BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

Nos. 23-CM-627 & 24-CM-408

DEREK MORRIS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

Cr. No. 2020-CMD-000684

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ISSUE PRESENTED

Whether appellant Derek Morris's jury instruction claim is waived under the invited error doctrine by his express agreement to the jury instruction he now challenges; and if not, whether the trial court plainly erred in not instructing the jury *sua sponte* that it must find an "additional specific factor" supporting Morris's lack of legal right to remain at the Supreme Court, where the court read all seven elements of the model jury instruction for unlawful entry on public property based on remaining without authority, which included an element that the person "did not have lawful authority to remain" that incorporates case law requiring an "additional specific factor," where the parties argued in closing arguments about whether an additional specific factor existed, and where the evidence of an additional specific factor was overwhelming.

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COUNTERSTATEMENT OF THE CASE

On January 15, 2020, appellant Derek Morris was charged by information with unlawfully remaining on public property for his actions inside the U.S. Supreme Court building on January 14, 2020 (3/12/20 Tr. 20).[1] After a jury trial before the Honorable Errol Arthur on April 19 and

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[1] Morris was originally charged also with unlawful entry on public property (3/12/20 Tr. 20), but the government dismissed this charge at the trial readiness hearing (4/18/23 Tr. 5-6).

20, 2023, Morris was found guilty of unlawfully remaining on public property on April 21, 2023 (4/21/23 Tr. 16). Judge Arthur imposed a suspended sentence of 30 days' incarceration, followed by six months of unsupervised probation, with an order to stay away from the Supreme Court except as necessary to conduct lawful business there, and a $50 fine to the Victims of Violent Crime Compensation Fund (*id.* at 26, 28). Morris filed a timely notice of appeal on April 24, 2024 (Record on Appeal (R.) 41-42 (PDF) (Notice of Appeal pp. 1-2)).[2]

The Trial

The Government's Evidence

The U.S. Supreme Court building is located at 1 First Street, Northeast, directly across from the U.S. Capitol building (4/19/23 Tr. 122). As public property, the Supreme Court building is generally open to the public (4/20/23 Tr. 15). The museum-style hallways contain

[2] Morris originally filed an untimely notice of appeal on July 25, 2023 (R. 33 (PDF) (Motion p. 1)). Then, on April 18, 2024, he asked the court to re-issue the judgment and commitment order to allow him to file a timely notice of appeal (R. 33-36 (PDF) (Motion pp. 1-4)). The court granted the motion (R. 37 (PDF) (Order); R. 38 (PDF) (Order)) and re-issued the judgment and commitment order on April 23, 2024 (R. 39-40 (PDF) (Judgment & Commitment Order)).

exhibits, pictures, and statues for public viewing (*id.* at 15-16). Areas that are not open to the public are identified by signs that say, "Employees only" (*id.* at 18). The hallway that leads to the Clerk's Office is generally open to the public from 9 a.m. to 4:30 p.m. (*id.*). However, a sign outside the Clerk's Office reads, "For business purposes only" (*id.* at 17).

To bring a case in the Supreme Court, a party must first be denied relief at the highest state court or one of the federal courts of appeals (4/19/23 Tr. 131). The first step is to file a petition for a writ of certiorari with the Supreme Court (*id.*). The Supreme Court has different rules governing the filing of petitions by attorneys and non-attorneys: while attorneys who are members of the Supreme Court Bar may electronically file their petitions and then deliver hard copies to the Supreme Court building, non-attorneys may not electronically file their petitions (*id.*). Instead, non-attorneys must either mail their petitions to the Supreme Court or hand deliver them to the Supreme Court building (*id.*). When hand delivering their petitions, non-attorneys are not permitted to take them directly into the Clerk's Office; instead, they must first deliver their documents to a Supreme Court police officer at a police booth directly behind the Supreme Court building (*id.* at 132; 4/20/23 Tr. 21). For

security reasons, all documents brought to the Supreme Court must be placed in a plastic bag at this police booth, sealed, taken off-site, tested to ensure there is no harmful material inside, and brought back to the Supreme Court by a police officer to be filed in the Clerk's Office (4/19/23 Tr. 135; 4/20/23 Tr. 21). A sign at the entrance to the Supreme Court states, "Any filings will be submitted to the booth at the rear of the building" (4/20/23 Tr. 35).

Morris, a non-attorney, had filed a petition with the Supreme Court, but it was rejected by the Clerk's Office as untimely (4/19/23 Tr. 159-62). On March 25, 2019, around 9:20 a.m., Morris walked into the Clerk's Office and said he wanted a case number to be assigned to his case (4/20/23 Tr. 24). He also "spoke incessantly" about "his dissatisfaction with the clerk's office and their procedures for handling filings" (*id.*). Supreme Court Police Officer Eric Leamy, who responded to the Clerk's Office that day, directed Morris how to file something with the Clerk's Office, including submitting it first to the police booth outside the building (*id.* at 35, 37). Morris said he wanted to submit the filing directly to the Clerk of the Court and pulled paperwork out of his briefcase (*id.* at 36-37). Finally, to appease Morris, Officer Leamy made

an exception to the policy, put gloves on, and offered to take Morris's paperwork to be tested before it could be filed (*id.* at 43).

On January 14, 2020, around 11:00 a.m., Morris walked into the Clerk's Office again (4/19/23 Tr. 136). James Bolden, the Clerk's Office supervisor, greeted Morris and remembered him from a prior encounter (*id.* at 136-37). Bolden got Redmond Barnes, a case analyst in the Clerk's Office who ensures that petitions follow Supreme Court rules, to come over to help Morris (*id.* at 138-39). But when Barnes introduced himself, Morris responded angrily, raising his voice while pointing at him, saying, "You're not my attorney. You're not a[n] attorney. Don't touch my shit." (*Id.* at 139.) Morris did not ask Barnes any questions, and Barnes eventually told him, "We can't help you anymore" (*id.* at 142-43). Barnes then said to Morris, "Sir, if I can't help you, I'm going to walk away," and then indeed walked away (*id.* at 163). Morris did not ask any questions of any other Clerk's Office personnel (*id.* at 144). After Morris did not leave, Bolden summoned Officer Leamy (*id.*).

Officer Leamy, and eventually several other Supreme Court Police officers, arrived (4/19/23 Tr. 144-45). Morris told Officer Leamy that he wanted to arrest certain Supreme Court employees and to submit certain

paperwork (4/20/23 Tr. 27). Officer Leamy explained that he would not arrest any Supreme Court employees (*id.* at 28). Officer Richard Bair advised Morris that he could not file paperwork directly in the Clerk's Office and needed to take it outside to the police booth per Supreme Court policy (*id.* at 49). Officers told Morris to leave the Clerk's Office to deliver his petition outside at least five times (4/19/23 Tr. 150; 4/20/23 Tr. 50). Eventually, following direction from the Supreme Court Chief of Police, officers informed Morris, "If you don't leave, we will arrest you" (4/19/23 Tr. 150; 4/20/23 Tr. 29, 50). Morris responded by putting his hands behind his back (4/19/23 Tr. 150; 4/20/23 Tr. 29, 50). Officers then handcuffed and arrested Morris (4/19/23 Tr. 150; 4/20/23 Tr. 30).

The Defense Evidence

Morris testified that he originally filed a petition for a writ of certiorari by mail on September 18, 2017 (4/20/23 Tr. 76, 79-80). Before filing it, he consulted the Supreme Court's website for filing rules (*id.* at 80). However, after mailing his petition, he did not receive a case number (*id.* at 79). On September 25, 2017, he received a letter from Barnes of the Supreme Court Clerk's Office explaining that his petition was not timely filed and citing several Supreme Court rules (*id.* at 98). He later

received other letters conveying the same message (*id.* at 99). From 2017 to 2020, he flew from his home in California to Washington, D.C., several times attempting to get his petition filed (*id.* at 81). As a retired Marine, he preferred dealing with issues "face to face" rather than "by correspondence" (*id.* at 127).

In March 2019 when Morris walked into the Clerk's Office, Officer Leamy "tried to help" him (4/20/23 Tr. 93). Morris denied that Officer Leamy showed him the police booth where he was supposed to file documents but admitted that at some point, he was directed to go to the police booth (*id.* at 104-06). Officer Leamy eventually took the document Morris was trying to file and asked, "Is this good enough for you?" (*id.* at 93). Morris said, "Yes," and left (*id.*).

Morris admitted that on January 14, 2020, he saw a sign reading, "For official business only," by the brass gate near the Clerk's Office (4/20/23 Tr. 109-10). He entered the Clerk's Office and did not initially say anything (*id.* at 84). An employee asked, "How may I help you?" and he responded, "I'm here to file a petition for a certiorari" (*id.*). His "primary goal" that day was to "file a petition for writ of certiorari" before the Supreme Court (*id.* at 112). Barnes came into the Clerk's Office, but

Morris "was tired of dealing with" Barnes (*id.* at 84). Morris admitted that he did not ask Barnes any questions about Supreme Court rules that day (*id.* at 117).

Suddenly, Supreme Court Police officers "flood[ed] the clerk's office" (4/20/23 Tr. 84). When Officer Leamy entered, he offered to look at Morris's paperwork, but Morris said, "No" (*id.* at 86). Morris told Officer Leamy that he wanted two people arrested, and Officer Leamy responded that Supreme Court Police "do[es]n't arrest employees" (*id.* at 88). Morris then said he was "here to file this paperwork" (*id.*). Morris admitted that the Supreme Court Police then told him to file the paperwork at the police booth (*id.*). The officers told him he had to leave, but he refused and said, "I will leave when you pay for all my expenses being in here" (*id.* at 91). After officers again advised him that if he did not leave, he would be arrested for unlawful entry, Morris said, "Then arrest me," and was arrested (*id.*).

The Jury Instructions[3]

At the trial call and motions hearing on April 18, 2023, Morris's trial counsel previewed that he expected to be "fighting over" jury instructions regarding the "additional specific factor" required to prove unlawfully remaining on public property (4/18/23 Tr. 27). Morris's trial counsel had argued that to establish a party's lack of a legal right to remain (the fourth element of unlawfully remaining on public property), the government had to prove an additional specific factor other than the whim of a police officer meant they could not remain (*id.* at 7-10 (citing *Byrne v. United States*, 578 A.2d 700 (D.C. 1990); *O'Brien v. United States*, 444 A.2d 946 (D.C. 1982))).

After the first day of testimony on April 19, 2023, Morris's trial counsel proposed an addition to the court's proposed jury instructions (4/19/23 Email from M. Rollins to Judge Arthur Chambers[4]). He proposed that in addition to the seven elements in the *Redbook* instruction, the

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[3] At the close of the government's case, and again after the defense's case, Morris moved for judgment of acquittal without argument, and the court denied the motion each time (4/20/23 Tr. 61, 128).

[4] The government will move to supplement the record with this email, as well as the proposal that he attached, and the government's response email.

court also read an eighth element: "That the Defendant did not have a legal right to remain." (*See* Proposed Jury Instructions on Unlawful Charge.) His proposal cited relevant D.C. case law on this "additional specific factor" requirement (*id.*).

The government objected to this proposal, arguing that the proposed additional element was "duplicative" of the fourth element in the *Redbook* instruction, which reads: "s/he did not have lawful authority to remain there" (4/19/23 Email from A. Cocuzza to Judge Arthur Chambers). The government observed that the *Redbook* instructions already incorporated the "additional specific factor" requirement and cited *O'Brien*, *Byrne*, and other cases (*id.*).

When the court raised the proposed jury instructions on April 20, 2023, Morris's trial counsel withdrew his request, stating: "I concur with the Government. I think that that element four will suffice" (4/20/23 Tr. 68). Accordingly, after both sides rested their cases, the court read the *Redbook* instruction on unlawfully remaining on public property:

> The elements of this offense, each of which the Government must prove beyond a reasonable doubt, are as follows:
>
> One, that Dr. Morris was present in restricted part of the Supreme Court of the United States;

> [T]wo, Dr. Morris was directed to leave the property by an officer of the Supreme Court of the United States police;
>
> [T]hree, an officer of the Supreme Court of the United States – pardon me – an officer of the Supreme Court of the United States police was a lawful occupant or person lawfully in charge of the property;
>
> [F]our, at the time, Dr. Morris was directed to leave the property, he did not have the lawful authority to remain there;
>
> [F]ive, Dr. Morris knew or should have known that he was remaining on the property against the will of the lawful occupant or person of – or the person lawfully in charge of the premises;
>
> [S]ix, upon being directed to leave the property, Dr. Morris refused to leave; and
>
> [S]even, the Supreme Court of the United States was public property (4/20/23 Tr. 146).

The Closing Arguments

In its closing argument, the government focused on the fourth element of unlawfully remaining on public property, noting that what occurred at the Supreme Court on January 14, 2020, was largely undisputed (4/20/23 Tr. 147). As the government explained, non-attorneys cannot file petitions directly in the Clerk's Office for security reasons, and a sign near the door says that the Clerk's Office is "For business purposes only" (*id.* at 149, 151). Supreme Court police officers

explained this policy to Morris multiple times before arresting him for refusing to leave (*id.* at 153). According to the government, Morris "ignored the rules and refused to leave" (*id.* at 147).

The defense's closing argument also focused on the fourth element, explaining the "additional specific factor" requirement for public property: "For our public institutions, the Government has to take one step further, and that means that you have to provide – because I have the First Amendment right. You have to provide me something great[er] than just someone on a whim telling me I have to leave." (4/20/23 Tr. 163.)

In rebuttal, the government did not disagree with the defense's characterization of the law but rather outlined three reasons why the Supreme Court Police did not "act on a whim" in directing Morris to leave: (1) the Clerk's Office allowed people to ask questions about their case, but Morris was not asking any questions about his case; (2) Morris was "trying to do something that he couldn't do under the rules": file a hard copy of his petition in the Clerk's Office "without it being screened outside in the [police] booth"; and (3) "he caused a disruption" (4/20/23 Tr. 167-68).

SUMMARY OF ARGUMENT

Morris invited, and thus waived, any instructional error by expressly agreeing that the court's proposed jury instructions adequately addressed the "additional specific factor" requirement. Even if reviewed for plain error, his claim is meritless. The trial court's jury instructions, which were based on the *Redbook* instructions for unlawfully remaining on public property, properly incorporated the "additional specific factor" requirement in the fourth element, which requires the government to prove that Morris did not have the lawful authority to remain on the property. Accordingly, Morris cannot show obvious error in the jury instructions. Nor did any error so affect Morris's substantial rights as to undermine the fairness and integrity of his trial. Instead, the government presented overwhelming evidence of an additional specific factor and the jury heard ample argument regarding this requirement.

ARGUMENT

Morris's Jury Instruction Claim Is Waived and Meritless.

Morris argues, notwithstanding his consent to the jury instructions at trial, that the trial court erred in not instructing the jury that it had

to find an "additional specific factor" supporting his lack of legal right to remain in the Clerk's Office of the Supreme Court. Morris's claim is waived and meritless.

A. Standard of Review and Applicable Legal Principles

Where a claim of error is preserved, this Court reviews any legal issues surrounding the denial of a requested jury instruction de novo. *Mack v. United States*, 6 A.3d 1224, 1228 (D.C. 2010). However, under the invited error doctrine, an instructional challenge is waived where a defendant agrees at trial to the instruction he challenges on appeal. *See, e.g., Young v. United States*, 305 A.3d 402, 429-30 (D.C. 2023) ("both Mr. Young and Mr. Height agreed to this jury instruction at trial, thus inviting the error and waiving any right to raise the claim on appeal. . . . Thus, this court is precluded from reviewing the claim of instructional error.") (citing *Masika v. United States*, 263 A.3d 1070, 1077 (D.C. 2021) (same); *Buskey v. United States*, 148 A.3d 1193, 1204 (D.C. 2016) (same); *Preacher v. United States*, 934 A.2d 363, 368 (D.C. 2007) (the invited error doctrine "precludes a party from asserting as error on

appeal a course that [they have] induced the trial court to take"); *Butts v. United States*, 822 A.2d 407, 416 (D.C. 2003) (same)).

Where a claim is not waived, if a party fails to object to the instructions given, this Court reviews a challenge to the jury instructions only for plain error. *See, e.g.*, *Williamson v. United States*, 993 A.2d 599, 603 (D.C. 2010). "Under the test for plain error, appellant first must show (1) error, (2) that is plain, and (3) that affected appellant's substantial rights. Even if all three of these conditions are met, this court will not reverse unless (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Lowery v. United States*, 3 A.3d 1169, 1173 (D.C. 2010) (quoting *In re D.B.*, 947 A.2d 443, 450 (D.C. 2008)).

To establish unlawfully remaining on public property under D.C. Code § 22-3102, the government must prove "(1) that a person lawfully in charge of the premises expressly order[ed] the party to leave, and (2) that, in addition to and independent of the evictor's wishes, there exists some additional specific factor establishing the party's lack of a legal right to remain." *O'Brien*, 444 A.2d at 948. "Such factors may consist of posted regulations, signs or fences and barricades regulating the

public's use of government property." *Carson v. United States*, 419 A.2d 996, 998 (D.C. 1980). The purpose of this "additional specific factor" requirement "is to protect any First Amendment rights which may be implicated in the defendant's conduct, so that 'an individual's lawful presence is not conditioned upon the mere whim of a public official." *United States v. Powell*, 563 A.2d 1086, 1089 (D.C. 1989) (quoting *Leiss v. United States*, 364 A.2d 803, 806 (D.C. 1976)).

B. Morris's Claim Is Waived.

Morris's trial counsel conceded that the fourth element of the jury instructions addressed the "additional specific factor" requirement, and therefore any error was invited. Morris's trial counsel originally proposed adding an eighth element — "That the Defendant did not have a legal right to remain" — to the court's proposed jury instructions to address the additional specific factor requirement (*see* Proposed Jury Instructions on Unlawful Charge). But when the government pointed out that this proposed language "duplicat[ed]" that in the fourth element (4/19/23 Email from A. Cocuzza to Judge Arthur Chambers), Morris's trial counsel agreed. When the court raised this proposed jury instruction, Morris's trial counsel withdrew his request, stating, "I concur with the

Government. I think that that element four will suffice." (4/20/23 Tr. 68.) This position was consistent with Morris's trial counsel's pretrial argument that *Byrne*, 578 A.2d 700, "essentially adds on an additional factor to the unlawful entry element that the Government is required to show that he *didn't have a legal right to remain*" (4/18/23 Tr. 8-9 (emphasis added); see also *id.* at 10-11 ("It's not just you ordered him to leave, but you also have to show that he did not have the legal right to remain.")). As Morris admits (at 31), his trial counsel mounted no further objections to the court's proposed jury instruction (see 4/20/23 Tr. 129-46). The jury then was properly instructed that there are seven elements the government must prove to establish unlawfully remaining on public property (4/20/23 Tr. 146).

By conceding the issue below, Morris waived his argument on appeal. The invited error doctrine "precludes a party from asserting as error on appeal a course that [they have] induced the trial court to take." *Young*, 305 A.3d at 430 (quoting *Preacher*, 934 A.2d at 368). "[A] defendant may not take one position at trial and a contradictory position on appeal." *(Thomas) Brown v. United States*, 627 A.2d 499, 508 (D.C. 1993) (where defense counsel asked court not to give instruction on issue,

court would not consider claim of instructional error on appeal). Here, as in *Butts*, 822 A.2d 407, Morris's trial counsel "not only failed to object, but actually agreed with the prosecutor" on the proper instructions. *Id.* at 416; *see also Masika*, 263 A.3d at 1077 ("Counsel for appellant did not merely fail to object to the instruction, but rather affirmatively agreed to the deletion of the paragraph defining 'false representation' and expressly stated no objection to deletion of the paragraph defining 'material fact.' Therefore, we hold that appellant waived this claim of instructional error."). Accordingly, because Morris's trial counsel agreed to the instruction that the trial court ultimately gave, this Court is precluded from considering his claim of instructional error. *Butts*, 822 A.2d at 416; *Young*, 305 A.3d at 429-30 ("[B]oth Mr. Young and Mr. Height agreed to this jury instruction at trial, thus inviting the error and waiving any right to raise the claim on appeal.").

C. In Any Event, Morris Fails to Show Plain Error in the Court's Jury Instructions.

Even if Morris's claim is not waived, it is reviewable at most for plain error. He fails to show error, plain or otherwise. The trial court's jury instructions properly addressed the required elements of unlawfully

remaining on public property. The court read the full *Redbook* jury instruction on unlawfully remaining on public property without lawful authority (compare 4/20/23 Tr. 146, with Criminal Jury Instructions for the District of Columbia, No. 5.401(B)). In that instruction, the second and fourth elements require the government to prove, respectively, that Morris "was directed to leave the property by" Supreme Court Police, and that at the time Morris "was directed to leave the property, he did not have the lawful authority to remain there" (4/20/23 Tr. 146). These two elements mirror the requirements outlined in this Court's case law, that the government must prove "(1) that a person lawfully in charge of the premises expressly order[ed] the party to leave, and (2) that, in addition to and independent of the evictor's wishes, there exists some additional specific factor establishing the party's lack of a legal right to remain." *O'Brien*, 444 A.2d at 948. The "additional specific factor" requirement is another way of stating that regardless of the police officer's order to leave, the person did not have a legal right to remain. *See Carson*, 419 A.2d at 998. That fourth element distinguishes unlawfully remaining on public property from unlawfully remaining on private property, where "the two components of the statute merge [and t]he mere demand of the person

lawfully in charge to leave necessarily deprives the other party of any lawful authority to remain on the premises," *O'Brien*, 444 A.2d at 948; *see also Larson-Olson v. United States*, 309 A.3d 1267, 1273 (D.C. 2024).

Morris cites no binding case law holding that, where unlawfully remaining on public property is charged, the trial court must instruct the jury specifically that it must find that an "additional specific factor" establishes the lack of legal right to remain, beyond the fourth element of the *Redbook* instruction. Indeed, even in his original proposal before he conceded that the *Redbook* instruction was sufficient, Morris never proposed a jury instruction that would specifically include the language "additional specific factor." Morris's reliance (at 21-22) on *Hasty v. United States*, 669 A.2d 127 (D.C. 1995), is misplaced. In *Hasty*, the Court required that the trial court instruct the jury on a further judicially imposed gloss on the "additional specific factor" requirement: for unlawful entry cases involving the Rotunda of the U.S. Capitol building, the government must prove that the defendants' disruption to the Capitol's order and decorum exceeded that of ordinary tourists (the so-called "tourist standard"). *Id.* at 129. But even now, Morris does not suggest that the tourist standard (or any other gloss on the "additional

specific factor" requirement) applies to the Supreme Court Clerk's Office, which in any event was open to the public "For business purposes only," rather than for general tourism (4/20/23 Tr. 17). Instead, as the parties agreed, the fourth element of the *Redbook* instruction appropriately required the government to prove that Morris did not have a legal right to remain, which incorporates the "additional specific factor" requirement. *See* Criminal Jury Instructions for the District of Columbia, No. 5.401, Comment ("Where a public or semi-public building is entered, the statute requires that, in addition to and independent of an express order to leave the premises, there exists some additional specific factor establishing the lack of a legal right to remain, such as posted regulations, signs, fences, or barricades.").

Morris also fails to show that any obvious error affected his substantial rights to such a degree as to undermine the fairness and integrity of his trial.[5] To the contrary, Morris's trial counsel agreed to it,

[5] Morris errs in suggesting (at 26) that any error should be reviewed for harmlessness beyond a reasonable doubt. Instead, as explained herein, his claim is reviewable at most for plain error. In any event, for the reasons herein, any error was not prejudicial under any standard of review.

which suggests any error was not prejudicial. *Perez v. United States*, 968 A.2d 39, 80 (D.C. 2009) ("Although a failure to object promptly is not dispositive of the issue of prejudice . . . it constitutes some evidence that appellants did not immediately perceive the challenged argument as prejudicial." (quoting *Parks v. United States*, 451 A.2d 591, 613 (D.C.1982) (internal citations omitted))).

In addition, as Morris concedes (at 27-29), there was ample argument to the jury regarding this additional specific factor requirement. In his closing argument, Morris's trial counsel explained to the jury, "For our public institutions, the Government has to take one step further, and that means that you have to provide – because I have the First Amendment right. You have to provide me something great[er] than just someone on a whim telling me I have to leave." (4/20/23 Tr. 163). In response, the government never argued to the jury that the Supreme Court police's command to Morris to leave was sufficient, independent of any legal right to remain, to convict him of unlawfully remaining on public property (see 4/19/23 Tr. 115-17; 4/20/23 Tr. 147-58, 167-68). Instead, the government's closing argument took up Morris's challenge, outlining in its rebuttal what that "something greater" was (4/20/23 Tr.

167-68). *See Griffin v. United States*, 144 A.3d 34, 39 (D.C. 2016) (instructional error on reasonable doubt standard failed third prong of plain error test where "both parties acknowledged the government's burden in their closing arguments"); *Kidd v. United States*, 940 A.2d 118, 128 (D.C. 2007) (instructional error on mens rea requirement for first-degree murder failed third prong of plain error test where "the government emphasized premeditation and deliberation at the outset and end of its case before the jury"). As the government explained, and the evidence supported, Morris was violating a Clerk's Office policy by trying to file a petition directly in the Clerk's Office "without it being screened outside in the [police] booth" (4/20/23 Tr. 167-68). The government also explained that Morris "wasn't asking questions anymore" but was instead "standing there refusing to leave" and "caus[ing] a disruption" (*id.*).

Nor did the jury convey any confusion about the meaning of Morris's "lack of a legal right to remain." *See (Henry) Brown v. United States*, 881 A.2d 586, 597 (D.C. 2005) ("There are no notes from the jury indicating that the jurors were confused in any way."); *Johnson v. United States*, 840 A.2d 1277, 1280 (D.C. 2004) ("no further notes sent to the

court indicating any confusion"). The only note they sent was about the meaning of a defendant's "good faith belief" of his right to remain and whether it was different from a "reasonable belief" (4/21/23 Tr. 3). Once the court properly instructed the jury that a good faith belief must also be reasonably held (4/21/23 Tr. 11-14), the jury shortly thereafter returned a guilty verdict (*id.* at 15-16). Accordingly, the jury's guilty verdict indicates that the jury found the requirement met. *Wilson v. United States*, 785 A.2d 321, 328 (D.C. 2001) ("we see not even a hint that the jury misunderstood the elements of aggravated assault" where "the jury sent no note to the judge requesting clarification").

The jury's lack of confusion is unsurprising, as the government presented overwhelming evidence of an additional specific factor establishing Morris's lack of a legal right to remain in the Clerk's Office. Supreme Court police officers and Clerk's Office personnel explained that non-attorneys are not permitted to deliver any paperwork, including petitions for certiorari, directly to the Clerk's Office (4/19/23 Tr. 132; 4/20/23 Tr. 21). This Clerk's Office policy is a "reasonable means of achieving the legitimate governmental interest of providing enhanced security" in an important government building, *Abney v. United States*,

616 A.2d 856, 859 (D.C. 1992); *see also Leiss*, 364 A.2d at 808 ("Within the acknowledged power to impose neutral regulations upon activity otherwise protected by the First Amendment is a state's ability to control the manner in which the general public may use public property."). For security reasons, all Supreme Court filings by non-attorneys must be placed in a plastic bag at the police booth, sealed, taken off-site, tested to ensure there is no harmful material inside, and brought back to the Supreme Court by a police officer to be filed in the Clerk's Office after being deemed safe (4/19/23 Tr. 135; 4/20/23 Tr. 21). Morris does not dispute that this was a permissible exercise of their authority, and with good reason. This Court has declined to "substitute [its] judgment for that" of Supreme Court police officers, *Powell*, 563 A.2d at 1091, who reasonably determined that the best way to ensure security for Supreme Court personnel was to not permit hand delivery of filings by non-attorneys in the Clerk's Office. *See Abney*, 616 A.2d at 860 ("We cannot substitute our judgment for that of the Capitol Police, the responsible body, which determined that restrictions on all, instead of just some, individuals were required to protect the perimeters of the Capitol under the circumstances.").

Moreover, this Clerk's Office policy was clearly stated at the entrance to the building and by personnel who attempted to assist Morris. Signs that place limits on the public's use of government property are a quintessential "additional specific factor." *See Boertje v. United States*, 569 A.2d 586, 590-91 (D.C. 1989) (sign at visitor's entrance stating that "any activity that disrupts the tour or impedes the flow of pedestrian traffic is prohibited"); *Leiss*, 364 A.2d at 807 (sign on gate restricting visiting hours); *Whittlesey v. United States*, 221 A.2d 86, 89 (D.C. 1966) (sign informing appellants of White House regular visiting hours). Even absent a sign communicating that policy, an established policy may be an additional specific factor sufficient to establish lack of legal authority to remain. *Hemmati v. United States*, 564 A.2d 739, 743 (D.C. 1989) (relying on "established policy in Senator Byrd's office" that "citizens from other states were referred as a matter of course to their own Senators"). At trial, neither the existence of the Clerk's Office policy prohibiting delivery of filings directly to the Clerk's Office, nor the degree to which Morris had notice of it, was ever called into question. The Supreme Court Clerk's Office is similar to a Senator's office or the White House complex in that it "require[s] order and efficiency for the day-to-day performance of vital

and often sensitive administrative activities," *id.* at 744 (quoting *Leiss*, 364 A.2d at 808). The Clerk's Office handles important and time-sensitive filings of the utmost national significance (see 4/19/23 Tr. 158) and requires order and efficiency in the performance of its duties.

The Clerk's Office staff also repeatedly emphasized to Morris that he had an easily available alternative to file his petition: delivering it to the police booth outside the Supreme Court building to be tested for hazardous substances and then filed. Supreme Court Police officers told Morris to leave the Clerk's Office to deliver his petition outside at least five times (4/19/23 Tr. 150; 4/20/23 Tr. 50), before eventually telling him, "If you don't leave, we will arrest you" (4/19/23 Tr. 150; 4/20/23 Tr. 29, 50). This Court has "universally discredited" the argument "that persons petitioning or expressing themselves on public property are authorized to do so whenever and wherever they see fit." *Leiss*, 364 A.2d at 809; *see also O'Brien*, 444 A.2d at 948 ("The First Amendment does not guarantee appellant the right to communicate his views at all times and places or in any manner he wishes."). Where an "equally effective alternative means of communicating their message" is available, this Court will not find a violation of the First Amendment. *Smith v. United States*, 445 A.2d

961, 967 (D.C. 1982); *see also Leiss*, 364 A.2d at 808 ("Given the alternative means available to appellant for the continued exercise of his rights . . . we perceive no infringement of protected expression[.]").

Morris cites no authority finding substantial harm, especially one undermining the fairness and integrity of the trial, in comparable circumstances. Instead he speculates (at 24-26) that despite this evidence, the jury might have instead found that in refusing to leave he was merely "persisting in his business-related goals"; that in not asking questions he nonetheless remained there to ask questions; and that in refusing to follow the proper filing procedure, and instead refusing to leave while angrily demanding that employees be arrested, and then challenging the officers to arrest him, he was not being "disruptive." But such conjecture falls short of meeting the third and fourth prongs of the plain error test, particularly where the contrary evidence was overwhelming. *Williams v. United States*, 210 A.3d 734, 744 (D.C. 2019) (under third prong of plain error review, "an appellant must show 'more than a mere possibility of prejudice,' so as to support a determination that the error in fact 'undermines confidence in the trial's outcome.'" (quoting *Jones v. United States*, 202 A.3d 1154, 1168 (D.C. 2019))));

(Henry) Brown, 881 A.2d at 597-98 (instructional error claim fails third and fourth prongs of plain error review where "there is nothing in the record" to suggest jurors were confused and evidence was very strong). Morris was repeatedly told that he could not achieve his purported business purpose, i.e., filing personally in the Clerk's office, but instead must submit his filing to the guard station outside. And as the government emphasized in its rebuttal (4/20/23 Tr. 167), although the Clerk's Office allowed people to ask questions about their cases, Morris was not actually asking any questions about his case that day. Instead, he refused to deal with Barnes, the case analyst who was trying to assist him, angrily stating, "You're not my attorney. You're not an attorney. Don't touch my shit." (4/19/23 Tr. 139.) Indeed, Morris claimed on cross-examination that his "primary goal" on January 14, 2020, was to "file a petition for writ of certiorari" before the Supreme Court (4/20/23 Tr. 112) and conceded that he did not ask Barnes any questions about Supreme Court rules that day (*id.* at 117). Notwithstanding Morris's suggestion (at 25), the fact that Morris saw the word "Inquiry" on the Clerk's Office door (4/20/23 Tr. 83) does not mean he actually inquired about anything in the Clerk's Office at any point on January 14, 2020, or that he refused

to leave so that he could ask questions. Accordingly, he cannot assert a First Amendment right to remain in the Clerk's Office for that purpose. *Boertje*, 569 A.2d at 589 (without engaging in any kind of communication, "officers had no way of knowing why [appellant] knelt down on the tour path and refused to leave when asked three times to do so," so "there was no need to prove an additional specific factor"). Morris therefore fails to show that any obvious error affected his substantial rights in a way that seriously affected the fairness, integrity, or public reputation of judicial proceedings.

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the Superior Court should be affirmed.

Respectfully submitted,

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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, Thomas G. Burgess, Esq., on this 7th day of August, 2024.

/s/
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