No. 24-CF-0828

THE DISTRICT OF COLUMBIA COURT OF APPEALS

GRISELDA MARTINEZ-MOZ

v.

UNITED STATES

CRIMINAL:

Appeal from the Superior Court (O'Keefe, Judge)

BRIEF OF APPELLANT

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BRIEF PROCEDURAL HISTORY

Appellant was convicted of all counts in the indictment filed against her following a jury trial in the Superior Court for the District of Columbia. (Judge O'Keefe, Presiding).

The trial court reserved ruling on a Motion for Judgment of Acquittal on two counts. (Id.) Appellant filed a Motion for Judgment of Acquittal in writing, in which Appellant argued for a new trial based on the undue prejudice caused by the admission of other crimes evidence, which was denied by the Court. (Id.).

Appellant was thereafter sentenced to twenty-five years of active incarceration, with credit for time served, and a period of probation. (Id.).

This timely appeal follows.

QUESTIONS PRESENTED

I. Did the trial court commit structural error in failing to consider Appellant's transgender identity[1] as a woman when admitting other crimes evidence against the Appellant, both concerning other alleged (i) crimes in the State of Maryland and (ii) one additional un-charged crime in the District of Columbia?

II. Was the evidence legally sufficient to convict Appellant of Count II and did the trial court commit a structural error in denying the Motion for Judgment of Acquittal it held sub-curia by failing to recognize the structural damage to the whole case from the admission of the *Drew* evidence it admitted?

STANDARD OF REVIEW

When reviewing a trial court's denial of a motion for new trial or an evidentiary motion, this court "must defer to the [trial] court's findings of evidentiary fact and view those facts and the reasonable inferences therefrom in the light most favorable to sustaining the ruling below."

[1] As a sub-argument and question on appeal, did the court commit also plain-error in failing to take into account Appellant's protections for her transgender rights in its *Drew/Johnson* analysis under section 301 (c) of the Human Rights Act of 1977 (Act), effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code $ 2-1403.0l(c), adopts a new Chapter 8 of Title 4 of the District of Columbia Municipal Regulations (DCMR)?

Jackson v. United States, 157 A.3d 1259, 1264 (D.C. 2017) (*quoting Joseph v. United States*, 926 A.2d 1156, 1160 (D.C. 2007)).

However, on a "… question of law …. we review de novo." *Posey v. United States*, 201 A.3d 1198, 1201 (D.C. 2019) (*citing Miles v. United States*, 181 A.3d 633, 637 (D.C. 2018). Whether the evidence is legally sufficient and whether evidence is other crimes evidence are questions of law. Id.

STATEMENT OF FACTS

A. Relevant Pretrial Facts

The Defendant was originally charged in a two-count indictment, with one count of First-Degree Child Sexual Abuse (Aggravating Circumstances), in violation of 22 D.C. Code, Section 3008, 3020(a)(1), 3020(a)(2) (2001 ed.) and one count of First-Degree Child Sexual Abuse (Aggravating Circumstances), in violation of 22 D.C. Code, Section 3008, 3020(a)(1), 3020(a)(2) (2001 ed.).

The indictment sought by the United States, drafted by the Office of the United States Attorney and handed down by the Grand Jury in the above-titled case states with particularity, the following:

The Grand Jury charges:

FIRST COUNT:

Between on or about January 1, 2015, and on or about December 31, 2016, within the District of Columbia, Griselda Martinez Moz, also known as Francesco Martinze Moz, also known as Marcia Martinez Moz, also known as Marcella Castillo, being more than four years older than N.C., a child under sixteen years of age, that is, 7 or 8 years of age, engaged in a sexual act with that child and cause that child to engage in a sexual act, that is penetration of N.C.'s vulva by Griselda Martinez Moz, also known as Francesco Martinze Moz, also known as Marcia Martinez Moz, also known as Marcella Castillo's, penis.

(First Degree Child Sexual Abuse, in violation of 22 D.C. Code, Section 3008 (2001 ed.).

The Grand Jury Further Charges that at the time Griselda Martinez Moz, also known as Francesco Martinze Moz, also known as Marcia Martinez Moz, also known as Marcella Castillo committed First Degree Child Sexual Abuse, the victim, N.C., was under the age of eighteen years and had a significant relationship with Griselda Martinez Moz, also known as Francesco Martinze Moz, also known as Marcia Martinez Moz, also known as Marcella Castillo, in that Griselda Martinez Moz, also known as Francesco Martinze Moz, also known as Marcia Martinez Moz, also known as Marcella Castillo was a legal or de factor guardian more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as N.C.

(First Degree Child Sexual Abuse (Aggravating Circumstances), in violation of 22 D.C. Code, Section 3008, 3020(a)(1), 3020(a)(2) (2001 ed.).

SECOND COUNT:

Between on or about January 1, 2015, and on or about December 31, 2016, within the District of Columbia, Griselda Martinez Moz, also known as Francesco Martinze Moz, also known as Marcia Martinez Moz, also known as Marcella Castillo, being more than four years older than N.C., a child under sixteen years of age, that is, 7 or 8 years of age, engaged in a sexual act with that child and cause that child to engage in a sexual act, that

> is penetration of N.C.'s vulva by Griselda Martinez Moz, also known as Francesco Martinze Moz, also known as Marcia Martinez Moz, also known as Marcella Castillo's penis.
> (First Degree Child Sexual Abuse, in violation of 22 D.C. Code, Section 3008 (2001 ed.))
>
> The Grand Jury Further Charges that at the time Griselda Martinze-Moz, also known as Francesco Martinze Moz, also known as Marcia Martinez Moz, also known as Marcella Castillo committed First Degree Child Sexual Abuse, the victim, N.C., was under the age of eighteen years and had a significant relationship with Griselda Martinez Moz, also known as Francesco Martinze Moz, also known as Marcia Martinez Moz, also known as Marcella Castillo, in that Griselda Martinez Moz, also known as Francesco Martinze Moz, also known as Marcia Martinez Moz, also known as Marcella Castillo was a legal or de factor guardian more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as N.C.
>
> (First Degree Child Sexual Abuse (Aggravating Circumstances), in violation of 22 D.C. Code, Section 3008, 3020(a)(1), 3020(a)(2) (2001 ed.)

It was upon the above indictment that the United States tried Defendant Moz over the course of a multi-day trial, and presented its evidence in its case in chief as follows.

Immediately prior to trial, however, the Government filed a Motion to Admit *Drew*, other crimes evidence against Appellant that allegedly transpired in Maryland, which the Government later supplemented and added another not previously revealed un-charged crime in the District of Columbia. (See, Government's Motion and Supplemental Motion).

Following an evidentiary hearing, the Court granted the Government's

Original Motion and its Supplemental Motion and proceeded to admit the alleged out of State and additional D.C. evidence at trial.

B. Trial Variances on Count II

During a trial in the above-mentioned case on the first count of the indictment, the alleged victim, N.C., testified before the Court that the first instance of child sexual abuse allegedly performed by the Defendant was accomplished through penial "vaginal penetration."

However, when N.C. next testified as to the second count, N.C. only testified that Defendant asked N.C. to perform oral sex, and did not reference, mention or accuse Defendant of performing any form of vaginal intercourse with N.C.

More specifically, during the Government's direct examination of the alleged victim, N.C., at trial, N.C. described two incidents that have allegedly occurred between her and the Defendant. N.C. described that the first incident occurred at the Riggs Road apartment where she shared a room with her mother and the Defendant (Jury Trial (W), pg. 12-13, lines 23(12)-3(13).

Further, N.C. testified that the Defendant had sexually abused her while her grandmother and mother were out, when the Defendant allegedly started touching her chest and lower body with her hand, and then put her penis in her vagina (Jury Trial (W), pg. 13-14, lines 18(13)-14(14).

After her testimony regarding the first incident, N.C. testified to the second incident, clearly stating that the Defendant had allegedly told her to "sit down" when she knelt, after which the Defendant allegedly "lifted up her skirt and she told me to suck her penis," which N.C. testified to doing when she stated that " I looked at her, and then I looked down and I did so" (Jury Trial (W), pg. 19, lines 13-25, Exhibit 1).

The following day, N.C. testified in relation to Count II, indicating there was in fact a vaginal penetration performed by the Defendant in the second instance as well, providing exclusively vague details about this instance.

In her testimony on Thursday, March 14. 2024, N.C. confirmed that she had testified to both vaginal and oral sex the day before, upon which she was reminded of the forensic interview, when she testified there were two instances of vaginal sex that occurred in Washington, D.C., and she further stated that she did not talk about this instance the day before as she was distraught about talking about it (Jury Trial (T), pg. 2-4, lines 11(2)-1(4).

She then stated that she was distraught about the instance of oral sex and proceeded to give details regarding the second instance of vaginal sex, stating that this had occurred in the shared bedroom on the Defendant's bed, when the Defendant's skirt was lifted. (Id.).

She added that she did not remember much of it besides that she wore a

nightgown, her legs were straight, the Defendant's skirt was up, and that she had not said anything to the Defendant (Jury Trial (T), pg. 4-6, lines 12(4)-20(6).

N.C. testified she was happy when the Defendant moved out of the apartment and she and her family also moved because she thought the apartment was a constant reminder of what happened, upon which she stated that she saw the Defendant again in 2019 (referred to as the 'Maryland allegations' in the transcript) at the family gathering when the Defendant was in her (N.C.'s) bedroom and told her mother that she had "felt her penis inside me," exact words being "I felt it inside me" (Jury Trial (T), pg. 9-15, lines 24(5)-1(15)).

N.C. added that after she told her mother, her mother checked her in the bathroom and after there was no blood or anything else, her mother told her that she might have felt it near her, maybe on her back, after which she just agreed with her mother, as she was concerned for her health (Jury Trial (T), pg. 15, lines 2-22). Other facts will be added and supplemented in the foregoing brief.

STATEMENT OF THE LAW

A. Other Crimes Evidence and Structural Error

The rules of evidence protect the accused in a criminal case from having evidence of one crime used to prove disposition to commit another. According to the so-called "propensity rule," which is indispensable to the presumption of innocence and a fair trial, evidence of a person's character or character trait cannot be used to prove that on a particular occasion the person acted in accordance with that character or trait.

In other words, the government must prove that you committed a crime, not that you are a bad person. The rule on "other crimes, wrongs, or acts" (or "bad acts") is provided for in Federal Rule of Evidence 404(b). In the District of Columbia, the prohibited evidence is known simply as "*Drew* evidence" based on *Drew v. United States*, 331 F.2d 85 (D.C. Cir. 1964). There are two forms of "prior bad acts" or "other crimes evidence" in D.C.

While *drew* itself refers only to evidence of a crime or bad act that is independent of the crime in question. In *Thompson v. United States,* 546 A.2d 414, for example, the government sought to introduce evidence of the defendant's prior conviction for selling PCP as evidence of his intent to sell PCP on the day in question.

As with the Federal rule, such evidence is only admissible if the government can prove that it is relevant to motive, intent, the absence of mistake or accident, a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of the one tends to establish the other, or the identity of the person charged with the commission of the crime at trial. *Drew,*331 F.2d at 90.

Before a court may admit other crimes evidence under one of the exceptions, the government must first establish (1) by clear and convincing evidence that the defendant committed the other crimes, (2) that the other crimes evidence is directed toward a genuine, material and contested issue in the case, (3) that the evidence is logically relevant to prove this issue for a reason other than its power to demonstrate criminal propensity, and (4) that the prejudicial impact of the evidence does not substantially outweigh its probative value. *Legette v. United States*, 69 A.3d 373, 379 (D.C. 2013).

The second form of other crimes evidence is known as either *Johnson* or *Tolliver* evidence.

According to *Johnson v. United States,*683 A.2d 1087 (D.C. 1996) (en banc), the *Drew* rule barring propensity evidence does not apply if the other crimes evidence is direct and substantial proof of the charged crime, is closely

intertwined with the evidence of the charged crime or is necessary to place the charged crime in an understandable context." Evidence under *Tolliver v. United States*, 468 A.2d 958, 960 (D.C. 1983) is "admissible to complete the story of the crime on trial by proving its immediate context."

To introduce *Johnson* or *Tolliver* evidence, however, the government must prove by clear and convincing evidence that the accused committed the other offense. It is also required to prove that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *Johnson*, 683 A.2d at 1099.

In deciding whether the danger of unfair prejudice substantially outweighs probative value, the trial court must weigh (1) the strength of the evidence as to the commission of the other crime, (2) the similarities between the crimes, (3) the interval of time that has elapsed between the crimes, (4) the need for the evidence, (5) the efficacy of alternative proof, and (6) the degree to which the evidence probably will rouse the jury to overmastering hostility. *Id.*at 1095 n.8. And as will be argued here, the Court should have also considered the transgender identity of the Appellant in the factorial analysis, to not negate Appellant's defense as a whole. Id.

Failing to account or undue prejudice under the facts of this case, would thus cause structural damage to the defense and impregnate the conviction with undue prejudice, beyond the reach of harmless error. *See, Chapman v. California*, 386 U.S. 18, 22 (1967).

B. Fatal Variances Warrant Reversal

A motion for judgment of acquittal must be granted if the evidence is legally or factually insufficient to prove the case beyond a reasonable doubt, even when viewed in the light most favorable to the State; or if there is a fatal variance between the *allegata and probata.*

While probable cause is a fluid concept, at a minimum it requires the Government to have a substantial basis to believe that criminal activity is being committed, within the criminal statute charged. *Maryland v. Pringle*, 540 U.S. at 375.

For this reason, it has been uniformly held across all circuits and the District of Columbia, that a fatal variance from the charges in the indictment to the proof presented at trial, thus warrants a judgement of acquittal as the variance in the proof is both material and prejudicial. *Stirone v. United States*, 361 U.S. 212 (1960); *United States v. Dellosantos*, 649 F.3d 109 (1st Cir. 2011), *United States v. Lander*, 668 F.3d 1289 (11th Cir. 2012), *United States*

v. Madden, 733 F.3d 1314 (11th Cir. 2013), *United States v. Ward*, 747 F.3d 1184 (9th Cir. 2014); *United States v. Hoover*, 467 F.3d 496 (5th Cir. 2006).

Importantly, when a fatal variance is identified and the variance is material, it is not subject to harmless error-analysis and the conviction must be reversed. *United States v. Farr*, 536 F.3d 1174 (10th Cir. 2008), *United States v. McKee*, 506 F.3d 225 (3rd Cir. 2007); *United States v. Stigler*, 413 F.3d 588 (7th Cir. 2005); *United States v. Ross*, 412 F.3d 771 (7th Cir. 2005)

It follows that if the government presents at trial proof of a different crime, instead of the indicted offense in its trial of the merits, that the variance violates the accused's Fifth Amendment rights, and the accused would not be on notice of the charges; and to allow it to proceed to verdict would improperly amend the charges to the detriment of the accused. *United States v. Milstein*, 401 F.3d 53 (2d Cir. 2005); *United States v. Combs*, 369 F.3d 925 (6th Cir. 2004), *United States v. Floresca*, 38 F.3d 706 (4th Cir. 1994); *United States v. Wozniak*, 126 F.3d 105 (2d Cir. 1997); *United States v. Doucet*, 994 F.2d 169 (5th Cir. 1993); *United States v. Lawton*, 995 F.2d 290 (D.C. Cir. 1993).

LEGAL ARGUMENT

A. The Court Committed a Structural Error in Admitting Other Crimes Evidence Without Taking into Account Appellant was a Transgender Woman for Undue Harm Analysis

The trial court here erred trusting that the Government's assertion that each of the events noticed by the Government was admissible as *Johnson* evidence, when in fact it was not; and more importantly, was unduly prejudicial when the trial court ignored Appellant's defense of actual impossibility due to her status as a transgender woman.

To begin, the crimes alleged in Maryland were not admissible under *Johnson* or *Toliver*, supra, because they were not "direct and substantial proof of the charged crime;" nor were they "closely intertwined with the evidence of the charged crime," nor "necessary to place the charged crime in an understandable context." *Johnson*, 683 A.2d at 1098. Simply put, they were other crimes evidence and should have been excluded under *Drew*, *supra*. More importantly, there was nothing intrinsic in those alleged crimes that was either necessary or intertwined to place the indicted charges in context. Id.

In fact, the Government's lack of concrete forensic evidence such as DNA, saliva or semen samples proves this. Clearly the Government wanted to include these alleged post-facto alleged crimes in another jurisdiction to make their own story more credible, rather than to "complete the story." Id.

(*quoting Williams v. United States*, 106 A.3d 1063, 1067 (D.C. 2015)); *see Toliver*, 468 A.2d at 960-61 (evidence "relevant to explain the immediate circumstances surrounding the offense charged "is not other crimes evidence because it is too intimately entangled with the charged criminal conduct").

Contrary the Government's claim, *Johnson* evidence is only presumptively admissible as direct evidence of the charged offenses if the court accepts that preliminary proffer on the grounds of logical relevance. Id. The safest course of course is for the Court to examine the evidence first under a clear and convincing standard for logical relevance, and then to apply the clear and convincing standard.

The Government was wrong to assume, and the court erred in taking the grand jury testimony and the forensic interview of the victim as proof of these other crimes, given that neither explained the context of the delayed disclosure which was key here. *Brown v. United States*, 840 A.2d 82, 90-94 (D.C. 2004).

More importantly, neither of these two pieces of evidence explained why Maryland did not charge Appellant Moz earlier, or why the alleged victim did not file these charges in Maryland at all. (Id.). And the trial court certainly did not take that into account in its factorial analysis either. (Id.)

The Court also erred in assuming that the Maryland evidence provided details about what occurred between December 31, 2016, the end date for the

charged offenses, and July of 2019, when the disclosure occurred. (Id.). Nothing in the forensic interview or the grand jury testimony linked the dichotomous and anomalous events, and neither explained the true context of this case. Which is why would a transgender woman who is attracted to men rape a female child in the first place?

The Court simply ignored this huge and tremendously important fact in its factorial analysis, since the trial court knew from the beginning of the prosecution that Moz was a transgender woman.

In summary, the Government's assertions that the Maryland crimes were necessary to be included in this prosecution because the child reported self-harm are simply pretextual and post-facto rationalizations by the prosecution team, rather than factually provable and sound factual claims. (See, Gov. Motion to Admit Drew Evidence).

In fact, the Government's own medical evidence refuted this claim. The victim's own medical records from Children's National Medical Center indicate that the child suffered a self-cutting incident in July 2019 was related to a weight issue. (Id.).

The Government knew, as the trial Court presumably knew, that had the Children's Hospital received a complaint of sexual abuse related to this self-cutting incident, they would have had to report it as such – but they didn't.

(Id). This important logical step in the analysis was ignored by the trial court.

Similarly, the Government's reference and the trial court's reliance on the claim that an "acrylic" nail found on December 15, 2023, by the victim was the cause of the self-harm is nothing more than voluptuous speculation, which was directly unsupported by the child's medical records from Children's. (Id.).

These claims as to events in Maryland were thus logically untangled from the charged offenses and did not actually provide any context to understand the complainant's delay in disclosing and the circumstances of her ultimate disclosure[2]. *See Johnson*, 683 A.2d at 1098.

More to the point. Since the charged offenses in the Government's indictment occurred between January 1, 2015, and December 31, 2016, it is obvious that the child's disclosure until July of 2019 was extremely delayed and unjustified. (Id.). The alleged Maryland should not have been presented to the jury for this reason alone.

But when the trial court allowed it to be presented, the structural harm was inflicted. The jury was unduly prejudiced with this inadmissible *Drew* evidence and was left with the false impression that the Appellant was a serial

[2] Moz does not concede that the Maryland alleged crimes fall within the MIMIC exceptions to the admission of other crimes evidence under F.R.E 404b either. *Drew*, 331 F.2d 85.

predator, and the Government was thus granted a second, but related win.

The trial Court gutted Appellant's defense of actual impossibility by virtue of her status as a transgender woman, i.e. that she could not have committed the offenses[3] due to her sexual identity as a transgender woman[4].

The reality is that the complainant disclosed the charged abuse out of the blue, with no triggering event, two and a half years after the claimed sexual abuse ended, because it never happened.

The harm here was structural and not harmless under *Chapman v. California*, 386 U.S. 18, 22 (1967). The jury found Appellant guilty in

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[3] While Appellant Moz neither testified in her own defense (presumably under the advice of her counsel), nor did her defense counsel introduce evidence of her prior relationships exclusively with biological males, nor did her defense counsel request an actual impossibility instruction; the defense was clear. Meaning, the defense theme was one of the actual impossibilities that Moz *could not have done these crimes due to her identity as a transgender woman.* Yet, when the Government was permitted to introduce these other crimes, this entire defense line was quashed and subdued under the earmark of Moz being a serial predator that chased this child from D.C. to Maryland. The trial court did not take this important factor into account (Moz being a transgender woman) when it examined undue prejudice under *Drew* or *Johnson, supra.* This was structural error of the court.

[4] Here the trial court should have *sua sponte* considered the D.C. Human Rights Act of 1977 and its implementing regulations from 2006. See, The Office of Human Rights and the Commission on Human Rights, pursuant to section 301 (c) of the Human Rights Act of 1977 (Act), effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code $ 2-1403.0l(c)), adopts a new Chapter 8 of Title 4 of the District of Columbia Municipal Regulations (DCMR) entitled "Compliance Rules and Regulations Regarding ~inder Identity or Expression." The trial judge in the District is presumed to know the law, and the trial court here should have balanced the protections imbedded in the D.C. Code protecting the transgender status of Moz when factoring the *Drew* or *Johnson* analysis. To the extent this issue was not preserved, we ask the court to consider it on plain-error grounds.

minutes after the parties' closing arguments and the jury instructions precisely because of the other crimes evidence was used it to bolster the verbal claims by the child in the district. (See, Verdict Sheet). This was structural error, based on inaccurate, misleading, and highly prejudicial F.R.E. 404b evidence and an improper undue balancing factorial analysis by the trial court.

Similarly, the claim by the Government that it would have been difficult for the "complainant to tell the story of the abuse without discussing the sexual assault the occurred the months before the disclosure" is absurd. (See, Government's Motion to Admit Drew Evidence at 3).

The child testified at trial serenely and with answered all her direct and cross-examination questions without unusual difficulty. (Id.). The child could have easily been directed to only testify about the evidence in the District and not the claims in Maryland.

Clearly what the Government wanted with this extra evidence was to bolster the claims by the child and prop her credibility before the jury, but the Court erred in trusting the Government's proffers and in failing to properly weigh the probative value was substantially outweighed by the danger of unfair prejudice. *Johnson*, 683 A.2d at 1100-01; see Malloy, 186 A.3d at 810 (quoting Johnson, 683 A.2d at 1101).

Similarly, the court erred in admitting the other un-charged crimes

evidence that the defendant caused the complainant to place her mouth on her (the defendant's) penis, which occurred during the second incident in D.C. (Count Two).

As was argued below in the Motion for New trial, the Appellant contends that this evidence should have been excluded and ultimately the Court should have granted a new trial due to the fatal variance of the proof and the charge. *See, Holmes v. United* States, 580 A.2d 1259, 1266 (D.C.1990) (internal quotations omitted).

B. <u>The Government Failed to Meet its Burden of Proof of Count II, as the Proof Presented Was Legally Insufficient as Charged and it is at Fatal Variance with the Indictment.</u>

As was argued below, this Court is aware, under § 22–3008, First degree sexual abuse of a minor is defined as below:

> Whoever, being at least 4 years older than a child, engages in a sexual act with that child or causes that child to engage in a sexual act shall be imprisoned for any term of years or for life and, in addition, may be fined not more than the amount set forth in § 22-3571.01. However, the court may impose a prison sentence more than 30 years only in accordance with § 22-3020 or § 24-403.01 (b-2). For purposes of imprisonment following revocation of release authorized by § 24-403.01(b)(7), the offense defined by this section is a Class A felony[5].

In this case the Government selected not only the language in the

[5] May 23, 1995, D.C. Law 10-257, § 207, 42 DCR 53; June 8, 2001, D.C. Law 13-302, § 7(b), 47 DCR 7249; June 11, 2013, D.C. Law 19-317, § 232(f), 60 DCR 2064.

indictment handed by the grand jury to charge the above offense, but also the evidence it allegedly presented to the grand jury to form the basis of its returnable indictment. (See, infra, pg. 2).

By doing so, the Government put the Defendant on notice of the two charges against her, and the specific conduct the Government alleged that transpired to form the legal basis for each count of First-Degree Sexual Abuse of a Minor. (Id.).

However, as the court saw the testimony at trial, N.C. did not testify in accordance with the indictment on Count II, and instead rendered a totally and not before revealed version of events – not even alluded anywhere on the Government's discovery.

Merely, N.C. testified under oath at trial that the Defendant solicited N.C. her to perform fellatio upon Defendant. (Jury Trial, pg. 19, lines 13-25, Exhibit 1). This was not the factual basis of the indicted First-Degree Sexual Abuse of a Minor charge in Count II, and instead it was new testimony concerning an entirely separate offence which would be a fourth-degree sexual

abuse solicitation or other lesser crimes[6].

The Government attempted to redirect N.C. by repeating the same questions concerning "other" sexual intercourse, but defense counsel objected on the grounds that the questions had been asked and answered, and the Court properly sustained the objection on those grounds. (Id.).

What N.C. testified to at trial as the factual basis conforming the entirety of the second incident does not meet the elemental definition of First-Degree Sexual Assault of a Minor as charged in the indictment and is therefore legally insufficient to convict Defendant of that crime as charged.

At most, this new evidence amounts to a solicitation to commit fourth

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[6] § 22–3005. Fourth degree sexual abuse.

A person shall be imprisoned for not more than 5 years and, in addition, may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes sexual contact with or by another person in the following manner:

(1) By threatening or placing that other person in reasonable fear (other than by threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping); or

(2) Where the person knows or has reason to know that the other person is:

(A) Incapable of appraising the nature of the conduct.

(B) Incapable of declining participation in that sexual contact; or

(C) Incapable of communicating unwillingness to engage in that sexual contact.

degree sexual assault, or indecent liberties with a child, but not First-Degree Sexual Abuse of a Minor as indicted[7].

Moreover, even assuming that the Government were to argue that Defendant certainly is at a fatal variance from the

For the above reasons, we move for a judgment of acquittal due to the insufficiency of the evidence and the fatal variance on Count II.

C. <u>The Fatal Variance is Not Subject to Harmless Error and Infected the Entire Case</u>

Clearly the evidence on Count II was legally insufficient and at a fatal variance with the Indictment. And as we did in the arguments above, Appellant maintains that the admission of this evidence affected the structural integrity of the entire prosecution, and it is therefore not subject to harmless error analysis and must be outright reversed[8]. *Chapman v. California*, 386 U. S. 18, 24 (1967).

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[7] We reiterate that Appellant holds N.C.'s testimony as to the events in Maryland and the "fellatio" event as evidence of "other crimes" that violates the seminal decision of *Drew v. United States*, 118 U.S. App. D.C. 11, 15, 331 F.2d 85, 89 (1964). Like in Drew, the evidence of the solicitation of fellatio (1) here was unfairly prejudicial as it was not charged; and (2) the government failed to show to the trial court that the crimes occurred by clear and convincing evidence as required by *Flores v. United States*, 698 A.2d 474, 482 (D.C. 1997).

[8] Structural error is that which "affect[s] the framework within which the trial proceeds," *Arizona v. Fulminante*, 499 U. S. 279, 310, and defies harmless error analysis, id., at 309. Thus, when a structural error is objected to and then raised on direct review, the defendant is entitled to relief without any inquiry into harm.

Here, the defense properly objected to the Government's repeated asked-and-answered questions concerning penial penetration, and the Court sustained that objection, but it nonetheless denied the acquittal on Count II and mistrial on Count I[9].

CONCLUSION

WHEREFORE, and for the reasons above articulated, we move this Court to reverse and grant a new trial on all counts.

Respectfully submitted,

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[9] As we argued below, and now on appeal as an additional factor under *Chapman, supra*, there was further structural error by the trial court in giving the case the jury on both counts with the evidence on the second count as presented, which implicitly but necessarily infected the jury and tainted the verdict with likely a compromised verdict on the first count by virtue of the identical nature of the verdict sheet and the Court's jury instructions on the identical charges. In other words, when the Court gave the case to the jury with the lesser proof on the second count, it diluted the burden of proof on the first count and contaminated the entire trial. For those reasons, the case should be reversed on both counts under *Chapman v. California, supra.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ***19TH day* of May 2025,** a copy of the foregoing was E-mailed and mailed first-class, postage prepaid, to the Office of the United States Attorney, 555 Fourth Street, N.W., Washington, D.C. 20530.

/s/Abraham F. Carpio

Abraham Fernando Carpio, Esquire