkins*, 980 A.2d at 426 (citation omitted).

CONCLUSION

WHEREFORE, the judgment of the Superior Court should be affirmed.

Respectfully submitted,

MATTHEW M. GRAVES
United States Attorney

CHRISELLEN R. KOLB
AMY ZUBRENSKY
STUART ALLEN
KATHLEEN A. KERN
Assistant United States Attorneys

/s/

DAVID B. GOODHAND, D.C. Bar #438844
Assistant United States Attorney
601 D Street, NW, Room 6.232
Washington, D.C. 20530
david.goodhand2@usdoj.gov
(202) 252-6829

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Sean Belanger, Esq., sean.belanger@hklaw.com, on this 2nd day of May, 2024.

/s/

DAVID B. GOODHAND
Assistant United States Attorney