Appeal Nos. 20-CO-728 & 23-CO-724

DISTRICT OF COLUMBIA COURT OF APPEALS

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C.P.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the Superior Court of the District of Columbia
Criminal Division

# REDACTED BRIEF FOR APPELLANT

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## DISCLOSURE STATEMENT

In Appeal No. 20-CO-728, appellant was represented in the Superior Court by Reginald Williamson of the Public Defender Service. Appellee was represented by Assistant United States Attorneys Margaret J. Chriss and Daniel Friedman.

In Appeal No. 23-CO-724, appellant was represented in the Superior Court by Lee R. Goebes of the Public Defender Service. Appellee was represented by Assistant United States Attorneys Margaret J. Chriss, Peter S. Smith, and Joseph Drummey.

The Honorable Laura A. Cordero presided over both cases. On appeal, appellant is represented in both cases by Samia Fam, Jaclyn S. Frankfurt, Alice Wang, and Lee R. Goebes of the Public Defender Service. Appellee is represented by Assistant United States Attorney Chrisellen R. Kolb.

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## ISSUES PRESENTED

1. Whether appellant's conviction for sodomy must be vacated pursuant to D.C. Code § 23-110, where: (a) the conviction was obtained under the since-repealed, "unconstitutionally overbroad" sodomy statute, *Valdez v. United States*, No. 18-CF-1340, 2024 WL 3819296, at *30 (D.C. Aug. 15, 2024), without a jury finding beyond a reasonable doubt that the charged act was forcible, nonconsensual, or anything other than constitutionally protected sexual conduct between consenting adults; and (b) appellant's constitutional claim, although previously raised in a pro se § 23-110 motion, was not previously considered and denied "on the merits," and in any event required reconsideration to serve "the ends of justice," *Vaughn v. United States*, 600 A.2d 96, 97 (D.C. 1991).

2. Whether appellant can be subject to lifetime sex offender registration based on his conviction for sodomy and the Superior Court's finding by a preponderance of the evidence that the sodomy was "forcible," D.C. Code § 22-4001(6)(A), where: (a) sex offender registration is a "severe penalty" that triggers the Sixth Amendment right to a jury trial, *Fallen v. United States*, 290 A.3d 486, 489 (D.C. 2023), and thus may not be imposed based on a fact found by a judge instead of a jury; (b) procedural due process requires a standard of proof higher than a preponderance of the evidence when the risk of error threatens significantly greater harm to the individual than to the government; and (c) the record in this case did not permit a reasonable factfinder to conclude by even a preponderance of the evidence that the sodomy was "forcible."

## STATEMENT OF THE CASE AND JURISDICTION

On October 3, 1979, a grand jury indicted appellant C.P.[1] on two counts of rape, in violation of former D.C. Code § 22-2801 (1973) (repealed), and two counts of sodomy, in violation of former D.C. Code § 22-3502 (1973) (repealed). App. 1–2.[2] On March 11, 1980, after a jury trial before the Honorable Sylvia Bacon, the jury convicted Mr. P. of oral sodomy and acquitted him of all other charges. *Id.* at 12. Judge Bacon sentenced Mr. P. to three to nine years in prison. *Id.* at 3.

On August 20, 2018, Mr. P. filed a motion pursuant to D.C. Code § 22-4004 challenging the determination of the Court Services and Offender Supervision Agency (CSOSA) that he was subject to lifetime sex offender registration under the Sex Offender Registration Act of 1999 (SORA) based on his sodomy conviction. *Id.* at 73. On June 16, 2020, the Honorable Laura A. Cordero denied the motion in a written order that was subsequently vacated and reentered on December 1, 2020. *Id.* at 93, 101. Mr. P. filed a timely notice of appeal in Case No. 20-CO-728. *Id.* at 103.

On September 27, 2021, Mr. P. filed a motion pursuant to D.C. Code § 23-110 challenging the constitutionality of his sodomy conviction. *Id.* at 105. On August 4, 2023, Judge Cordero denied the motion in a written order. *Id.* at 117. Mr. P. filed a timely notice of appeal in Case No. 23-CO-0724. *Id.* at 123.

This Court consolidated the two appeals on October 2, 2023. This Court has jurisdiction pursuant to D.C. Code § 11-721(a)(1).

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[1] Appellant has filed a motion to recaption this case using his initials, as this Court has done with other appeals challenging sex offender registration.

[2] Citations to "App. *" refer to page numbers marked in the Appendix for Appellant, which includes portions of the appellate records in these consolidated cases.

## STATEMENT OF FACTS

### I. Overview

More than forty years ago, appellant C.P. and his cousin Roy Leasure were jointly tried on two counts of rape and two counts of sodomy for allegedly forcing eighteen-year-old G.D. to engage in vaginal, oral, and anal sex on June 12, 1979. At that time, rape was defined as the forcible, nonconsensual penetration of the vulva by the penis, and sodomy was defined as the penetration of the mouth or the anus by the penis, regardless of whether the participants consented to the act. *See* Criminal Jury Instructions for the District of Columbia §§ 4.74, 4.79 (3d ed. 1978).

The main factual dispute at trial was whether the sexual activity was forcible or consensual. Ms. D. told the jury that, after she accepted a ride from Mr. P. and Mr. Leasure around 1:00 a.m. on June 12, 1979, the men drove her to Congressional Cemetery and forced her to engage in vaginal intercourse with each of them, as well as oral and anal sodomy with Mr. P. App. 12–13 (citing Tr. 100–06); *id.* at 40 (citing Tr. 100–07).[3] Testifying in his own defense, Mr. P. conceded having vaginal and oral sex with Ms. D. but maintained that all sexual activity was consensual and did not include anal sodomy. *Id.* at 16, 40. At the close of the evidence, the defense requested a jury instruction on a consent defense to sodomy, arguing that substantive due process precluded the government from criminalizing consensual sexual activity

[3] Because the trial transcript was no longer available by the time the postconviction motions in this case were litigated, App. 96 n.1, the court relied on descriptions of the trial testimony contained in the appellate briefing, which included citations to the then-available transcript, *id.* at 96–99 (citing Mr. P.'s appellate brief (Ex. B) and the government's motion for summary affirmance (Ex. 6)). This brief does the same.

between adults. *Id.* at 16–17, 40. The trial court denied the request and "instructed the jury pursuant to the standard jury instructions," *id.* at 17, that while force and nonconsent were essential elements of rape, consent was "not a defense to sodomy," and it was "immaterial whether or not [the complainant] consented to the act alleged in the indictment." Criminal Jury Instructions §§ 4.74, 4.79. Thus instructed, and apparently crediting Mr. P.'s account of consensual vaginal and oral sex but no anal sex, the jury acquitted Mr. P. of rape and anal sodomy, and convicted him of oral sodomy. App. 17, 40.

After being released on parole in 2018, Mr. P. filed postconviction motions challenging both his sodomy conviction and the requirement that he register as a sex offender based on that conviction. *Id.* at 73, 105. Notwithstanding the jury's apparent determination that the charged sodomy was consensual and not forcible, Judge Cordero (who did not preside over the jury trial) found that the court records presented by the government—in particular, a police report and a preliminary hearing transcript describing Ms. D.'s out-of-court statements to the police—proved by a preponderance of the evidence that the oral sodomy was "forcible." *Id.* at 96–99. Based on that judicial finding, and without a jury finding beyond a reasonable doubt that the charged sodomy was anything other than constitutionally protected sexual conduct between consenting adults, Judge Cordero rejected Mr. P.'s constitutional challenge to his sodomy conviction, *id.* at 121, and ordered lifetime sex offender registration based on his conviction for sodomy "where the offense was *forcible*," *id.* at 94 (quoting D.C. Code § 22-4001(6)(A), and adding emphasis); *id.* at 99–100. This consolidated appeal challenges those rulings.

II. The Trial, Judgment, and Direct Appeal

Ms. D. testified at trial that, on the evening of June 11, 1979, she went to a drive-in movie and smoked some marijuana with her cousin Janet and her friend Al White. App. 12 (citing Tr. 81–83). Around midnight, they went back to Mr. White's apartment, and after Ms. D. refused to have sex with Mr. White, he drove the two women to the intersection of Southern Avenue and Wheeler Road and dropped them off there. *Id.* (citing Tr. 84). Around 1:00 a.m., while Ms. D. and her cousin were waiting at a bus stop, a car driven by Mr. P. approached, and one of the passengers, Mr. Leasure, offered her a ride home. *Id.* at 12, 40 (citing Tr. 87–89). Ms. D. accepted the offer, leaving her cousin at the bus stop and telling her, "I will call you when I get home, or wherever I end up at." *Id.* at 12, 14 (quoting Tr. 143). Ms. D. sat in the back seat of the car next to a female passenger, Sheila Barnes. *Id.* at 12 (citing Tr. 90). After Ms. D. passed around a marijuana cigarette, Mr. P. drove to a store to buy some beer. *Id.* He then drove Ms. Barnes home because she was not feeling well. *Id.* at 12–13 (citing Tr. 94). Ms. D. testified that, after dropping off Ms. Barnes, Mr. P. drove toward Congressional Cemetery, which he said was "where we do our business." *Id.* at 13 (citing Tr. 98–99). On the way to the cemetery, Ms. D. told the men that she had been beaten, robbed, and raped earlier in the evening, which she later told the jury was a lie. *Id.* at 14 (citing Tr. 176–77). Ms. D. testified that, when they reached "'all the way to the back' of the cemetery," *id.* at 13 (quoting Tr. 99), where "she could not see any houses, lights or other people," the men asked if she would "trick" for them, and she said "no," *id.* at 13 (citing Tr. 100). According to Ms. D., the men "ordered" her to undress, and Mr. P. "forced her to submit to anal

and oral sodomy and finally intercourse" in the back seat of the car. *Id.* at 13 (citing Tr. 103–05); *id.* at 40 (citing Tr. 100–05). Afterward, Mr. Leasure led her to a blanket on the ground near the car, "where he slapped her and engaged in intercourse." *Id.* at 13 (citing Tr. 105–06); *id.* at 40 (citing Tr. 105–07). Mr. Leasure then woke up Mr. P., who had fallen asleep inside the car, and Mr. P. drove her home. *Id.* at 13.

Mr. P. testified in his own defense. *Id.* at 16, 40. He recounted that, after they dropped off Ms. Barnes, Ms. D. asked if they would "like to go someplace dark, finish getting high[.]" *Id.* at 16 (quoting Tr. 403). Mr. P. "interpreted this comment to be an invitation for sexual activity and proceeded to drive to the cemetery." *Id.* According to Mr. P., Ms. D. "readily consented to sexual conduct"—first with him, and then with Mr. Leasure. *Id.* Mr. P. admitted to engaging in vaginal and oral sex with Ms. D. but denied engaging in anal sex. *Id.* at 16 (citing Tr. 404); *id.* at 40 (citing Tr. 404–06, 428–31). After Mr. P. and Ms. D. had sex in the car, Ms. D. left the car to have sex with Mr. Leasure, and Mr. P. fell asleep. *Id.* at 16. Mr. P. testified that Ms. D. "voluntarily participate[d] in all the sexual activity of that evening." *Id.* (citing Tr. 405). Mr. Leasure did not testify at trial. *Id.* at 16, 40.

Ms. D. testified that the men dropped her off at home around daybreak, between 5:00 and 6:00 a.m., and that "she had to be home before her mother got up." *Id.* at 13, 15. About fifteen minutes after she arrived home, the phone rang, and her mother answered. *Id.* at 13. Ms. D. picked up another extension and recognized the caller as Mr. Leasure. *Id.* According to Ms. D., Mr. Leasure knew her phone number because he had searched her purse and written down her phone number and address during the drive from the cemetery. *Id.* at 13–14 (citing Tr. 110). When her mother

told the caller that Ms. D. was not home, Mr. Leasure volunteered that he had just driven her home. *Id.* at 14. Ms. D. then hung up the phone. *Id.* She did not tell her mother at that time that she had been raped, and instead went to sleep. *Id.*

When she woke up around noon, Ms. D. called her cousin Janet and told her she had been raped. *Id.* While on the phone with Janet, she received a call from Mr. Leasure, who asked her to meet him at Sixth and Chesapeake Streets. *Id.* Janet then told their cousin William Graham that Ms. D. had been sexually assaulted, and Ms. D. later called Mr. Graham to tell him the same. *Id.* (citing Tr. 116).

Around 3:00 p.m., Ms. D. and several of her cousins arrived at Sixth and Chesapeake to meet Mr. Leasure. *Id.* As Mr. Graham confronted Mr. Leasure, a police car drove by, and Ms. D. told the police for the first time "what had happened." *Id.* (quoting Tr. 120). The police arrested Mr. Leasure at that time. *Id.* (citing Tr. 319). Ms. D. accompanied the police to Congressional Cemetery and pointed out the location of the alleged assault, *id.* at 15 (citing Tr. 329), but she refused to undergo a medical or forensic examination, *id.* (citing Tr. 193–94).

Mr. Leasure's aunt, Wilemina Lawson, testified that Ms. D. had come to her house alone looking for Mr. Leasure about an hour before he was arrested. *Id.* at 16 (citing Tr. 374–75). Ms. D. denied doing so. *Id.* at 15 (citing Tr. 192).

After being instructed that force and nonconsent were essential elements of rape but not of sodomy, *see supra* pp. 3–4, the jury acquitted Mr. P. of rape and anal sodomy (which he had denied), and convicted him of oral sodomy (which he had effectively conceded in the absence of his requested consent defense). *Id.* at 17, 40. The jury also acquitted Mr. Leasure of all charges. *Id.* at 17, 40.

On June 19, 1980, Judge Bacon sentenced Mr. P. to a prison term of three to nine years. *Id.* at 3. On appeal, Mr. P. challenged the constitutionality of his sodomy conviction, arguing that the sodomy statute's criminalization of consensual sexual conduct between adults violated substantive due process, and thus the trial court erred in refusing to instruct the jury on his consent defense. *Id.* at 11, 18–19. The government moved for summary affirmance, arguing that Mr. P.'s constitutional claim was foreclosed by this Court's then-binding case law. *Id.* at 39. On October 19, 1981, a two-judge panel of this Court summarily affirmed Mr. P.'s sodomy conviction in an unpublished judgment. *Id.* at 46.

III. Postconviction Litigation

On March 4, 1982, Mr. P. filed a motion to reduce his sentence pursuant to Rule 35 of the Superior Court Rules of Criminal Procedure, arguing that the jury's verdicts reflected its determination that the sodomy was consensual. *Id.* at 49–50. Judge Bacon denied the motion on March 9, 1982. *Id.* at 56.

On December 22, 2004, after the D.C. Council decriminalized consensual sodomy between adults in the Right to Privacy Amendment Act of 1993, and after the U.S. Supreme Court held in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), that a conviction for consensual sodomy between adults violated substantive due process, Mr. P. filed a pro se motion pursuant to D.C. § 23-110 to vacate his sodomy conviction on both statutory and constitutional grounds. App. 57. He contended not only that "the new statute" entitled him to the consent instruction he had requested at trial, *id.* at 60, but that his conviction for sodomy was "unconstitutional" because it rested on "nothing other than consentual [sic] acts between two adults," *id.* at 61.

The Honorable Brian F. Holeman denied the pro se motion without appointing counsel or holding a hearing. Although the court acknowledged in its written order that Mr. P. had raised both statutory and constitutional claims, *id.* at 65–66, the court resolved only the statutory claim, ruling that the Right to Privacy Amendment Act of 1993 did not apply retroactively to Mr. P.'s case, *id.* at 68–69.

After Mr. P. was released on parole on June 15, 2018, CSOSA determined that he was subject to lifetime sex offender registration based on his conviction for "Sodomy (against an adult)." *Id.* at 71–72. On August 20, 2018, Mr. P. filed a motion pursuant to D.C. Code § 22-4004 challenging CSOSA's determination, arguing that his conviction for sodomy did not require him to register under SORA because the jury did not find that he committed sodomy "by force," and sodomy "without force" is not a registration offense. *Id.* at 73–75. In opposing the § 22-4004 motion, the government presented two police reports, a preliminary hearing transcript, and its motion for summary affirmance, arguing that "the record in the case demonstrates, by at least a preponderance, that the defendant committed forcible oral sodomy." *Id.* at 78–81. On June 16, 2020, Judge Cordero denied the § 22-4004 motion, finding that the court records presented by the government proved by a preponderance of the evidence that the sodomy was "forcible," *id.* at 96, and ordered Mr. P. to register as a sex offender for the rest of his life, *id.* at 100.

On September 27, 2021, Mr. P. filed a second § 23-110 motion to vacate his conviction, this time represented by counsel. He argued that the Supreme Court's decision in *Lawrence* made clear that his sodomy conviction was unconstitutional, *id.* at 110: not only did "the terms of the statute" fail "to require the government to

prove everything the Constitution requires it to prove for a criminal sanction to be imposed," *id.* at 111–12 (quoting *Conley v. United States*, 79 A.3d 270, 277 (D.C. 2013)), but the jury instructions permitted him to be "convicted of oral sodomy without any jury finding that the act was non-consensual," *id.* at 114. On August 4, 2023, Judge Cordero denied the § 23-110 motion, ruling that Mr. P.'s constitutional claim was "procedurally barred" as "successive" because it had been previously raised in his pro se § 23-110 motion and "denied on the merits" by Judge Holeman, *id.* at 119–20, and that, even if not procedurally barred, the claim failed on the merits because, in ordering him to register as a sex offender, the court had found by a preponderance of the evidence that the sodomy was "*forcible*," and *Lawrence* was "inapplicable to nonconsensual oral sodomy in a public space," *id.* at 121.

## SUMMARY OF ARGUMENT

Appellant's sodomy conviction must be vacated because the former sodomy statute was unconstitutionally overbroad, and the jury instructions permitted him to be convicted of nothing more than constitutionally protected sexual conduct between consenting adults. That claim was not procedurally barred as "successive" because, although it was previously raised pro se, it was not previously considered and denied on the merits, and "the ends of justice" required it to be redetermined in any event.

Even if appellant's sodomy conviction is upheld, the order subjecting him to lifetime sex offender registration, based on a judicial finding by a preponderance that the sodomy was "forcible," must be reversed. Because sex offender registration is a "severe penalty" that triggers the Sixth Amendment right to a jury trial, appellant was entitled to have a jury, not a judge, find the requisite fact of force. He was also

entitled to have that finding made by more than a preponderance of the evidence because, as the individual and government interests at stake have changed over time, procedural due process now requires that the government bear a greater share of the risk of error in a § 22-4004 proceeding. Finally, reversal is required because the court records presented by the government in the § 22-4004 proceeding were insufficient as a matter of law to prove by even a preponderance that the sodomy was "forcible."

## ARGUMENT

### I. Appellant's Conviction Must Be Vacated Under D.C. Code § 23-110.

#### A. Appellant's Sodomy Conviction Is Unconstitutional.

Mr. P.'s conviction must be vacated because it was obtained under the since-repealed, "unconstitutionally overbroad" sodomy statute, *Valdez v. United States*, No. 18-CF-1340, 2024 WL 3819296, at *30 (D.C. Aug. 15, 2024), without a jury finding beyond a reasonable doubt that the charged act was anything other than constitutionally protected conduct. At the time of Mr. P.'s charged conduct in 1979, "[t]he District's former sodomy statute, which was repealed in 1995, made it a felony offense," punishable by up to ten years in prison, "to engage in oral or anal sex, regardless of the circumstances." *Id*.[4] "The statute criminalized not only sexual

[4] *See* D.C. Code § 22-3502(a) (1973) (repealed) ("Every person who shall be convicted of taking into his or her mouth or anus the sexual organ of any other person or animal, or who shall be convicted of placing his or her sexual organ in the mouth or anus of any other person or animal, or who shall be convicted of having carnal copulation in an opening of the body except sexual parts with another person, shall be fined not more than $1,000 or be imprisoned for a period not exceeding ten years. Any person convicted under this section of committing such act with a person under the age of sixteen years shall be fined not more than $1,000 or be imprisoned for a period not exceeding twenty years.").

assaults and other predatory, nonconsensual acts, but also private acts of sodomy between consenting adults." *Id.*; *see Harley v. United States*, 373 A.2d 898, 901 (D.C. 1977) ("consent is not a defense to the crime of sodomy"). Thus, "pursuant to the standard jury instructions" and this Court's case law at the time of trial, App. 17, 40, the trial court instructed the jury that consent was "immaterial" to the offense of sodomy. Criminal Jury Instructions for the District of Columbia § 4.79 (3d ed. 1978).

Ten years after the D.C. Council amended the sodomy statute in the Right to Privacy Amendment Act of 1993 to exclude consensual sodomy between adults, the Supreme Court held in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), that a sodomy conviction for private sexual conduct between consenting adults violated substantive due process. More than two decades later, this Court held in *Valdez* that, in light of *Lawrence*, the District's former sodomy statute was unconstitutionally "overbroad on its face" because "it categorically banned acts of sodomy regardless of consent." *Valdez*, 2024 WL 3819296, at *31.[5] In choosing a remedy for this constitutional defect, however, the Court declined to invalidate the former sodomy statute "in its entirety," as the appellant in *Valdez* had been indicted and convicted "specifically for nonconsensual sodomy,"[6] and it was "clear" from *Lawrence* that "there is no constitutional right to engage in nonconsensual sodomy," which "remains subject to prosecution." *Id.* at *30, *32. Seeking "not to nullify more of a legislature's work

[5] The sodomy in *Valdez* occurred in 1991, before the statute was amended in 1993.

[6] In *Valdez*, appellant was charged with oral sodomy "while armed with a firearm," and "without the consent of [the complainant]," and the trial court "instructed the jury that the government had to prove that appellant committed the act of sodomy without [the complainant's] consent (and while armed with a firearm)." *Id.* at *30.

than is necessary," *id.* at *31 (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006)), this Court chose to "save" part of the former sodomy statute by "reading in a missing element" of nonconsent, explaining that it had "no doubt" that the legislature "would prefer" that the Court "uphold application of the sodomy statute" to nonconsensual sodomy instead of "leaving such conduct possibly immune from prosecution (if the conduct was committed when the statute was in force)," *id.* at *31, *32.[7] Because the jury in *Valdez* had been instructed that "the government had to prove that appellant committed the act of sodomy without [the complainant's] consent (and while armed with a firearm)," this Court rejected appellant's claim that his sodomy conviction was unconstitutional. *Id.* at *30, *32.

This case requires a different result. Here, unlike in *Valdez*, the jury was not instructed that nonconsent was an essential element of sodomy that the government was required to prove beyond a reasonable doubt. To the contrary, the trial court instructed the jury that, unlike the offense of rape, which required proof that "the act was committed forcibly and against the will of the complaining witness," Criminal Jury Instructions § 4.74, it was "immaterial" to the offense of sodomy "whether or not [the complainant] consented to the act alleged in the indictment," *id.* § 4.79.

[7] That narrowing construction was consistent with the Right to Privacy Amendment Act of 1993, which amended the sodomy statute to exclude consensual sodomy between persons over the age of consent, but retained the statute's proscription of nonconsensual sodomy and sodomy with persons under the age of consent. *See* D.C. Law 10-14 (1993) ("No act engaged in only by consenting persons 16 years of age or older shall constitute an offense under this section."); *Augustin v. United States*, 240 A.3d 816, 827 (D.C. 2020) (explaining that sixteen years is "the age of consent" for "common law sexual assault offenses").

Thus, unlike in *Valdez*, Mr. P. was convicted of sodomy without a jury finding that he engaged in anything other than constitutionally protected conduct.

In rejecting Mr. P.'s constitutional challenge to his sodomy conviction, Judge Cordero erred in relying on her own finding "by a preponderance of [the] evidence" that the sodomy was "forcible." App. 121. Because the former sodomy statute's unconstitutional overbreadth required "reading in a missing element" of nonconsent, *Valdez*, 2024 WL 3819296, at *31, Mr. P. was constitutionally entitled to have a jury determine that essential element of the offense beyond a reasonable doubt, just as he requested at trial. *See United States v. Gaudin*, 515 U.S. 506, 522–23 (1995) ("The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged."); *Hasty v. United States*, 669 A.2d 127, 133 (D.C. 1995) ("Where a narrowing construction or interpretation has been placed by a court upon a statute that, absent the narrowing construction, might otherwise be unconstitutional in some respect, that narrowing construction or interpretation, upon request and where supported by the evidence, must be the subject of proof at trial and should be submitted to the trier of fact for its determination." (citing *Gaudin*, 515 U.S. at 518–19)).

The trial court's failure to instruct the jury on the constitutionally necessary element of nonconsent was an error of constitutional dimension that requires vacatur of Mr. P.'s conviction, as the government cannot show "beyond a reasonable doubt" that the error "did not contribute to the verdict." *Neder v. United States*, 527 U.S. 1, 15 (1999) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). Here, where Ms. D. testified that Mr. P. forced her to engage in vaginal, oral, and anal sex; where

Mr. P. conceded having vaginal and oral sex with Ms. D. but testified that the sexual activity was consensual and did not include anal sex; and where the jury was instructed that nonconsent was an essential element of rape but not of sodomy, the jury's acquittals on rape and anal sodomy but conviction on oral sodomy strongly imply that it credited Mr. P.'s account over Ms. D.'s. *See Robinson v. United States*, 100 A.3d 95, 109 (D.C. 2014) (inferring from acquittals on offenses that required intent to kill, and convictions on offenses that did not require intent to kill, that "the jury credited [the defendant's] testimony that she did not mean for [the decedent] to be killed"). "Judging by the jury's verdict" and the trial court's explicit admonition that consent was immaterial to the offense of sodomy, it is at least "reasonably possible," and indeed highly probable, that the jury found Mr. P. guilty of oral sodomy without finding beyond a reasonable doubt that the act was nonconsensual. *Id.* at 108. Here, "where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding," "the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Neder*, 527 U.S. at 19. Accordingly, the sodomy conviction must be vacated.

To the extent that Judge Cordero rejected Mr. P.'s constitutional claim based on evidence that the sodomy "took place in public, in Congressional Cemetery," App. 121, that ruling was likewise erroneous. Although the trial record in *Valdez* established that the sodomy took place in Langdon Park, *Valdez*, 2024 WL 3819296, at *1–*2, this Court did not rely on that evidence to uphold the appellant's sodomy conviction, as the jury was not instructed to determine whether the sodomy was committed "in public," and the Court had no occasion to consider whether the

unconstitutionally overbroad sodomy statute could be partially "saved" by limiting its application to consensual sex between adults in public. *Id.* at *30–*32.

Neither *Lawrence* nor "the legislative design" permits this Court to adopt such a limiting construction here. *Id.* at *31. Unlike in *Valdez*, where it was "clear and undisputed that there is no constitutional right to engage in *nonconsensual* sodomy," *id.* at *30 (emphasis added), it is not at all clear from *Lawrence* that the setting of Mr. P.'s conduct—inside his own car, parked "all the way [in] the back" of Congressional Cemetery, away from any "houses, lights or other people," and under cover of darkness during the small hours of the morning, App. 13 (citing Tr. 99–100)—stripped his inherently private sexual conduct of all constitutional protection from government intrusion.[8] Although the Supreme Court noted in *Lawrence* that the sodomy in that case took place in "the most private of places, the home," it did not hold or even suggest that "the most private of human conduct, sexual behavior," loses all constitutional protection from government interference when it takes place outside the home. 539 U.S. at 567. Rather, in holding that substantive due process protects "a realm of personal liberty which the government may not enter," the Court explained that "[f]reedom extends beyond spatial bounds," and "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." *Id.* at 562, 578. Thus, "as a general rule," the government may not intrude into "the personal and private life of the individual" by criminalizing "a

[8] *Cf. Biles v. United States*, 101 A.3d 1012, 1024 (D.C. 2014) (holding that appellant maintained reasonable expectation of privacy in items located "in a 'public' market" but not "exposed to public view").

particular sexual act," "absent injury to a person or abuse of an institution the law protects." *Id.* at 567, 578.

Even if *Lawrence* can be read to mean that the inherent privacy of sexual conduct loses constitutional protection from government intrusion at some point on the spatial spectrum between the home and the town square, this Court cannot use its remedial powers to limit the overbroad sodomy statute on this point because *Lawrence* does not make "clear" where the "dividing line" must be drawn. *Valdez*, 2024 WL 3819296, at *32; *see Ayotte*, 546 U.S. at 329 ("Our ability to devise a judicial remedy that does not entail quintessentially legislative work depends on how clearly we have already articulated the background constitutional rules at issue and how easily we can articulate the remedy."). May the government prohibit consensual sex between adults in a hotel room? In a tent pitched on a public campground? In a car parked on public property? Distinguishing between "private" and "public" sexual conduct in this "murky constitutional context" is no "simple matter" and requires "a 'far more serious invasion of the legislative domain' than [this Court] ought to undertake." *Ayotte*, 546 U.S. at 330.

Moreover, even if it were obvious from *Lawrence* where to draw the line between public and private sexual conduct, this Court still could not hold that the District's sodomy statute remains validly applicable to consensual sodomy between adults in public, because such a remedy would impermissibly "circumvent the intent of the legislature." *Valdez*, 2024 WL 3819296, at *32. Unlike in *Valdez*, where this Court had "no doubt" that the legislature would prefer the sodomy statute to remain applicable to nonconsensual sodomy, which "always was (and still is) permissibly

proscribed" as a serious felony, *id.* at *32, here the legislature has specifically *rejected* the application of the sodomy statute to consensual sex between adults in public, and has treated such conduct as a petty misdemeanor at most.

In the Right to Privacy Amendment Act of 1993, the D.C. Council recognized, even before *Lawrence* was decided, that the District's criminalization of all sodomy violated the constitutional right to privacy, and accordingly amended the sodomy statute to exclude consensual sodomy between persons above the age of consent, even if committed "in public." *See supra* note 7. Likewise, when the D.C. Council repealed the sodomy and rape statutes and replaced them with statutes punishing various degrees of nonconsensual and forcible sexual acts by up to life in prison, *see* Anti-Sexual Abuse Act of 1994, D.C. Law 10-257 (1995), it did not enact a statute specifically punishing consensual sodomy (or any other sexual act) between adults in public. The Council did not specifically proscribe such conduct until it enacted the Disorderly Conduct Amendment Act of 2010, D.C. Law 18-375 (2011), which amended the indecent exposure statute to prohibit committing a "sexual act" "in public"—a misdemeanor punishable by up to ninety days of incarceration, D.C. Code § 22-1312, and prosecuted in the name of the District of Columbia under D.C. Code § 23-101(c).[9] Even then, the Council made clear that "in public" means not

[9] *See* Council of the District of Columbia, Report on Bill 18-425, at 7 (2010). Prior to this amendment, the government "sometimes . . . charged persons having sex in public places with disorderly conduct under the catch-all subsection of [D.C. Code] § 22-1321," *id.* at 82, which prohibited "act[ing] in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others," D.C. Code § 22-1321(a) (2009). Because such language was vague and potentially unconstitutional, the Council eliminated it in the Disorderly Conduct Amendment Act of 2010, and

merely outside the home or on public property, but "in open view; before the people at large; not in private or secrecy." Report on Bill 18-425, *supra* note 9, at 7. In other words, after recognizing that the sodomy statute violated the right to privacy, and after eliminating any distinction in the D.C. Code between sodomy and other sexual acts, the legislature made the policy determination that, while forcible and predatory sexual acts are among the most serious crimes in the District, consensual sexual acts between adults in public should not be punished as a ten-year felony under the sodomy statute, and instead should be punished only as a ninety-day misdemeanor under the indecent exposure statute, and only then if committed "in open view" and "before the people at large." In the face of that legislative determination, any attempt by this Court to "save" the former sodomy statute by "reading in a missing element" of commission "in public" would exceed "the limits of the judicial function" and "usurp the prerogatives of the legislature." *Valdez*, 2024 WL 3819296, at *31.

Finally, even if this Court were to "save" the overbroad sodomy statute by "reading in a missing element" of commission "in public," Mr. P.'s sodomy conviction could not be upheld on that basis, as the jury was not instructed on that constitutionally necessary element of the offense, and that error was not harmless.

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amended the indecent exposure statute to "specifically prohibit sexual acts in public." Report on Bill 18-425, at 7. Prior to that amendment, the indecent exposure statute did not include the words "in public" and had been interpreted to prohibit "indecent exposure committed both in a public setting and a private one." *Parnigoni v. District of Columbia*, 933 A.2d 823, 829 (D.C. 2007). And although a previous version of the indecent exposure statute also prohibited engaging in "lewd, indecent, or obscene acts," that language was invalidated as unconstitutionally vague in *District of Columbia v. Walters*, 319 A.2d 332, 337 (D.C. 1974), and repealed in the Omnibus Public Safety Amendment Act of 2006, D.C. Law 16-306 (2007).

To avoid punishing more conduct than intended by the legislature, this Court would need to limit the statute's proscription of "public" sodomy to acts committed "in open view" and "before the people at large," not merely outside the home or on public property. Here, where the government's own evidence at trial established that the oral sex took place in the back seat of Mr. P.'s car, parked "all the way [in] the back" of the cemetery where the road "dead-ended," away from "any houses, lights or other people," and during the dark hours between midnight and daybreak, App. 13–15 (citing Tr. 99–100 and quoting Tr. 329), it is at least "reasonably possible," and in fact highly likely, that the jury found Mr. P. guilty of oral sodomy without finding that he committed the act in public view, and purposely or knowingly so.[10] *Robinson*, 100 A.3d at 108. Accordingly, the sodomy conviction must be vacated.

B. Appellant's Constitutional Claim Was Not Procedurally Barred.

Contrary to Judge Cordero's ruling, Mr. P.'s § 23-110 motion to vacate his conviction was not "procedurally barred as a successive motion," App. 119, and the denial of the motion cannot be affirmed on that alternative ground. The District's local habeas statute, like its former federal counterpart, provides that a court "shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." D.C. Code § 23-110(e); *Sanders v. United States*, 373 U.S. 1, 6 (1963) (construing same language in former 28 U.S.C. § 2255). This permissive—

[10] Because "the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct," *Perez Hernandez v. United States*, 286 A.3d 990, 1001 (D.C. 2022) (en banc), the government would be required to prove that Mr. P. intended or knew that his act of oral sodomy was "in open view" and "before the public at large."

not mandatory—procedural bar on successive habeas motions reflects the common-law principle that, although "res judicata is inapplicable in habeas proceedings," the court's action "on the second application will naturally be affected" by "the fullness of the consideration given to" the first application. *Sanders*, 373 U.S. at 8, 9. Thus, "'[c]ontrolling weight *may* be given' to the denial of a prior application for collateral relief on the same ground if that denial was *on the merits*, unless the *ends of justice* require that the claim be considered anew." *Vaughn v. United States*, 600 A.2d 96, 97 (D.C. 1991) (emphases added) (quoting *Sanders*, 373 U.S. at 15); *see Sanders*, 373 U.S. at 12 ("The judge is permitted, not compelled, to decline to entertain [a successive] application, and then only if he is satisfied that the ends of justice will not be served by inquiring into the merits." (quotation marks omitted)).

Here, although Judge Cordero correctly ruled that Mr. P.'s constitutional claim was previously raised in his pro se § 23-110 motion, she erred in ruling that it was "denied on the merits" by Judge Holeman. App. 119–20. As Judge Holeman himself recognized, Mr. P.'s pro se motion raised both statutory and constitutional challenges to his sodomy conviction, arguing that it violated "the new statute" decriminalizing consensual sodomy, *id.* at 60, and that it was "unconstitutional" because it punished "nothing other than consentual [sic] acts between two adults," *id.* at 61. *See id.* at 65–66 (noting that Mr. P. argued that "the Right to Privacy Amendment Act of 1993 [was] retroactive," and that his sodomy conviction was "unconstitutional" because "the trial judge lacked authority to convict or punish consensual sodomy in the first place"). But in denying the pro se motion in a seven-page written order, Judge Holeman devoted the entirety of his discussion and

analysis to resolving the statutory claim, ruling that the Right to Privacy Amendment Act of 1993 did not apply retroactively. *Id.* at 67–69. Although the order concluded with a single sentence stating that, "[i]n summary, Petitioner fails to establish grounds indicating that the sentence imposed was in violation of the Constitution of the United States or the laws of the District of Columbia," or any other grounds for relief under § 23-110, *id.* at 69, nothing in the preceding six pages of the order discussed the merits of Mr. P.'s *constitutional* claim or otherwise indicated that Judge Holeman had fully considered and adjudicated that claim. In contrast to its discussion of the case law governing the retroactivity of statutes, *id.* at 67–69, for example, the order did not even mention the Supreme Court's decision in *Lawrence*, much less discuss how that watershed decision affected Mr. P.'s conviction.

In ruling that Mr. P.'s constitutional claim was previously "denied on the merits," Judge Cordero erred in relying solely on Judge Holeman's stray reference to "the Constitution" in the concluding sentence of his order, *id.* at 120–21, as that reference appeared in the context of boilerplate language merely quoting the statutory grounds for relief under D.C. Code § 23-110,[11] and the Supreme Court has

[11] *See* App. 69 ("In summary, Petitioner fails to establish grounds indicating that the sentence imposed was in violation of the Constitution of the United States or the laws of the District of Columbia, that the trial court was without jurisdiction to impose the sentence, that the sentence was in excess of the maximum authorized by law, or that the sentence is otherwise subject to collateral attack."); D.C. Code § 23-110(a) ("A prisoner in custody under sentence of the Superior Court claiming the right to be released upon the ground that (1) the sentence was imposed in violation of the Constitution of the United States or the laws of the District of Columbia, (2) the court was without jurisdiction to impose the sentence, (3) the sentence was in excess of the maximum authorized by law, (4) the sentence is otherwise subject to collateral attack, may move the court to vacate, set aside, or correct the sentence.").

held that a prior denial "on the merits" requires more than simply stating that the claim is meritless. In *Sanders*, the seminal Supreme Court decision construing the procedural bar on successive habeas motions, the order denying the first motion stated in a footnote that the court had "reviewed the entire file" and was "of the view that petitioner's complaints are without merit in fact." *Id.* Despite this language, the Supreme Court held that the denial was "not on the merits"—and thus did not procedurally bar a second motion raising the same legal claim—because it did not address the "crucial" factual allegations made in the second motion in support of the claim. *Id.* Thus, the Supreme Court refused to elevate form over substance when deciding whether a claim for habeas relief was previously denied "on the merits."

The same principle applies here. Because Judge Holeman's denial of Mr. P.'s pro se motion rested solely on his consideration and rejection of the statutory claim, and did not actually address or resolve the constitutional claim, Judge Cordero could not refuse to entertain the merits of Mr. P.'s constitutional claim merely because the concluding sentence in Judge Holeman's order referred to "the Constitution." Such reliance on "magic words" to bar a claim for habeas relief is contrary to Supreme Court precedent and does not serve the judicial interest in preventing prisoners from relitigating claims "already fully considered on a prior motion and decided against [them]." *Sanders*, 373 U.S. at 9. No finality is preserved, and no deference is warranted, if the judicial mind did not actually pass on the issue.

Mr. P.'s constitutional claim could not be denied as procedurally barred in any event because "the ends of justice" required that it be "considered anew." *Vaughn*, 600 A.2d at 97. Because the "primary purpose of § 23-110 is to enable convicted

prisoners to escape the shackles of res judicata when constitutional rights have been violated," a court may not refuse to entertain a previously denied claim for § 23-110 relief if doing so would thwart "the ends of justice," as any interest in finality of litigation is outweighed by the interest in correcting a prisoner's "unconstitutional sentence." *Kirk v. United States*, 510 A.2d 499, 503–04 (D.C. 1986).[12]

In this case, "the ends of justice" required Judge Cordero to redetermine the merits of Mr. P.'s constitutional claim, for at least two reasons. First, even if Judge Holeman had actually considered and decided the constitutional claim raised in Mr. P.'s pro se § 23-110 motion, he did so without the benefit of the legal arguments and analysis of constitutional authority (including the Supreme Court's pivotal decision in *Lawrence*) presented in the second § 23-110 motion, App. 110–15, as Mr. P.'s incarceration and lack of legal training prevented him from developing and presenting these "crucial point[s] [and] argument[s] in the prior application," *Sanders*, 373 U.S. at 17. Recognizing that legal counsel is essential to the factual development of a claim for § 23-110 relief, and that a § 23-110 hearing litigated without the benefit of counsel is not "full and fair," *id.*, but rather "flawed" and "defective," *Brown v. United States*, 656 A.2d 1133, 1135–36 (D.C. 1995), this

[12] *Sanders* identified two examples of when "the ends of justice" require a court to redetermine a previously denied claim for habeas relief: "If factual issues are involved, the applicant is entitled to a new hearing upon showing that the evidentiary hearing on the prior application was not full and fair . . . . If purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application." *Sanders*, 373 U.S. at 16–17. The Court emphasized, however, that these examples are not "exhaustive," and the test for determining "the ends of justice" "cannot be too finely particularized." *Id.* at 17.

Court has held that "where a [§ 23-110] movant is without legal counsel in the earlier proceeding, under circumstances where he was entitled to have counsel appointed," the first petition "may not serve as a bar to a successive § 23-110 petition," and "the ends of justice require that the claim be considered anew," *id.* at 1136 (quoting *Vaughn*, 600 A.2d at 97) (brackets omitted). That principle is no less applicable when a § 23-110 motion raises "purely legal questions," *Sanders*, 373 U.S. at 17, as a "prisoner, unlearned in the law, may not comply with the State's procedural rules or may misapprehend the substantive details of federal constitutional law," and the assistance of counsel is as essential to the development and presentation of legal arguments as it is to the development and presentation of factual evidence. *Martinez v. Ryan*, 566 U.S. 1, 12 (2012); *see Evitts v. Lucey*, 469 U.S. 387, 393 (1985) ("[T]he services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits."). Because Mr. P. lacked the assistance of counsel necessary to develop and present "crucial point[s] [and] argument[s]" in support of the constitutional claim raised in his first § 23-110 motion, "the ends of justice" required that his claim be redetermined in light of the points and arguments made in his second § 23-110 motion. *Sanders*, 373 U.S. at 17.

Second, and even more fundamentally, "the ends of justice" required that Mr. P.'s constitutional claim be considered anew because, if meritorious, it established that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Schlup v. Delo*, 513 U.S. 298, 327 (1995); *see Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986) ("Even where, as here, the many judges who have reviewed the prisoner's claims in several proceedings . . . have determined that his

trial was free from constitutional error, a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated."); *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992) (explaining that the "actual innocence" or "miscarriage of justice" exception to the procedural bar on successive motions is derived from "the ends of justice" language in the original federal habeas statute). "To establish actual innocence, petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him" in the absence of the constitutional error. *Bousley v. United States*, 523 U.S. 614, 623 (1998) (quoting *Schlup*, 513 U.S. at 327–28) (quotation marks omitted). As Mr. P. contended at trial, on direct appeal, in his Rule 35 motion, in his first § 23-110 motion, in his second § 23-110 motion, and in the instant appeal, his conviction for sodomy was unconstitutional because the jury instructions permitted him to be convicted of "nothing other than consentual [sic] acts between two adults," App. 61—conduct that the Supreme Court and this Court have now held to be innocent conduct that is beyond the power of the legislature to punish. And as explained above, *supra* pp. 14–15, the verdicts strongly implied that the jury credited Mr. P.'s account of consensual sex and "probably" would have acquitted him of oral sodomy, just as it acquitted him of rape, if it had been instructed that nonconsent was an essential element of sodomy. *Schlup*, 513 U.S. at 327.

Because Mr. P.'s constitutional challenge to his sodomy conviction was not previously denied "on the merits," and in any event required redetermination on the merits to serve "the ends of justice," this Court may not affirm Judge Cordero's denial of the § 23-110 motion on the ground that the motion was procedurally barred.

II. The Order Requiring Sex Offender Registration Must Be Reversed.

Even if this Court does not vacate Mr. P.'s sodomy conviction, it must still reverse the § 22-4004 order requiring lifetime sex offender registration. Unlike most sex offenses, a conviction for sodomy does not, by itself, trigger any requirements under SORA. Rather, because SORA generally does not apply to "offenses that are non-assaultive and that do not involve minors," *In re W.M.*, 851 A.2d 431, 436 n.2 (D.C. 2004), sodomy is a "registration offense" only "where the offense was forcible or committed against a minor," D.C. Code § 22-4001(8)(B), and it is a "lifetime registration offense" only "where the offense was forcible" or "committed against a person under the age of 13 years," *id.* § 22-4001(6)(A), (B). In cases where registration depends on facts "not apparent" from the conviction, SORA provides for "dispute resolution procedures in the Superior Court," *id.* § 22-4004(a)(1)(A), where the government bears the burden of persuasion, *W.M.*, 851 A.2d at 453.[13]

In this case, it was not "apparent" from Mr. P.'s conviction for sodomy that "the offense was forcible" because the jury was not instructed that force was an element of sodomy. In fact, the jury acquitted Mr. P. of all counts requiring the use or threat of force, and its verdicts strongly implied that it credited Mr. P.'s account of consensual sex over Ms. D.'s account of forcible sex. *See supra* pp. 14–15.

[13] There is inherent tension between SORA's provision that a person has "committed a registration offense" only when "*convicted* or found not guilty by reason of insanity of a *registration offense*," D.C. Code § 22-4001(3)(A)(i) (emphases added), and its provision that sodomy is a "registration offense" only when committed under certain circumstances that "cannot be determined from the elements of the offense" and thus are not "apparent from" the conviction, *id.* § 22-4001(6), (8); *id.* § 22-4004(a)(1)(A); Council of the District of Columbia, Report on Bill 13-350, at 10 (1999).

Accordingly, Mr. P. filed a § 22-4004 motion challenging CSOSA's determination that he was subject to lifetime sex offender registration based on his conviction for "Sodomy (against an adult)," App. 72, arguing that "the jury" did not find that the sodomy was committed "by force," and sodomy "without force" is "not a registrable offense," *id.* at 74–75. Rejecting Mr. P.'s claim that he was not "convicted" of a "registration offense" because "the jury" did not find that the sodomy was "forcible," *id.*, Judge Cordero ruled that Mr. P. was subject to lifetime sex offender registration based on her own finding that "the evidence presented by the Government" in the § 22-4004 record—in particular, a police report (Ex. 1) and a preliminary hearing transcript (Ex. 3) describing Ms. D.'s out-of-court statements to the police—proved "by a preponderance of evidence that Defendant committed forcible sodomy." *Id.* at 96–99. That ruling must be reversed because, as explained below, its reliance on judicial factfinding by a mere preponderance of the evidence violated the Sixth Amendment guarantee of trial by jury and the Fifth Amendment guarantee of procedural due process, and the evidence in the § 22-4004 record was insufficient to prove by even a preponderance that the sodomy was "forcible."

A. The Requisite Finding of Force Must Be Made by a Jury, Not a Judge.

The Sixth Amendment's guarantee of trial by jury in criminal prosecutions is "fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). The Framers of the Constitution understood "from history and experience" that "plenary powers over the life and liberty of the citizen" could not be entrusted to "judges too responsive to the voice of higher authority," and that the right of an accused to have "a jury of his peers" test "the truth of every accusation"

provided an "inestimable safeguard" against "oppression by the Government." *Id.* at 151, 155–56. As the Supreme Court held in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Sixth Amendment right to trial by jury includes the right to have a jury—not a judge—determine all "facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Id.* at 490.[14] Thus, even after a defendant is tried and convicted of a criminal offense by a jury of his peers, the Sixth Amendment continues to protect him from any increase in the authorized penalty for that offense based on a fact found by a judge, rather than a jury. *Id.*; *see also S. Union Co. v. United States*, 567 U.S. 343, 346 (2012) (applying *Apprendi* to judicial factfinding that increased the authorized fine for a criminal offense).

Although the Supreme Court has yet to define exactly what it means to be a "penalty" under *Apprendi*,[15] it has held that "the relevant question is the significance of the [penalty] from the perspective of the Sixth Amendment's jury trial guarantee." *S. Union Co.*, 567 U.S. at 352. The Sixth Amendment's guarantee of trial by jury "in

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[14] The only exception to this rule is "the fact of a prior conviction," *Apprendi*, 530 U.S. at 490, which "must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees," *Jones v. United States*, 526 U.S. 227, 249 (1999).

[15] *See, e.g.*, *S. Union Co.*, 567 U.S. at 350 (noting that *Apprendi* and its progeny "broadly prohibit judicial factfinding that increases maximum criminal 'sentences,' 'penalties,' or 'punishment'—terms that each undeniably embrace fines'" (brackets omitted)); *Hester v. United States*, 139 S. Ct. 509, 509, 511 (2019) (Gorsuch, J., dissenting from denial of cert.) (opining that *Apprendi* requires a jury to "find all the facts needed to justify a restitution order" because, although restitution is "a civil remedy that compensates victims for their economic losses," it is a "penalty" that is "imposed as part of a defendant's criminal conviction" and thus implicates the Sixth Amendment right to trial by jury in "all criminal prosecutions" (brackets and quotation marks omitted)).

all criminal prosecutions," U.S. CONST. amend. VI, has long been held, despite its broad language, to apply only to crimes that are considered "serious," not "petty," as measured by the "severity of the maximum authorized penalty" for the offense. *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 541 (1989); *see Duncan*, 391 U.S. at 160 (explaining that "petty offenses" were tried without juries at common law, and "the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications"). Where a penalty for a criminal offense "is so insubstantial that the underlying offense is considered 'petty,' the Sixth Amendment right of jury trial is not triggered, and no *Apprendi* issue arises." *S. Union Co.*, 567 U.S. at 350 (citing *Blanton*, 489 U.S. at 541). But where a penalty for an offense "is substantial enough to trigger that right, *Apprendi* applies in full." *Id.* at 352.

Here, the *Apprendi* rule "applies in full" because, as this Court held in *Fallen v. United States*, 290 A.3d 486 (D.C. 2023), sex offender registration is a "penalty" for a criminal offense that is "severe" enough to trigger the Sixth Amendment right to a jury trial under *Blanton*. *Id.* at 489, 499. In reaching that holding, this Court first explained in *Fallen* that its prior contrary case law rested on the false assumption that a "penalty" for purposes of the Sixth Amendment right to a jury trial must be punitive, rather than regulatory, in intent or effect—the test for whether a statute imposes criminal "punishment" for purposes of the Ex Post Facto and Double Jeopardy Clauses of the Fifth Amendment. *Fallen*, 290 A.3d at 493–94. That faulty premise was overruled en banc in *Bado v. United States*, 186 A.3d 1243 (D.C. 2018)

(en banc), which held that a "penalty" implicating the Sixth Amendment's jury trial guarantee need not be intended as "punishment," *Fallen*, 290 A.3d at 494 (citing *Bado*, 186 A.3d at 1252–54), and instead may include a "civil and regulatory measure," such as deportation, that "attaches to a criminal conviction" and is "enmeshed" in the criminal proceeding, *id.* at 494–95 (quoting *Bado*, 186 A.3d at 1254, 1258 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010))). As the Court explained in *Bado*, "analysis under the Sixth Amendment guarantee to a jury trial is fundamentally different from analysis under the Fifth Amendment's Ex Post Facto and Double Jeopardy Clauses because of differences in the constitutional text and rights protected," *id.* at 494 (quoting *Bado*, 186 A.3d at 1258 n.31), and the "civil/criminal" distinction is "unhelpful in the Sixth Amendment analysis" when a civil sanction like deportation forms "an integral part—indeed, sometimes the most important part—of the penalty that may be imposed" for the offense, *id.* (quoting *Bado*, 186 A.3d at 1254 (quoting *Padilla*, 559 U.S. at 364)). Applying these principles in *Fallen*, this Court held that sex offender registration is a "penalty" for purposes of the *Blanton* analysis because it is even more "enmeshed in the criminal proceeding" than deportation, as "it is a direct, statutorily mandated requirement that follows ineluctably from conviction and is ordered by the trial court that imposes sentence." *Id.* at 495 (citing D.C. Code § 22-4003).

This Court went on to hold in *Fallen* that, like deportation, the "penalty" of sex offender registration is "severe" enough to require the safeguard of a jury trial under the Sixth Amendment. *Id*. The Court explained that, although SORA's registration requirement does not impose "'physical restraints' like incarceration," it

has "serious negative consequences for registrants and their families, including for their social relationships, education, employment, and psychological health." *Id.* at 496. It "identifies the registrant as dangerous and disseminates information to the public that allows them to be shunned and denied opportunities to live and work in their communities," causing "economic, family, social, and psychological harms" that are "intrinsic to SORA's design" and "distinct from [the harms] resulting from the underlying conviction." *Id.* at 496–98. The severity of this panoply of harms is exacerbated by the lengthy duration of the registration requirement: a "ten-year minimum—and in some cases [a] lifetime." *Id.* at 495. The Court thus concluded that SORA "imposes serious negative consequences on the registrant to such an extent that the protection of the Sixth Amendment guarantee to a jury trial should be interposed before the registration requirement is triggered by conviction." *Id.* at 499.

Here, Judge Cordero's order certifying Mr. P. as a sex offender must be reversed as a violation of the Sixth Amendment because it increased the authorized penalty for his sodomy conviction—from no sex offender registration to lifetime sex offender registration—based on a finding of force made by the judge rather than the jury. That constitutional error was not harmless beyond a reasonable doubt because, as explained above, *supra* pp. 14–15, it is at least "reasonably possible" and in fact highly likely that, if the jury had been instructed to determine whether the sodomy was "forcible," it would have found that it was not.[16] Accordingly, this Court should

[16] Although Mr. P.'s § 22-4004 motion "did not invoke [*Apprendi*] by name," the claim he raised in the Superior Court—that he was not subject to sex offender registration because "the jury" did not make the requisite finding of force, App. 74–75—bore "the clear hallmarks of [an *Apprendi*] claim" and preserved his Sixth

reverse the § 22-4004 order and instruct the Superior Court to enter an order pursuant to § 22-4004(c)(2) certifying that Mr. P. is not required to register under SORA.

### B. The Requisite Finding of Force Must Be Made by More Than a Mere Preponderance of the Evidence.

Even if this Court were to conclude that the Sixth Amendment does not require a jury to make the requisite finding of force before the severe penalty of lifetime sex offender registration may be imposed for a sodomy conviction, it must still reverse the Superior Court's § 22-4004 order because its finding of force by a mere "preponderance of [the] evidence," App. 96, violated procedural due process.

The standard of proof required by due process "turns on a balancing of the 'three distinct factors' specified in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976): the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting

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Amendment claim for appellate review. *Biles*, 101 A.3d at 1018. Even if Mr. P.'s Sixth Amendment claim were unpreserved, however, the error still requires reversal on plain error review. Not only does this Court's decision in *Fallen* make the error "plain" or "clear under current law," *Conley*, 79 A.3d at 289–90 ("the plainness of the error can depend on well-settled legal *principles* as much as well-settled legal *precedents*" (quotation marks omitted)), but if this Court "finds error" in this case, "the error by definition is plain *at* the time of appellate consideration and clear under *current* law," *Thomas v. United States*, 914 A.2d 1, 21 (D.C. 2006) (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)) (emphases in *Thomas*). The error "affected substantial rights" because, as explained above, *supra* pp. 14–15, there is at least a "reasonable probability" that the jury would have found the sodomy not "forcible" if it had been instructed to decide that issue. *Long v. United States*, 83 A.3d 369, 379 (D.C. 2013). And in cases where an *Apprendi* error was prejudicial, this Court has uniformly held that the error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings" and required reversal on plain error review. *Id.* at 383–84; *Keels v. United States*, 785 A.2d 672 (D.C. 2001).

use of the challenged procedure." *Santosky v. Kramer*, 455 U.S. 745, 754 (1982) (parallel citation omitted). The Supreme Court has mandated a heightened standard of proof—at least "clear and convincing evidence"—when the individual interests at stake "are both 'particularly important' and 'more substantial than mere loss of money.'" *Id.* at 756 (quoting *Addington v. Texas*, 441 U.S. 418, 424 (1979)). Because a heightened standard of proof "reduce[s] factual error without imposing substantial fiscal burdens upon the State," and because the government shares the individual's interest "in an accurate and just decision at the *factfinding* proceeding," an "individual should not be asked to shared equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." *Id.* at 766–68 (quoting *Addington*, 441 U.S. at 427) (quotation marks omitted). Thus, the Supreme Court has deemed a heightened standard of proof "necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with 'a significant deprivation of liberty' or 'stigma,'" including civil commitment, deportation, denaturalization, and termination of parental rights. *Id.* at 756 (quoting *Addington*, 441 U.S. at 425–26); *see Addington*, 441 U.S. at 425–26 (emphasizing that involuntary commitment based on a finding of dangerousness "can engender adverse social consequences to the individual" that "can have a very significant impact on the individual").[17]

[17] Likewise, this Court has held that a heightened standard of proof is "necessary when dealing with issues having 'far-reaching effects on individuals,' or where the consequences of a court's decision will be severe." *In re K.I.*, 735 A.2d 448, 463 (D.C. 1999) (quoting *In re J.S.R.*, 374 A.2d 860, 864 (D.C. 1977)).

This Court held in *W.M.* that, because "the individual liberty interests at stake" in a § 22-4004 proceeding are not "fundamental ones for purposes of substantive due process," and because the government has a "compelling interest in protecting the public from sex offenses committed by recidivists," the government "should not bear a disproportionate share of the risk of error," and proof by a preponderance satisfies procedural due process. *W.M.*, 851 A.2d at 453, 455. That balancing of interests, however, is "not graven in stone" for purposes of stare decisis. *Wolff v. McDonnell*, 418 U.S. 539, 572 (1974). As the Supreme Court has explained, procedural due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances," *Mathews*, 424 U.S. at 334, and changes in the factual circumstances over time will necessarily "require further consideration and reflection of this Court," and may result in the conclusion that more process is due. *Wolff*, 418 U.S. at 572; *see also Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992) (explaining that stare decisis does not require adherence to a court's prior legal rule when the "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification"). Here, the factual circumstances and the judicial understanding of the competing interests at stake in a § 22-4004 proceeding have substantially changed in the twenty years since *W.M.* was decided, requiring this Court to reconsider what process is due.

In weighing the individual liberty interest at stake, *W.M.* considered only the "nontrivial" burden of registering with CSOSA and periodically verifying and updating one's registration information, 851 A.2d at 450–51, 453, and disregarded the panoply of "economic, family, social, and psychological harms" that result from

the "social stigma" imposed by SORA, *Fallen*, 290 A.3d at 496–97. It did so based on the Supreme Court's finding in *Smith v. Doe*, 538 U.S. 84 (2003), that "[t]he record in [that] case contain[ed] no evidence that [SORA] has led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred through the use of routine background checks by employers and landlords," *id.* at 100, and thus any "lasting and painful" impacts of sex offender registration flow "not from [SORA]'s registration and dissemination provisions, but from the fact of conviction, already a matter of public record," *W.M.*, 851 A.2d at 444 & n.15 (quoting *Smith*, 538 U.S. at 101). But as this Court and other courts have recognized in the twenty years since *Smith* and *W.M.* were decided, "[e]xtensive social science research" now shows that "sex offender registration has serious negative consequences for registrants" in nearly every aspect of their lives, *Fallen*, 290 A.3d at 497 & n.5 (citing research), and that such harm is "*distinct* from that resulting from the underlying conviction," *id.* at 498 (emphasis added) (citing *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 62 A.3d 123, 142 (Md. 2013); *Doe v. State*, 189 P.3d 999, 1011 (Alaska 2008)); *see also id.* (noting that the District's online sex offender registry "publishes more personal information than what would otherwise be easily accessible in public court records" and "is searchable by the registrant's name and location," "making it easier for community members to identify and avoid offenders"). Based on this new information not previously considered in *Smith* and *W.M.*, this Court held in *Fallen* that the harm to individual liberty imposed by SORA is not limited to the "nontrivial" burden of registering with CSOSA, *W.M.*, 851 A.2d at 453, but also includes "the social stigma and other real-life consequences of sex

offender registration," *Fallen*, 290 A.3d at 497. As the Court explained in *Fallen*, "sex offender registration identifies the registrant as dangerous and disseminates information to the public that allows them to be shunned and denied opportunities to live and work in their communities"—a harm analogous to the "expulsion from the community" rendered by the "geographical separation" of deportation or the "custodial segregation" of incarceration. *Id.* at 496–98 (quoting *Doe*, 62 A.3d at 142); *see Addington*, 441 U.S. at 425–26 (emphasizing the "stigma" and "adverse social consequences to the individual" caused by involuntary commitment based on finding of dangerousness). In the case of lifetime sex offender registration, the harm is permanent and irreversible, as SORA provides no mechanism for an individual to be removed from the registry based on a finding that he is no longer dangerous. *See* D.C. Code § 22-4002(d) ("a sex offender shall not be eligible for relief from the registration requirements); *Santosky*, 455 U.S. at 758 ("Whether the loss threatened by a particular type of proceeding is sufficiently grave to warrant more than average certainty on the part of the factfinder turns on both the nature of the private interest threatened and the permanency of the threatened loss."). Because a finding of force in a § 22-4004 proceeding threatens the individual "with 'a significant deprivation of liberty' or 'stigma'" for the rest of his life, due process requires that finding to be made by more than a mere preponderance. *Santosky*, 455 U.S. at 756.

Recent factual and legal developments also shed new light on the government interest at stake in a § 22-4004 proceeding. In assessing the weight of that interest in *W.M.*, this Court relied on the Supreme Court's observation in *Smith* that "the risk of recidivism posed by sex offenders is frightening and high," *W.M.*, 851 A.2d at

445 (quoting *Smith*, 538 U.S. at 103) (brackets and quotation marks omitted), and found that the "government's compelling interest in protecting the public from sex offenses committed by recidivists" weighs against requiring the government to "bear a disproportionate share of the risk of error" in a § 22-4004 proceeding, *id.* at 455. But in the two decades that have passed since *Smith* and *W.M.* were decided, courts around the country have recognized that new empirical research not only casts "significant doubt" on the oft-repeated but unsubstantiated assumption that sex offenders pose a high risk of recidivism, but also demonstrates that sex offender registration "has, at best, no impact on recidivism," and may even "*increase* the risk of recidivism" "by making it hard for registrants to get and keep a job, find housing, and reintegrate into their communities." *Does #1–5 v. Snyder*, 834 F.3d 696, 704–05 (6th Cir. 2016).[18] Moreover, because the legislature has determined that an individual convicted of *nonforcible* sodomy poses no heightened danger to the community and thus should not be on the sex offender registry, the government shares the individual's interest "in an accurate and just decision at the *factfinding* proceeding" on whether the sodomy was forcible. *Santosky*, 455 U.S. at 766.

[18] *See also People v. Betts*, 968 N.W.2d 497, 514 (Mich. 2021) (finding that a "growing body of research" supports the proposition that "sex offenders are actually less likely to recidivate than other offenders" and that "sex-offender registries have dubious efficacy in achieving their professed goals of decreasing recidivism"); *State v. Grady*, 831 S.E.2d 542, 565 (N.C. 2019) (finding that "the only actual evidence concerning the threat posed by the recidivism of sex offenders tends to suggest that sex offender recidivism rates are *not* unusually high" and are in fact "lower than those sentenced for assault or robbery" (emphasis added)); *In re T.B.*, 489 P.3d 752, 768 (Colo. 2021) (finding that "a number of studies indicate that registration requirements have no statistically significant effect on reducing recidivism rates among offenders" and "may actually increase crime").

Because an erroneous finding of force at a § 22-4004 proceeding threatens far more harm to the individual than to the government, "a near-equal allocation of risk" between the parties is "constitutionally intolerable," *id.* at 768, and Judge Cordero's imposition of a registration requirement based on a finding of force by a mere preponderance of the evidence was constitutional error.[19]

If this Court agrees that procedural due process requires a heightened standard of proof and "finds error" in this case, "the error by definition is plain *at* the time of appellate consideration and clear under *current* law," *Thomas*, 914 A.2d at 21 (quoting *Olano*, 507 U.S. at 734) (emphases in *Thomas*), and this Court should

[19] This Court need not decide in this case which heightened standard of proof—"clear and convincing evidence" or "proof beyond a reasonable doubt"—is required by procedural due process because, as demonstrated below, *infra* pp. 40–50, the evidence in the § 22-4004 record was insufficient to satisfy even the preponderance standard, much less any heightened standard of proof. Should this Court reach that question, however, it should hold that, when the government seeks to attach lifetime sex offender registration to a sodomy conviction based on a finding that "the offense was forcible," procedural due process requires the finding to be made "beyond a reasonable doubt," no matter who the factfinder may be. Although that exacting standard should not be applied "too broadly or casually in non-criminal cases," *Santosky*, 455 U.S. at 768 (quoting *Addington*, 441 U.S. at 428), its application is appropriate here, where sex offender registration is "enmeshed in the criminal proceeding," *Fallen*, 290 A.3d at 495, and where the sole inquiry is whether the charged sexual act was "forcible"—a "straightforward factual question" that the government is frequently required to prove beyond a reasonable doubt in criminal prosecutions for sexual assaults. *Addington*, 441 U.S. at 429–30 (explaining that the findings of mental illness and future dangerousness required at a civil commitment hearing are medical and psychological judgments that are not susceptible to proof "beyond a reasonable doubt"); *Santosky*, 455 U.S. at 768–69 (explaining that termination of parental rights depends on "issues difficult to prove to a level of absolute certainty, such as lack of parental motive, absence of affection between parents and child, and failure of parental foresight and progress").

reverse the § 22-4004 order on plain error review. The error affected "substantial rights" because, given the weakness of the unsworn, unconfronted, uncorroborated hearsay evidence presented by the government in the § 22-4004 litigation, *see infra* pp. 40–50, there is at least a reasonable probability that the factfinder would have reached a different result under a heightened standard of proof, and this Court has held that, under such circumstances, reversal is warranted on plain error review. *In re Taylor*, 268 A.2d 522, 524 (D.C. 1970). Because the evidence in the § 22-4004 record was insufficient as a matter of law to prove that the sodomy was "forcible" under any heightened standard of proof, *see infra* pp. 40–50, a remand to apply a heightened standard is unnecessary. Accordingly, this Court should reverse the § 22-4004 order and remand with instructions to certify pursuant to § 22-4004(c)(2) that Mr. P. is not required to register as a sex offender.

C. The Evidence of Force Was Insufficient.

Regardless of the correct standard of proof, Judge Cordero's § 22-4004 order requiring sex offender registration must be reversed because the evidence in the § 22-4004 record was insufficient as a matter of law to prove that the oral sodomy was "forcible," even by a preponderance of the evidence.[20] As explained below, the only evidence in the § 22-4004 record of what force Mr. P. used or threatened against Ms. D. was Ms. D.'s unsworn, unconfronted statement to the police that Mr. P.

[20] This Court has never construed what it means for sodomy to be "forcible" in the context of SORA, D.C. Code § 22-4001(6)(A), but the term "forcibly" in the former rape statute, D.C. Code § 22-2801, was construed to require use of "physical force" or "threats which put [the complainant] in reasonable fear of death or grave bodily harm." Criminal Jury Instructions for the District of Columbia § 4.74 (3d ed. 1978).

"threatened to beat her up if she didn't cooperate" with his sexual advances. App. 82, 97 (citing Ex. 3). That uncorroborated hearsay was contradicted by Mr. P.'s sworn trial testimony, which the jury apparently credited after observing the live testimony of both Mr. P. and Ms. D., whose credibility was substantially impeached at trial. On this record, no reasonable factfinder could find by a preponderance of the evidence that Mr. P. used or threatened force against Ms. D., and Judge Cordero's finding of force was "clearly erroneous" and must be reversed.

As this Court has explained, "a preponderance of the evidence" is "evidence which is *of greater weight* or *more convincing* than the evidence presented in opposition to it," and which "as a whole shows that the fact sought to be proved is more probable than not." *In re E.D.R.*, 772 A.2d 1156, 1160 (D.C. 2001) (emphases added) (quoting *Preponderance of the Evidence*, BLACK'S LAW DICTIONARY (6th ed. 1990)). A finding of fact is "clearly erroneous" when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Murphy v. McCloud*, 650 A.2d 202, 209–10 (D.C. 1994) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). While "credibility assessments derived from personal observations of the witnesses" are generally "beyond appellate reversal" because this Court has no opportunity to observe the witnesses' demeanor for itself, the same is not true of credibility determinations based on "documents or objective evidence," *Stringer v. United States*, 301 A.3d 1218, 1227–28 (D.C. 2023) (brackets omitted), and this Court "will not sustain findings in which the trial court has rejected or failed to draw the inferences which [this Court finds] inescapable from the record as a whole,"

*Murphy*, 650 A.2d at 210 (brackets and quotation marks omitted). "Moreover, findings induced by, or resulting from, a misapprehension of controlling substantive legal principles lose the insulation of" the "clearly erroneous" standard, and "a judgment based thereon cannot stand." *Id.* (brackets and quotation marks omitted).

Here, the only factual dispute in the § 22-4004 litigation was whether the oral sodomy was "forcible." On that point, Ms. D. testified at trial that Mr. P. "forced her" to engage in oral sodomy, App. 13 (citing Tr. 103–05); *id.* at 40 (citing Tr. 100–05), while Mr. P. testified that Ms. D. "readily consented" to such conduct, *id.* at 16 (citing Tr. 404–05). Because Judge Cordero did not preside over the trial, she could not assess the credibility of the witnesses based on their demeanor, and thus her "assessment of the weight of the trial evidence [could] be no better than [this Court's] own." *Caston v. United States*, 146 A.3d 1082, 1099 (D.C. 2016); *see W.M.*, 851 A.2d at 455–56 (noting that, if the § 22-4004 court "finds the government's evidence sufficient to establish that [the] offense did involve the use of force," an "evidentiary hearing likely will be necessary" when resolution of the factual dispute turns on "witness credibility," which is "typically reflected best through live testimony under oath" (quoting *Samuels v. United States*, 435 A.2d 392, 395 (D.C. 1981))). In reviewing "the available court records pertaining to the evidence presented at trial," Judge Cordero noted that the trial transcript was no longer available, App. 96 & n.1, and thus she relied on the uncontested descriptions of the trial testimony contained in the parties' appellate filings, which included citations to the then-available trial transcript, *id.* at 97–99 (citing Mr. P.'s appellate brief, filed

as Ex. B to his motion to reduce sentence, and the government's motion for summary affirmance, filed as Ex. 6 to its opposition to the § 22-4004 motion).

Although both parties' appellate filings indicated that Ms. D. testified at trial that Mr. P. "forced her" to engage in oral, anal, and vaginal sex, *id.* at 13 (citing Tr. 103–05); *id.* at 40 (citing Tr. 100–05), nothing in the record described any trial testimony about any specific acts or threats of force by Mr. P. Thus, in seeking to meet its burden to prove by a preponderance of the evidence that the oral sodomy was "forcible," *id.* at 80, the government presented two police reports (filed as Ex. 1 and Ex. 2) and a transcript of a detective's preliminary hearing testimony (filed as Ex. 3) summarizing Ms. D.'s unsworn statements to the police, *id.* at 78 nn.1–2. According to those records, Ms. D. told the police that she tried to leave the car when the men dropped off Ms. Barnes, but the men told her that they would not "let her out of the car until they had sex with her," and they "threatened to beat her up if she didn't cooperate." *Id.* at 97 (citing Ex. 1 and Ex. 3).

Ms. D.'s hearsay statements to the police about Mr. P.'s alleged threat of force were not corroborated by any independent evidence in the record, and they were contradicted by Mr. P.'s sworn testimony at trial. As Judge Cordero acknowledged, Mr. P. testified at trial that, after they dropped off Ms. Barnes, Ms. D. asked him and Mr. Leasure if they would "like to go someplace dark" and "finish getting high," which Mr. P. interpreted as "an invitation for sexual activity." *Id.* at 16, 98. Mr. P. further testified that Ms. D. "readily consented to sexual conduct, first with [him] and then with [Mr.] Leasure," and that she "voluntarily participate[d] in all the sexual activity of that evening," which included vaginal intercourse and oral sodomy, but

not anal sodomy. *Id.* at 16 (citing Tr. 404–05); *see also id.* at 40 (citing Tr. 404–06, 428–31); *id.* at 98.

In finding by a preponderance of the evidence that the charged sodomy was "forcible," Judge Cordero credited and relied on Ms. D.'s unsworn, unconfronted, uncorroborated statements to the police about Mr. P.'s alleged threat of force, *id.* at 97 (citing Ex. 1 and Ex. 3), without identifying any reasonable basis to conclude that those hearsay statements were "of greater weight or more convincing" than Mr. P.'s sworn, cross-examined trial testimony. *E.D.R.*, 772 A.2d at 1160. Indeed, the record permitted no such conclusion.

Although Judge Cordero noted that Mr. P., like the government, did not provide a trial transcript "because the records had been destroyed" pursuant to the "document retention policy" of the Court Reporter's Office, App. 96 & n.1, 98, she did not question the undisputed fact that Mr. P. testified at trial that the entire sexual encounter was consensual. *Id.* at 98; *see id.* at 81 (government's acknowledgment that Mr. P. "testified that he had engaged in consensual oral sodomy and sexual intercourse with [Ms. D.] in the back seat of the car," but "denied committing anal sodomy or raping her" (quoting Ex. 6 (citing Tr. 404–06, 428–31)). Nor did Judge Cordero explain how the lack of a transcript discredited Mr. P.'s account more than it did Ms. D.'s, when neither the police reports nor the preliminary hearing transcript reflected a contemporaneous recording or verbatim quotation of Ms. D.'s out-of-court statements to the police, and instead represented the officers' own recollection and characterization of what Ms. D. told them. Indeed, in recounting the evidence presented at trial, Judge Cordero herself relied on the description of the trial

testimony contained in Mr. P.'s appellate brief, *id.* at 97–99 (citing Ex. B), the accuracy of which the government did not challenge in its motion for summary affirmance, when it still had access to the trial transcript, *id.* at 40.

Although Judge Cordero noted that the preliminary hearing judge found probable cause to believe that Mr. P. committed the charged offenses, including rape, *id.* at 98, that finding contributed nothing to the § 22-4004 inquiry, as it was made without the benefit of Mr. P.'s testimony; it was not based on an assessment of Ms. D.'s credibility, as she did not testify at the preliminary hearing; and it found only probable cause to believe that the vaginal intercourse was forcible—a much lower standard of proof than even the preponderance standard. Similarly, although Judge Cordero noted that the trial court denied Mr. P.'s motion for a judgment of acquittal, *id.* at 99, that ruling meant only that a reasonable jury *could* find that the vaginal intercourse was forcible if it credited Ms. D.'s trial testimony on the matter after having observed her demeanor and manner of testifying. But as explained above, *supra* pp. 14–15, the jury acquitted Mr. P. of rape, indicating that it did *not* credit Ms. D.'s trial testimony on the only contested issues of force and nonconsent.

Judge Cordero gave no weight to the jury's verdict, citing *Greene v. United States*, 571 A.2d 218, 222 (D.C. 1990), for the proposition that "a defendant's acquittal on a rape charge does not thereby determine that the acts underlying a concurrent sodomy conviction were consensual," App. 96. But this case is nothing like *Greene*, where the Court held that the jury's acquittal on rape did not necessarily reflect the jury's determination that the sexual encounter was consensual because the acquittal could be easily and rationally explained by the fact that the medical

evidence of "labial penetration"—an essential element of rape—was "inconclusive." *Greene*, 571 A.2d at 221–22; *see also id.* at 220 (noting that the defendant testified that he did not engage in any sexual activity with the complainant). Here, by contrast, Mr. P. conceded that he engaged in vaginal intercourse with Ms. D., and the *only* disputed elements of rape were force and nonconsent, making it "irrational and bizarre" for the jury to acquit Mr. P. of rape based on anything other than doubt about force and nonconsent. *Id.* at 221 n.3; *see also United States v. Felder*, 548 A.2d 57, 67 (D.C. 1988) (holding that, in deciding whether a factual issue has been previously determined by a jury's acquittal for purposes of collateral estoppel, this Court must examine the trial record to determine "whether a *rational* jury could have acquitted based on an issue other than the one the defendant seeks to bar from reconsideration," and it must not "postulate hypertechnical and unrealistic grounds on which the jury could conceivably have rested its conclusions" (emphasis added) (brackets, ellipsis, and quotation marks omitted)). Moreover, unlike in *Greene*, the combination of the jury's verdicts—acquittals on rape and anal sodomy (which Mr. P. denied) and a conviction on oral sodomy (which Mr. P. effectively conceded)—strongly implied that the jury credited Mr. P.'s account over Ms. D.'s. *See Robinson*, 100 A.3d at 109 (inferring from acquittals on offenses that required intent to kill, and convictions on offenses that did not require intent to kill, that "the jury credited [the defendant's] testimony that she did not mean for [the decedent] to be killed"). While the jury's verdict did not necessarily preclude Judge Cordero from finding by a preponderance of the evidence that the oral sodomy was forcible, given that the government's evidence at trial was subject to proof beyond a reasonable doubt, it at

least provided compelling evidence about the quality and credibility of Mr. P.'s trial testimony compared to Ms. D.'s, and Judge Cordero erred in ignoring it altogether.

Judge Cordero also erred in crediting Ms. D.'s hearsay claim of threatened force without considering the many reasons apparent from the trial evidence to doubt her credibility, including her admitted use of marijuana on the night of the sexual encounter, App. 12 (citing Tr. 81–83); the bizarreness of her testimony that she had told Mr. P. and Mr. Leasure on the way to the cemetery that she had been beaten, robbed, and raped earlier in the evening, but that this statement was actually a lie, *id.* at 14 (citing Tr. 176–77); her expressed concern about her mother finding out that she had stayed out all night, *id.* at 13; the implausibility of her claim that Mr. Leasure called her at home just minutes after raping her and volunteered to her mother that "he had just driven her home," *id.* at 13–14; her refusal to undergo a medical or forensic examination after being allegedly raped and anally sodomized, *id.* at 15 (citing Tr. 193–94); and the conflict between Ms. Lawson's testimony that Ms. D. came to the house alone looking for Mr. Leasure, *id.* at 16 (citing Tr. 374–75), and Ms. D.'s testimony that she did no such thing, *id.* at 15 (citing Tr. 192). In choosing to credit Ms. D.'s account of the events over Mr. P.'s, "it was incumbent on the court to at least consider the potential weaknesses in the government's case," and Judge Cordero erred in failing to do so. *Caston*, 146 A.3d at 1099.

Because Judge Cordero's decision to credit Ms. D.'s claim of threatened force was infected by numerous "misapprehension[s] of controlling substantive legal principles," it was "clearly erroneous" and must be reversed. *Murphy*, 650 A.2d at 210 (brackets and quotation marks omitted). This Court should not remand for Judge

Cordero to make new factual findings or to hold an evidentiary hearing, however, because the government's evidence at the § 22-4004 proceeding was insufficient as a matter of law to support a finding of force by a preponderance of the evidence. *See W.M.*, 851 A.2d at 455–56 (noting that an "evidentiary hearing likely will be necessary" if the court "finds the government's evidence sufficient to establish that [the] offense did involve the use of force").

Because the § 22-4004 record lacked any evidence of what Ms. D. testified at trial regarding what force Mr. P. supposedly used or threatened against her, the government's evidence on that issue rested entirely on Ms. D.'s unsworn hearsay to the police. As both the Supreme Court and this Court have recognized, hearsay statements are generally too "untrustworthy" to admit at trial because "they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the [factfinder]." *Laumer v. United States*, 409 A.2d 190, 194 (D.C. 1979) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 298 (1973)). Even in the context of administrative proceedings, where "hearsay is generally admissible," and where the standard of proof is merely "substantial evidence,"[21] "the practice of relying exclusively on hearsay is strongly discouraged," *Conrad v. Dist. of Columbia Alcoholic Beverage Control Bd.*, 287

[21] *See Dist. of Columbia Dep't of Mental Health v. Dist. of Columbia Dep't of Emp. Servs.*, 15 A.3d 692, 698 (D.C. 2011) (noting that the "substantial evidence" standard is "less demanding" than the "preponderance of the evidence" standard).

A.3d 635, 643 (D.C. 2023), and "reversal may be warranted if the [factfinder] places undue confidence in hearsay evidence that is too unreliable to justify the weight given to it," *Martin v. Dist. of Columbia Police & Firefighters' Ret. & Relief Bd.*, 532 A.2d 102, 109 (D.C. 1987); *see also James v. Dist. of Columbia Dep't of Emp. Servs.*, 632 A.2d 395, 398 (D.C. 1993) (explaining that, while hearsay evidence "may constitute substantial evidence" if it is "found to be reliable and credible," "hearsay evidence alone should not be permitted to offset the sworn testimony of a witness" in the absence of "some indicia of credibility" (quoting *Simmons v. Police & Firefighters' Ret. & Relief Bd.*, 478 A.2d 1093, 1095 (D.C. 1984), and *Jadallah v. Dist. of Columbia Dep't of Emp. Servs.*, 476 A.2d 671, 677 (D.C. 1984) (Ferren, J., concurring))); *In re K.H.*, 14 A.3d 1087, 1091 (D.C. 2011) ("*Trustworthy* hearsay is admissible in a suppression hearing and may justify a finding of probable cause," but the testimony of a detective "who possessed no personal knowledge" of the police encounter was "too unreliable and uncertain to support such a finding.").

Here, Ms. D.'s hearsay statements to the police bore none of the indicia of reliability conferred by any of the exceptions to the rule against hearsay, such as excited utterances, statements against penal interest, or statements made for the purpose of seeking medical treatment. Her out-of-court claim that Mr. P. "threatened to beat her up if she didn't cooperate" was not corroborated by any independent evidence, and it was contradicted by Mr. P.'s trial testimony, which bore the indicia of reliability conferred by the oath and the crucible of cross-examination. Indeed, having observed the live testimony of both witnesses at trial, the jury rendered a combination of verdicts that strongly implied that it credited Mr. P. over Ms. D. On

this § 22-4004 record, no factfinder could rationally conclude that Ms. D.'s unsworn, unconfronted, uncorroborated hearsay was "of greater weight, or more convincing," than Mr. P.'s trial testimony. *E.D.R.*, 772 A.2d at 1160. Because the government failed to meet its burden of persuasion at the § 22-4004 proceeding, Judge Cordero's order must be reversed with instructions to certify that Mr. P. is not required to register as sex offender.

## CONCLUSION

For the reasons stated above, this Court should reverse the orders denying appellant's § 23-110 and § 22-4004 motions, vacate his sodomy conviction, and direct the Superior Court to certify pursuant to D.C. Code § 22-4004(c)(2) that appellant is not required to register under SORA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief has been served electronically, by the Appellate E-Filing System, on Chrisellen Kolb, Esq., Chief of the Appellate Division, Office of the United States Attorney, this 18th day of September, 2024.

/s/ Alice Wang
Alice Wang