BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

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

CHARLES PERKINS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

Cr. No. 1979-FEL-3237

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I. Whether the trial court abused its discretion in denying Perkins's constitutional challenge to his 1980 sodomy conviction under D.C. Code § 23-110, where this Court has long held that sodomy in public places enjoys no constitutional protection and where this Court rejected Perkins's constitutional challenge on that basis in the 1981 direct appeal.

II. Whether Perkins was entitled to a jury finding based on clear-and-convincing evidence regarding his eligibility for lifetime sex-offender registration, where Perkins made no such demand in the trial court given this Court's established precedents, and whether sufficient evidence supported the trial court's finding by a preponderance of the evidence that Perkins's sodomy offense involved forcible conduct and thus required lifetime sex-offender registration.

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INTRODUCTION

Forty years ago, appellant Charles Perkins was charged with raping and sodomizing a stranger in a public cemetery. A jury acquitted him of rape but convicted him of sodomy. In his direct appeal, Perkins argued that consensual sodomy was constitutionally protected, and the failure to give a jury instruction saying as much was error. But even at that time, this Court's precedents held that even if private consensual sodomy enjoys constitutional protection, public sodomy like Perkins's

offense does not. This Court thus summarily affirmed Perkins's conviction.

Now, decades later, Perkins reprises essentially the same arguments. But the answer remains the same: sodomy in a public cemetery enjoys no constitutional protection. Perkins thus fails in his attempt to relitigate his direct appeal. Moreover, sufficient evidence supported the trial court's factual finding that Perkins's sodomy was likely forcible, meaning that he must register as a sex offender. The trial court's orders should be affirmed.

COUNTERSTATEMENT OF THE CASE

On October 3, 1979, Perkins and co-defendant Roy Leasure were indicted for two counts of rape (D.C. Code § 22-2801 (1973)) and two counts of sodomy (D.C. Code § 22-3502 (1973)) (Appendix (App.) 1-2).[1] Following a 1980 jury trial before the Honorable Sylvia Bacon, Perkins

[1] To avoid confusion, we follow appellant's convention for citing the appendix (see Appellant's Brief (Br.) 2 n.2) and cite the page number that is stamped on each appendix page. All page references to the record are to the PDF page numbers. Because there are separate records for the 2020 and 2023 appeals, each record citation also notes whether it comes from the 2020 or 2023 appeal.

was convicted of oral sodomy but he and Leasure were acquitted of all other counts (see App. 12, 39-40). Judge Bacon sentenced Perkins to three to nine years of incarceration (App. 3; see App. 12, 39-40). This Court affirmed the conviction in a one-page judgment (App. 46). *See Perkins v. United States*, No. 80-817, Judgment (D.C. Oct. 19, 1981).

On June 16, 2020, the Honorable Laura A. Cordero denied Perkins's challenge to the Court Services and Offender Supervision Agency's (CSOSA's) determination of lifetime sex-offender registration (App. 93-100). Judge Cordero reentered the order on December 1, 2020, to allow the filing of a timely notice of appeal, and Perkins noticed an appeal on December 14, 2020 (App. 101-04).

On August 4, 2023, Judge Cordero denied Perkins's motion under D.C. Code § 23-110 to vacate his sodomy conviction (App. 117-22). Perkins noticed an appeal on August 29, 2023 (123-24). This Court consolidated the appeals.

The Trial

No one could find the 1980 trial transcripts from the case (see, e.g., App. 106). The most complete account of the trial evidence thus came from Perkins's brief in the direct appeal, which summarized:

The evidence elicited by the government at trial was largely undisputed by the defense. The complainant, G.D.,[2] 18, testified that she spent the evening of June 11, 1979 with her cousin Janet D. and friend Al White. TR 81-83. They went to a drive-in movie and smoked some marijuana. At roughly midnight, the three left the movie and returned to Al White's apartment. G.D. testified that they left Mr. White's apartment shortly thereafter when she refused to have sex with him. TR 84. Al White then drove G.D. and her cousin to the intersection of Southern Avenue and Wheeler Road where the women exited the car. They walked a few blocks to a bus stop at Barnaby Terrace where G.D. planned to wait for a bus for home. TR 86. She estimated that she arrived at the bus stop at 1:00 a.m. and shortly thereafter a car driven by Charles Perkins came by. When a passenger in the car, Roy Leasure, offered her a ride home, G.D. accepted. G.D. entered the back seat of the car and began a conversation with a woman passenger, Sheila Barnes. TR 90. After she passed Perkins and Leasure a marijuana cigarette, Perkins drove to a carryout store called Jake's and left the car with Leasure to buy some beer. When they returned, Perkins began to drive in a direction away from G.D.'s house. When G.D. inquired as to where they were going, someone responded that Sheila Barnes was not feeling well and they were going to take her home. TR 94.

After dropping Ms. Barnes off at her home [in Northwest], Perkins, Leasure and G.D. headed back to Southeast. G.D. testified that she thought she was being taken home until they turned off of 17th Street onto "E" Street and began heading for the Congressional Cemetery. TR 98. She testified that Perkins stated "this is where we do our business" and drove the car "all the way to the back" of the cemetery. TR 99. Once there, she recalled, both men entered the back seat where she had been sitting and Perkins asked if she would

[2] Throughout the brief, when quoting from the underlying documents, we substitute the complainant's initials for her full name.

> "trick" for them. She said no and recalled being afraid because she could not see any houses, lights or other people. TR 100.
>
> She then recalled that Perkins forced her to commit oral sodomy. After a short time, both Perkins and Leasure ordered her to remove her clothing which she did. She then recalled hearing Leasure ask Perkins whether the "piece" was still under the front seat. TR 102. Perkins then forced her to submit to anal and oral sodomy and finally intercourse. TR 103-105.
>
> While she was being assaulted by Perkins in the car, Leasure exited the car and spread a blanket on the ground nearby. When Perkins announced that he was through, Leasure then led her to the blanket where he slapped her and engaged in intercourse. TR 105-106.
>
> After Leasure was through, G.D. testified that Leasure ordered her to get dressed and woke up Perkins, who had fallen asleep in the car. They then proceeded toward G.D.'s home. (App. 12-13.)

Fifteen minutes after being dropped off at home, G.D.'s mother answered a phone call, and G.D. picked up the extension and recognized the caller as Leasure (App. 13). "Leasure had searched her purse during the ride from the cemetery and had written down her phone number and address" (*id.* at 13-14).

The next morning, G.D. told multiple cousins that she had been raped "by men named Peewee and Charles" (App. 14). Leasure asked G.D. to meet him that day, and G.D. went with multiple cousins (*id.*). "Just as the argument started, a police car drove by and G.D., for the first

time, reported to the police 'what had happened'" (*id.*). Leasure was placed under arrest (*id.*). A detective drove G.D. back to the cemetery, and she showed him where the crime had occurred (*id.* at 14-15).

In his own defense, Perkins gave a very different account:

> He testified that after dropping off passenger Sheila Barnes, he, Roy Leasure and the complainant began to drive back toward Southeast. During this time, G.D. asked of appellant and Leasure "would we like to go someplace dark, finish getting high . . ." TR 403. Perkins interpreted this comment to be an invitation for sexual activity and proceeded to drive to the cemetery. Once at the cemetery, the complainant readily consented to sexual conduct, first with appellant and then with Leasure. Perkins then recalled that he did engage in intercourse and oral sodomy. TR 404. After he was finished, he testified the complainant left the car to be with Leasure and he fell asleep in the front seat of the car. Appellant did testify that G.D. did voluntarily participate in all the sexual activity of that evening. TR 405. (App. 16.)

At the close of evidence, Leasure (joined by Perkins) argued that "the jury should be instructed that consent is a defense to sodomy" under cases like *Griswold v. Connecticut*, 381 U.S. 479 (1965), which recognize "that consensual sexual activity was meritorious of constitutional protection" (App. 16-17). "After a careful review of the case law, the trial court rejected the proposed instruction, finding that 'the place at which the alleged acts were committed was indeed a place accessible to the public'" (App. 40). The trial court explained that it was "constrained by

prior rulings of this Court which have denied standing to defendants to raise a privacy argument where the acts took place in a public place" (App. 17) (citing *Stewart v. United States*, 364 A.2d 1205 (D.C. 1976); *United States v. Buck*, 342 A.2d 48 (D.C. 1975)).

The trial court denied motions for judgment of acquittal on all counts (see App. 15-16). The jury convicted Perkins of oral sodomy but acquitted him and Leasure of all other counts (see App. 17).

The Direct Appeal

In his direct appeal, Perkins argued that the Constitution protected private consensual sexual conduct between adults (App. 18-29, 32-38). That constitutional protection, he contended, should include consensual sodomy in the "secluded setting" of "the far recesses of the Congressional Cemetery during the early morning hours" (App. 29-32, 37). Perkins thus argued that the lack of consent instruction as to the sodomy charge in his trial denied him liberty without due process (see App. 18-38).

The government's motion for summary affirmance countered that "consent is not a defense to a charge of sodomy when the offense occurs in a public place" (App. 39; 41-42) (citing *Buck*, 342 A.2d 48; *Harris v. United States*, 315 A.2d 569 (D.C. 1974) (en banc)). Even if this Court

were to recognize a right to privacy in some places beyond the home, the government contended, "decisions of this Court conclusively establish that no such right exists when the act occurs in a place accessible to the public" (App. 42) (citing *Lutz v. United States*, 434 A.2d 442 (D.C. 1981); *Harley v. United States*, 373 A.2d 898 (D.C. 1977); *Stewart*, 364 A.2d 1205; *United States v. McKean*, 338 A.2d 439 (D.C. 1975); *Buck*, 342 A.2d 48). And "[t]he trial court's conclusion that Congressional Cemetery was a 'place accessible to the public' and that appellant's sodomitic acts were therefore not entitled to constitutional protection was amply supported by the evidence" (App. 43-44) (citation omitted). Finally, the government added, "any right to privacy that otherwise might have attached to appellant's activities was nullified by the presence of his co-defendant Leasure" (App. 44-45).

In a one-page judgment, this Court granted the motion for summary affirmance and affirmed Perkins's conviction (App. 46).

Postconviction Litigation

Perkins first moved for postconviction relief in 1982, arguing that his sentence should be reduced because the D.C. Council had recently attempted to decriminalize consensual sex acts between adults, although

Congress overrode the Council's legislation (see App. 47-54). Judge Bacon denied the motion, explaining that "[a]ny reduction of sentence would unduly deprecate the seriousness of the offense" (App. 55-56).

In 2004, Perkins filed a pro se motion under D.C. Code § 23-110 asking the court to expunge his sodomy conviction (App. 57-62). Perkins noted that the D.C. Council had decriminalized sex acts between consenting adults in 1993 (App. 58). He contended that his conviction for "nothing other than consentual [sic] acts between two adults" was "unconstitutional" (App. 59, 61). The government opposed, arguing that Perkins's conviction reflected forcible sodomy, that his unexplained delay in bringing his claim had unfairly prejudiced the government (as trial transcripts were no longer available), and that the 1993 legislation was not retroactive (2020 Record (R.) 108-42 (2005 23-110 Opp'n)). Perkins apparently replied in 2006, although his reply was not docketed until 2018 (2020 R. 11 (Docket); 2020 R. 149-59 (2006 23-110 Reply)). The Honorable Brian F. Holeman denied the § 23-110 motion in December 2018, concluding that consent was not a defense to sodomy at the time of the conviction, the 1993 legislation was not retroactive, and Perkins had failed to establish any constitutional violation (App. 64-70).

The D.C. Sex Offender Registration Act of 1999 (SORA) requires lifetime registration as a sex offender for anyone convicted of "sodomy as this offense was proscribed until May 23, 1995 by § 22-3802(a) where the offense was forcible." D.C. Code §§ 22-4001(6)(A), 22-4002(b)(1). Upon his release onto parole in 2018,[3] CSOSA notified Perkins that he would have to register as a sex offender (App. 71-72). Perkins filed a short motion under D.C. Code § 22-4004 to contest CSOSA's determination, contending that his conviction was for consensual sodomy, and the government had the burden to show Perkins's obligation to register under *In re W.M.*, 851 A.2d 431 (D.C. 2004) (App. 73-76). The government opposed, arguing that "the record establishes by at least a preponderance of the evidence that defendant used force to sodomize his victim" based on the surviving records from the case (App. 77-92). *See also* 2020 R. 211-56 (exhibits to Gov't SORA Opp'n). Perkins did not file a reply.

[3] Perkins was not released until 2018 because he was also serving a sentence in a separate 1979 case for felony murder of two individuals (App. 79 n.3). The indictment in that case charged that Perkins, his codefendant Leasure, and a third defendant raped the female victim during the incident and sodomized the male victim, although Perkins was not convicted of those sex offenses (*id.*).

Judge Cordero denied Perkins's challenge to his sex-offender registration, finding that the government had "shown by a preponderance of evidence that Defendant committed forcible sodomy" (App. 4). While the jury's verdict did not definitively resolve the issue (*id.* at 3-4), surviving accounts from documents like police reports and hearing transcripts showed the use of threats and force (see *id.* at 4-7). Judge Bacon's denial of the motion for judgment of acquittal on the rape charges and near-maximum sentence for the sodomy conviction likewise pointed to force (see *id.* at 7).

In 2021, Perkins again moved under D.C. Code § 23-110 to vacate his sodomy conviction, contending that after *Lawrence v. Texas*, 539 U.S. 558 (2003), the sodomy statute was unconstitutional facially and as applied (App. 105-16). The government opposed, arguing that the motion was procedurally barred and meritless (2023 R. 94-112 (2022 23-110 Opp'n)). Perkins replied (2023 R. 127-36 (2023 23-110 Reply)).[4]

[4] D.C. Code § 23-110(a) applies to a "prisoner in custody." For purposes of this appeal, we assume without conceding that release on parole still qualifies as "custody." *See Jones v. Cunningham*, 371 U.S. 236 (1963) (state prisoner on parole is "in custody" for purposes of federal habeas statute); *Snell v. United States*, 754 A.2d 289, 292-93 (D.C. 2000) (D.C. probationer is "in custody" under § 23-110(a)).

Judge Cordero denied the § 23-110 motion on both procedural and substantive grounds. Procedurally, the court concluded, Perkins's latest § 23-110 was a successive claim in light of his previous § 23-110 motion that had sought release on the same legal basis—namely, that his conviction was unconstitutional because consensual sodomy is no longer a valid basis for a criminal prosecution (App. 119-20). Perkins had offered no cause for his procedural default (App. 120-21). On the merits, the claim failed because *Lawrence* did not recognize a right to "engage in oral sodomy in a public place" or "without consent" (App. 121).

SUMMARY OF ARGUMENT

The trial court properly rejected Perkins's § 23-110 motion challenging the constitutionality of his sodomy conviction. As already established in the direct appeal, Perkins's claim fails on the merits. He had no constitutional right to engage in sodomy (even consensual sodomy) in a public place like the Congressional Cemetery. That conclusion is consistent with the Supreme Court's decision in *Lawrence* and this Court's recent decision in *Valdez v. United States*, 320 A.3d 339 (D.C. 2024). Moreover, given Perkins's prior litigation of these issues, and

his failure to justify his delay in bringing his claim, his latest § 23-110 motion is also procedurally barred.

The trial court likewise properly denied Perkins's challenge to the order that he register as a sex offender. Perkins's demands for a jury trial and a heightened standard of proof are forfeited and foreclosed by precedent. And on this record, sufficient evidence supports the trial court's finding that Perkins's sodomy offense was forcible.

ARGUMENT

I. Perkins's Constitutional Challenge Is Meritless and Procedurally Barred.

A. Standard of Review and Applicable Legal Principles

Under D.C. Code § 23-110(a), a defendant may move to vacate, set aside, or correct a sentence on the ground that (1) the sentence was imposed in violation of the Constitution or the laws of the District of Columbia; (2) the court was without jurisdiction to impose the sentence; (3) the sentence exceeded the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. This Court reviews the denial of a § 23-110 motion for abuse of discretion. *Johnson v. United States*, 633 A.2d 828, 831 (D.C. 1993).

Lawrence recognized that "[l]iberty protects the person from unwarranted government intrusions into a dwelling or other private places." 539 U.S. at 562. The Supreme Court thus overturned Lawrence's conviction for consensual sodomy committed in a private residence. But, the Court emphasized, "[t]he present case" "does not involve persons who might be injured or coerced" and "does not involve public conduct." 539 U.S. at 578.

This Court recently explained that, in light of *Lawrence,* "[t]he District's former sodomy statute, which was repealed in 1995," "was unconstitutionally overbroad" insofar as it "made it a felony offense to engage in oral or anal sex, regardless of the circumstances." *Valdez*, 320 A.3d at 381. But *Lawrence* "did not render the District's sodomy statute unconstitutional in every application; the Supreme Court's decision means only that certain conduct (essentially, the private and noncommercial sexual behavior of consenting adults) is exempt from the sodomy statute's purview." *Id.* at 381-82. "[T]he sodomy statute," *Valdez* held, "is still validly applicable to nonconsensual conduct *and other activity within its scope that is not constitutionally protected* as set forth in *Lawrence*." *Valdez*, 320 A.3d at 383-84 (emphasis added). Noting that

"[o]ther jurisdictions have reached the same conclusion," *Valdez* quoted the Virginia Supreme Court's holding that its sodomy statute "'can continue to regulate other forms of sodomy, such as sodomy involving children, forcible sodomy, prostitution involving sodomy *and sodomy in public*.'" *Id.* at 384 n.12 (emphasis added) (quoting *Toghill v. Commonwealth*, 768 S.E.2d 674, 681 (Va. 2015)). Because Valdez (who had committed a non-consensual sodomy) "ha[d] not shown that the sodomy statute was unconstitutionally applied to him," this Court affirmed. *Id.* at 382.

B. Perkins's Sodomy Conviction Was Constitutional.

Perkins's current challenge to his sodomy conviction is essentially identical to the argument he made in his direct appeal: that his conviction for potentially consensual sodomy is unconstitutional. Four decades later, his challenge still fails for the same reason. Perkins's sodomy took place in the public Congressional Cemetery, and therefore the Constitution does not protect his conduct.

This Court's decisions in *Buck* and *Harris* anticipated *Lawrence*'s conclusion that consensual sodomy in private was constitutionally

protected. The en banc Court in *Harris*, for example, "expressly d[id] not reach" the issue of "the applicability of the right of privacy decisions to a homosexual act committed by two consenting adults in private." 315 A.2d at 574; *accord, e.g.*, *McKean*, 338 A.2d at 440; *United States v. Carson*, 319 A.2d 329, 332 (D.C. 1974); *see also Rittenour v. District of Columbia*, 163 A.2d 558, 559 (D.C. 1960) (holding that statute forbidding "lewd, obscene, or indecent act" did not apply to "homosexual advances" "committed in privacy in the presence of a single and consenting person"). But these cases held that, even assuming the existence of such a constitutional right, consensual sodomy "carried on in a place which cannot in contemplation of law reasonably be considered private is not protected by a constitutional right to privacy." *McKean*, 338 A.2d at 440; *accord, e.g.*, *Stewart*, 364 A.2d at 1207; *Buck*, 342 A.2d at 49; *Carson*, 319 A.2d at 332; *Harris*, 315 A.2d at 574-75; *see also Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 n.13 (1973) ("[o]bviously, there is no necessary or legitimate expectation of privacy which would extend to marital intercourse on a street corner").

Decisions like *Buck* and *Harris* remain good law and binding on this Court. These cases preclude Perkins from claiming a right to privacy

while engaging in sodomy in the public Congressional Cemetery. For example, *Buck* held that "participants in an act performed in a 'public wooded area' cannot invoke a right to privacy even though they may have believed that because of the hour of the night and the density of the foliage, their behavior would go unobserved." 342 A.2d at 49. Likewise, *Stewart* held that "sodomitic acts" at 1:15 a.m. on "the banks of the C&O Canal near 30th and M Streets, N.W.," were "not protected by any right to privacy since they occurred in a public area." 364 A.2d at 1206-07.

As the government's motion for summary affirmance explained in the direct appeal, the Congressional Cemetery similarly qualified as a public place where Perkins enjoyed no constitutional right to privacy:

> The trial court's conclusion that Congressional Cemetery was a 'place accessible to the public' (Tr. II 20) and that appellant's sodomitic acts were therefore not entitled to constitutional protection was amply supported by the evidence. The cemetery is located at 1801 E Street, S.E., near Pennsylvania Avenue and another heavily traveled road used 'for personnel going to the jail, ambulances, peopled going to the hospital' (Tr. I 329). The cemetery was easily accessible to the public at the time of the incident; the evidence showed that its gate was wide open and that appellant drove G.D. there without hinderance (Tr. I 98). G.D. had been there on an earlier occasion for a funeral, and appellant had also been there before (Tr. [illegible]). There is a house in the middle of the cemetery (Tr. I 329). Moreover, G.D. testified that appellant was prompted to leave when a light flashed, and Leasure said to appellant, "Let's go because here come the Fuzz" (Tr. I 109).

> For these reasons, the trial court's factual conclusion that Congressional Cemetery was a place accessible to the public was plainly correct. Accordingly, appellant had no constitutional right to privacy while at that location. (App. 43-44) (footnote omitted).

See also App. 30 (Perkins conceded on direct appeal that "[t]he record is silent as to whether anyone else observed them"). The case for finding a right to privacy here appears even weaker than in *Buck*, where at least "the density of the foliage" led the participants to believe that "their behavior would go unobserved." 342 A.2d at 49.[5]

At the very least, given that *this exact issue* was fully and competently litigated as part of the direct appeal, Perkins's attempt to relitigate the same issue 45 years later—after the trial record has been

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[5] In passing, Perkins asserts that his conduct was private in part because he was "inside his own car" (Br. 16). But he cites no record evidence indicating that the car meaningfully hid their activity. It is not even clear if the car doors were open or closed. In the direct appeal, Perkins never suggested that the setting in the car undercut the trial court's finding of a public place. And indeed, many indecent exposure or public masturbation cases involves defendants in cars. *See, e.g.*, *Lickers v. United States*, 98 F.4th 847, 851 (7th Cir. 2024); *United States v. Richardson*, 40 F.4th 858, 862-63 (8th Cir. 2022); *People v. Honan*, 186 Cal. App. 4th 175, 181 (2010) ("[a]n example of such lewd conduct is a couple engaging in a sexual encounter in a public restroom or in a parked car"). Nor is there any "legitimate expectation of privacy shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers." *Texas v. Brown*, 460 U.S. 730, 740 (1983) (plurality op.) (citation omitted).

lost—must be rejected. Indeed, Perkins refuses to even acknowledge the trial court's (and this Court's) determination based on the full trial record that the Congressional Cemetery was a public area where Perkins had no right to privacy.

Lawrence does not change the calculus (cf. Br. 16-18). As already explained, *Harris* and its progeny assumed the existence of a constitutional right to engage in consensual sodomy in private (as *Lawrence* later found), but these cases determined that there was no privacy-based right to engage in sodomy in a public area. *Lawrence* specifically did not address "public conduct," thus leaving the *Harris* line of cases in place. Indeed, under current D.C. law, it remains "unlawful for a person, in public, . . . or to engage in a sexual act." D.C. Code § 22-1312; *see also id.* § 22-3001(8) ("sexual act" includes "[c]ontact between the mouth and the penis"). That public sodomy today is a misdemeanor instead of a felony is irrelevant (cf. Br. 18-19). The fact that it remains criminalized establishes that public sodomy is not constitutionally protected, even after *Lawrence*.[6]

[6] This case does not require this Court to determine the "dividing line" between "private" and "public" or address Perkins's hypothetical (continued . . .)

This outcome is also consistent with *Valdez*. Far from limiting the old sodomy statute to nonconsensual acts (cf. Br. 12-17), *Valdez* explained that it was "holding that the sodomy statute is still validly applicable to nonconsensual conduct *and other activity within its scope that is not*

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scenarios concerning hotel rooms and tents in public campgrounds (cf. Br. 17). The en banc decision in *Harris* holds that a defendant who engages in sex in a public area cannot assert a privacy-based overbreadth challenge on behalf of others whose conduct might be constitutionally protected. *See* 315 A.2d at 574-75. And cases like *Buck* and *Stewart* make clear that Perkins had no constitutional right to privacy in the public Congressional Cemetery. *See also Paris Adult Theatre I*, 413 U.S. at 57, 67 n.13 (recognizing that although privacy rights sometimes "extend[ ] to the doctor's office, the hospital, the hotel room," they cannot apply to "public places—discreet, if you will, but accessible to all," where "to grant him his right is to affect the world about the rest of us").

Similarly irrelevant (cf. Br. 18-20) is the newly added requirement that acts under § 22-1312 be "in public," which the 2010 legislative history defined as "'in open view; before the people at large.'" *Bolz v. District of Columbia*, 149 A.3d 1130, 1143 (D.C. 2016). There is every reason to think that this definition would cover Perkins's conduct: the revised statute aims to capture settings where "minors might be present or nonconsenting adults are not easily shielded from displays of nudity." *Id.* A cemetery that "was easily accessible to the public at the time of the incident" is a place where minors or nonconsenting adults might be present, with the risks of public exposure increased by multiple nearby "heavily traveled road[s]," a house, and a light that "flashed" during the crime and seemed to signal the presence of others (App. 43-44). In any event, the definition of a different term in a recently revised statute cannot displace the cases stemming from *Harris*, which make clear that the sodomy statute constitutionally covered Perkins's conduct in the Congressional Cemetery.

constitutionally protected as set forth in *Lawrence*," including "sodomy in public." 320 A.3d at 381 n.97, 383-84 & n.112 (emphasis added). *Valdez* thus "uph[e]ld application of the sodomy statute to conduct that always was (and still is) permissibly proscribed by it." *Id.* at 384; *see also Harris*, 315 A.2d at 574-75 (similarly rejecting request "to declare the sodomy statute void on its face" and holding that statute constitutionally covered "the premises of a commercial establishment open to the public"). While the *Valdez* decision focused on nonconsensual sodomy because of how Valdez's crime was indicted and presented to the jury, it casts no doubt on prosecutions for sodomy that are not "private." *See id.* at 382. Because Perkins "has not shown that the sodomy statute was unconstitutionally applied to him," *Valdez* supports affirmance of his sodomy conviction here. 320 A.3d at 382.

Finally, Perkins's suggestion that his 1980 jury should been required to find that the Congressional Cemetery is a "public area" (Br. 19-20) is not properly before the Court and has no merit. Although Perkins's brief never articulates his legal theory for this argument, it seems to be based in the *Apprendi* line of cases, which recognize a constitutional right to have necessary elements found by a jury beyond a

reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000). But Perkins has never before suggested that a jury should have found that this was a "public area." Nor has he attempted to justify his failure to raise that issue in the direct appeal or the § 23-110 motion. This appeal is not the proper venue for raising the issue for the first time. *See United States v. Frady*, 456 U.S. 152, 164 (1982) ("the 'plain error' standard is out of place when a prisoner launches a collateral attack against a criminal conviction"). In any event, this Court has already held that *Apprendi* "does not apply retroactively to cases on collateral review." *Long v. United States*, 36 A.3d 363, 379 (D.C. 2012). A defendant cannot reopen a long-final conviction based on procedural objections about "who decides a given question (judge versus jury) and under what standard (preponderance versus reasonable doubt)." *Id.* Perkins's sodomy conviction rests on firm constitutional ground.

C. Perkins's Attacks on His Sodomy Conviction Are Procedurally Barred.

In any event, Perkins's 2021 collateral attack on his 1980 conviction is barred many times over. This Court reviews the denial of a § 23-110

motion on procedural grounds for abuse of discretion. *See Richardson v. United States*, 8 A.3d 1245, 1251 (D.C. 2010).

To begin, as explained above, the challenge Perkins is now trying to raise through his § 23-110 petition is *the exact same claim* that he raised in his direct appeal. *Lawrence* did not change the legal landscape: this Court had already assumed—long before *Lawrence*—the existence of the constitutional right that *Lawrence* found. Given Perkins's unsuccessful direct appeal, two related doctrines thus bar Perkins's new § 23-110. "The mandate of an appeals court precludes the trial court on remand from reconsidering matters which were either expressly or implicitly disposed of upon appeal." *Willis v. United States*, 692 A.2d 1380, 1382 (D.C. 1997) (cleaned up). Further, the "law of the case precludes reopening questions resolved by an earlier appeal in the same case." *Thompson v. Armstrong*, 134 A.3d 305, 309 (D.C. 2016) (quotation marks omitted); *see also, e.g.*, *Campbell v. United States*, 224 A.3d 205, 211 n.2 (D.C. 2020); *Graham v. United States*, 895 A.2d 305, 308 n.5 (D.C. 2006); *Willis*, 692 A.2d at 1383. Although this Court's judgment on direct appeal did not explain its reasoning, the affirmance of Perkins's conviction necessarily required this Court to conclude that Perkins's

conduct was not constitutionally protected. *See, e.g.*, *Head v. United States*, 626 A.2d 1382, 1384 (D.C. 1993) (recognizing that by denying motion, "the court found that it did not have sufficient merit"). That prior decision remains binding.

Perkins's 2004 § 23-110 motion creates additional procedural bars, because his most recent § 23-110 was "successive" to that prior motion. Under § 23-110(e), "[t]he court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." "A motion is 'successive' if it raises *claims* identical to those raised and denied on the merits in a prior motion," even if the specifics of the legal claim are different. *Bradley v. United States*, 881 A.2d 640, 645 (D.C. 2005) (emphasis added). For example, if a defendant raises a claim of ineffective assistance in his first § 23-110, a claim of ineffectiveness in a second § 23-110 is deemed "successive," even if the theories for ineffectiveness are different. *See id.* at 645-46. As Perkins concedes (Br. 21), his 2004 § 23-110 motion "argued that consensual oral sodomy was no longer considered a crime between two consenting adults" and his conviction was thus "unconstitutional," "the same legal basis for relief as the claim made in the instant Motion" (App. 120). Judge Holeman denied

that 2004 § 23-110 motion "on the merits," finding that "the Defendant 'faile[d] to establish grounds indicating that the sentence imposed was in violation of the Constitution of the United States'" (*id.*). Even assuming that Judge Holeman was not thinking of *Lawrence* (see Br. 20-23)—an implausible assumption, given *Lawrence*'s prominence and relevance—it remains a merits denial of the same constitutional claim. *See also Bernal v. United States*, 162 A.3d 128, 134 n.10 (D.C. 2017) ("Judges are presumed to know the law.").

In any event, even if Perkins had never previously raised his current § 23-110 claim, it would still be procedurally barred. "[W]here a defendant has failed to raise an available challenge to his conviction on direct appeal, he may not raise that issue on collateral attack unless he shows both cause for his failure to do so and prejudice as a result of his failure." *Long*, 36 A.3d at 378; *see Frady*, 456 U.S. at 167-68. The same goes for claims he failed to raise in an earlier § 23-110 motion, which are barred as an "abuse of the writ," *see McCrimmon v. United States*, 853 A.2d 154, 159 (D.C. 2004); *McCleskey v. Zant*, 499 U.S. 467, 490 (1991), and a successive claim, *see Hardy v. United States*, 988 A.2d 950, 960 (D.C. 2010).

Perkins cannot escape these procedural bars. To show "cause" for failure to raise a claim earlier, a defendant "must show (if he can) that he 'was prevented by exceptional circumstances' from raising the claim at the appropriate time." *Hardy*, 988 A.2d at 960-61. Perkins offers no "exceptional circumstances" that prevented him from raising his constitutional claim in the direct appeal or 2004 § 23-110 motion. Instead, he contends that he should be exempt from the cause-and-prejudice requirements based on "the ends of justice," because he was acting pro se in his first § 23-110 motion and is "actually innocent" (Br. 23-26).[7] Perkins's pro se status at the time of his first § 23-110 does not relieve the procedural bar here (cf. Br. 24-25). To the extent that Perkins's pro se § 23-110 motion filed in 2004 raised the same claims that were addressed on direct appeal, he had no entitlement to counsel in his collateral attack. *See, e.g.*, *Wu v. United States*, 798 A.2d 1083, 1089 (D.C. 2002) (appointment of counsel not required where § 23-110 motion fails

[7] To the extent it still exists at all, the "ends of justice" standard that Perkins invokes (Br. 20-21) is equivalent to "actual innocence." *See Schlup v. Delo*, 513 U.S. 298, 318-23 (1995); *see also Banister v. Davis*, 590 U.S. 504, 514 (2020) (explaining that "ends of justice" standard was abrogated by the statutory bar on "second or successive" petitions).

to state a claim). Indeed, since most § 23-110 petitions are filed by pro se defendants, excusing defaults in pro se filings would largely erase the existence of procedural bars.

Nor has Perkins shown actual innocence. "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." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (cleaned up); *see Ward v. United States*, 318 A.3d 520, 529 (D.C. 2024). Here, "'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623.

Perkins has not "demonstrated" that "it is more likely than not that no reasonable juror would have convicted him." *Bousley*, 523 U.S. at 623. Most obviously, because the sodomy statute validly captured sexual conduct in public areas like the Congressional Cemetery, Perkins was guilty. *See supra* Part I.B. Further, as explained below, compelling evidence established that G.D. did not consent, and the jury's verdict did not find otherwise. *See infra* Part II.C. In any event, the actual-innocence inquiry asks not what the original jury thought, but whether Perkins can show that "no reasonable juror" would have convicted him. Perkins has

not met that standard. Because of Perkins's decades-long delay in bringing his claims, the original trial transcripts no longer exist. That "unjustifiable delay on a habeas petitioner's part" is "a factor in determining whether actual innocence has been reliably shown," undercutting a claim of actual innocence. *McQuiggin v. Perkins*, 569 U.S. 383, 387 (2013). Moreover, in denying the motion for judgment of acquittal on the rape count, the trial judge found that the evidence as to the victim's lack of consent "was sufficient to permit reasonable jurors to find guilt beyond a reasonable doubt." *Dyson v. United States*, 450 A.2d 432, 436 (D.C. 1982). Particularly given that the trial "came down to a credibility contest" between the victim and the defendant, it is appropriate to defer to the determinations of the trial judge who watched the testimony. *Hart v. United States*, 863 A.2d 866, 873 (D.C. 2004). While some evidence corroborated the victim's testimony (such as her report of the rape and the recovery of her underwear in the cemetery), Perkins points to nothing that corroborated his own contrary testimony. On this record, Perkins has failed to carry his burden to establish actual innocence. His attempt to overturn his 1980 sodomy conviction is thus also procedurally barred.

II. Perkins's Attacks on His Sex-Offender Registration Fail.

A. Additional Legal Principles and Standard of Review

"SORA requires persons who have committed serious sex offenses to register with CSOSA if they live, reside, work, or attend school in the District of Columbia." *Cox v. United States*, 325 A.3d 360, 368 (D.C. 2024). A person who has committed a "lifetime registration offense" must register as a sex offender for life. *See* D.C. Code § 22-4002. A "lifetime registration offense" includes "sodomy as this offense was proscribed until May 23, 1995 by § 22-3802(a) where the offense was forcible," or any "substantially similar" offense. D.C. Code § 22-4001(6).[8]

"If CSOSA determines that a person is required to register based on a factual determination about the nature of the conduct underlying that person's . . . offense, the person may seek review of that factual

[8] Although today's codification references a sodomy conviction proscribed by "D.C. Code § 22-3802(a)," SORA originally referred to a sodomy conviction proscribed by § 22-3502(a), the statute under which Perkins was convicted. After the sodomy statute was repealed, it was recodified to D.C. Code § 22-3802. These sorts of post-enactment recodifications do not affect statutory meaning. *See In re W.M.*, 851 A.2d 431, 442 (D.C. 2004); *see also Hickerson v. United States*, 287 A.3d 237, 241 (D.C. 2023).

determination in Superior Court." *Cox*, 325 A.3d at 368. Such reviewable factual determinations include a finding that "certain sexual acts or contacts were forcible." D.C. Code § 22-4004(a)(ii). SORA instructs how the dispute should be resolved:

> The Court may, in its sole discretion, decide a motion made under subsection (a) of this section on the basis of the motion, affidavits, the files and records of the case, other written documents, proffers of the parties, or an evidentiary hearing. If the Court determines that a hearing is necessary to decide the issue or if the interests of justice otherwise require, the Court shall appoint counsel for the person if he or she is not represented by counsel and meets the financial criteria for the appointment of counsel.

D.C. Code § 22-4004(c)(1). "The Superior Court decides that factual issue de novo, and the United States bears the burden of proving the disputed fact by a preponderance of the evidence." *Cox*, 325 A.3d at 368 (citing *In re W.M.*, 851 A.2d 431, 455 (D.C. 2004)).

In turn, this Court reviews a trial court's finding that the "offense involved the use or threatened use of force" for "sufficiency of the evidence." *Cox*, 325 A.3d at 375-76. Sufficiency "review is deferential, giving full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.* at 376 (quotation marks

omitted). Further, the trial court's underlying factual findings are reviewed for clear error, reversible only if "the finding is plainly wrong or without evidence to support it." *Id.* (quotation marks omitted). The clear-error standard applies "to all factual determinations made by the trial court, even those that rest on review of documents rather than live testimony." *Id.* at 376-77.

B. Perkins's Procedural Challenges Are Unpreserved and Unsuccessful.

For the first time on appeal, Perkins raises two procedural objections to the trial court's registration order, contending that under the SORA statute, the finding that the sodomy was "forcible" should have been made by a jury instead of a judge (Br. 28-33) and requires a standard of proof higher than preponderance of the evidence (Br. 33-40). Perkins's three-page motion by PDS counsel below (App. 73-75) never hinted at these arguments. Instead, his motion requested judicial factfinding under *W.M.*'s preponderance standard, saying that he was "request[ing] that *this Court find* that he is not required to register as a sex offender," and asserting under *W.M.* that "it is the government that has the burden

to show that Mr. Perkins can be required to register as a sex offender" (App. 73, 75) (emphasis added).[9]

The invited-error doctrine "precludes a party from asserting as error on appeal a course that [they have] induced the trial court to take." *Young v. United States*, 305 A.3d 402, 430 (D.C. 2023) (citing *Preacher v. United States*, 934 A.2d 363, 368 (D.C. 2007)). Further, SORA is a civil scheme. *See W.M.*, 851 A.2d at 441-46. Even if Perkins's new arguments for a jury trial and a higher standard of proof are merely deemed forfeited, they still are not properly presented on appeal at all, as he has never claimed (or shown) that those procedural arguments present an "exceptional situation" where "review is necessary to prevent a clear miscarriage of justice apparent from the record." *Thompson v. United States*, 322 A.3d 509, 515 (D.C. 2024) (quotation marks and brackets omitted); *see also id.* (reserving judgment even in § 23-110 context on

[9] Perkins seems to acknowledge (Br. 39-40) that he never argued below for a heightened standard of review. And the sentence he cites from the general background description of his trial—"The complainant testified at trial and after deliberations in this matter the jury did not convict Mr. Perkins or the co-defendant of any of any sex offenses involving force, including the offense of Rape" (App. 74)—was not an assertion that under SORA, Judge Cordero was required to empanel a jury to resolve whether his sodomy offense was forcible (cf. Br. 32 n.16).

whether unraised claims are subject to review, given "hybrid" criminal and civil nature of § 23-110 proceeding).

At most, Perkins's claims are subject to plain-error review. Under that standard, Perkins must show: (1) "an error or defect"; (2) that is plain, meaning "clear or obvious, rather than subject to reasonable dispute"; (3) that "affected [his] substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [trial] court proceedings"; in which case, (4) "the court of appeals has the *discretion* to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Puckett v. United States*, 556 U.S. 129, 135 (2009) (quoting *United States v. Olano*, 507 U.S. 725, 736 (1993)).[10]

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[10] Perkins's attempt to cut the "plainness" requirement from the plain-error standard (Br. 39) finds no support. Under his theory, an appellate court which finds "error" must automatically also deem that error "plain." Such a theory is contrary to substantial precedent finding a trial court's decision to be "error, but not plain error." *See, e.g.*, *United States v. Young*, 470 U.S. 1, 14 (1985); *Ko v. United States*, 722 A.2d 830, 835-36 (D.C. 1998); *Green v. United States*, 718 A.2d 1042, 1059 (D.C. 1998) (citing *Foreman v. United States*, 633 A.2d 792, 794 (D.C. 1993)); *Robinson v. United States*, 513 A.2d 218, 224 (D.C. 1986) (citing *Brown v. United States*, 387 A.2d 728, 730-31 (D.C. 1978)). Likewise, that theory (continued . . .)

Perkins shows no error on these procedural issues, let alone plain error. Perkins asserts that, in light of constitutional principles, the statute should be interpreted to require a jury and heightened standard of review. Such statutory arguments are baseless.[11]

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would contradict the familiar alternative ruling that "there was no error, *and certainly no plain error*." *See, e.g.*, *Musacchio v. United States*, 577 U.S. 237, 248 (2016); *Jones v. United States*, 127 A.3d 1173, 1188 (D.C. 2015); *Ball v. United States*, 26 A.3d 764, 772 (D.C. 2011); *Brown v. United States*, 840 A.2d 82, 94 (D.C. 2004); *Hawthorne v. United States*, 829 A.2d 948, 953 (D.C. 2003).

The language that Perkins cites (Br. 39-40) from *Thomas v. United States*, 914 A.2d 1 (D.C. 2006), provides a "special plain error rule" for situations when the governing law at the time of trial foreclosed the argument, such that any objection would have been futile. *Id.* at 20-21 & n.26 (citing *Johnson v. United States*, 520 U.S. 461, 468 (1997)). But Perkins identifies no grounds for that "special" rule here—there has been no "dramatic transformation" in the law that rendered his objections futile in the trial court but viable on appeal. *See, e.g.*, *Zanders v. United States*, 999 A.2d 149, 158 (D.C. 2010); *Otts v. United States*, 952 A.2d 156, 162 (D.C. 2008). In any event, *Thomas*'s "special" rule has not survived *Henderson v. United States*, 568 U.S. 266 (2013), which promised that assessing the plainness of the error at the time of appellate review would not make "'plain error' . . . disappear, leaving only simple 'error' in its stead": "A new rule of law, set forth by an appellate court, cannot automatically lead that court to consider all contrary determinations by trial courts *plainly* erroneous." *Id.* at 278.

[11] Perkins's counsel has indicated that Perkins is not challenging the constitutionality of § 22-4004, which is why Perkins did not file a notice under D.C. App. R. 44(b) for this appeal.

The statutory text of SORA clearly requires resolution by a judge, not a jury. A person ordered to register may seek review of a "determination [that] depends on a finding or findings which are not apparent from the disposition," including on "[w]hether certain sexual acts or contacts were forcible." D.C. Code § 22-4004(a). That "review" of the "finding" of forcible contact is to be done by "[t]he Court" "*in its sole discretion*." D.C. Code § 22-4004(c)(1) (emphasis added). In fact, this Court has already repeatedly interpreted the statute to require factfinding by the reviewing judge, not a jury. In *W.M.*—issued four years after *Apprendi*—this Court explained that "basic fairness . . . require[s] the government to persuade *the judge* that the critical fact [(i.e., the use of force)] is true." 851 A.2d at 454 (emphasis added); *see also id.* at 455 (requiring de novo review of CSOSA's factual findings by "a court"). *W.M.* thus remanded "for *the Superior Court* to reconsider its decision under a proper allocation of the burden," which could include an evidentiary hearing "*if the trial judge* finds" a credibility determination necessary. *Id.* at 455-56 (emphasis added). Then last year—after *Fallen v. United States*, 290 A.3d 486 (D.C. 2023), had issued—*Cox* reiterated that when a person contests "the nature of the conduct underlying" their offense,

"[t]he Superior Court decides that factual issue de novo." 325 A.3d at 368. *Cox* upheld "the trial court's finding by a preponderance of the evidence that Mr. Cox's Wisconsin offense involved the use or threatened use of force." *Id.* at 375.

This Panel cannot overrule *W.M.* and *Cox*. *See M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971). Moreover, *W.M.* has provided a stable interpretation of § 22-4004 for 20 years that the D.C. Council has left in place. So even if the issue were presented to the en banc Court, statutory *stare decisis* would prevent reinterpreting SORA, as "interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to [legislative] change." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015).

Nor do the Sixth Amendment jury-trial decisions in *Apprendi* and *Fallen* have any relevance to interpreting D.C. Code § 22-4004. "The Sixth Amendment guarantees several rights *in 'all criminal prosecutions,'* including 'the right to a speedy and public trial, by an impartial jury.'" *Fallen*, 290 A.3d at 490 (emphasis added); *accord Apprendi*, 530 U.S. at 476-77. But a SORA proceeding under § 22-4004 clearly is not a "criminal prosecution." There is no constitutional right to

counsel, no vicinage or confrontation right, no right to indictment by a Grand Jury. The Sixth Amendment framework does not apply at all. By contrast, cases like *Fallen* and *Bado v. United States*, 186 A.3d 1243 (D.C. 2018) (en banc), address the right to a jury trial in a new criminal prosecution. Perkins received his constitutionally guaranteed jury trial in 1980. And to the extent that he is suggesting that *Apprendi* somehow required that jury to find forcible conduct, *Apprendi* "does not apply retroactively." *Long*, 36 A.3d at 379.

Any demand for a higher standard of proof similarly fails. Again, this Court has already resolved that issue. "[T]he preponderance standard is the 'default rule'" that "ordinarily applies," even in criminal-adjacent proceedings like compassionate release. *Bailey v. United States*, 251 A.3d 724, 729 (D.C. 2021). In *W.M.,* this Court held that, while § 22-4004 is "silent . . . as to the standard of proof," "proof by a preponderance of the evidence is sufficient," rejecting the argument that "principles of procedural due process require . . . clear and convincing evidence." 851 A.2d at 453 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)). And once again, *Cox* reiterated the preponderance standard just a few months ago. *See* 325 A.3d at 368, 375-76, 378.

Perkins contends (Br. 34-39) that *W.M.* incorrectly weighed the costs and benefits of sex-offender registration. But even if *W.M.* and *Cox* somehow relied on "mistaken analysis," they remain binding on this Panel. *Galberth v. United States*, 590 A.2d 990, 991 n.1 (D.C. 1991), *abrogated on other grounds by Byrd v. United States*, 598 A.2d 386 (D.C. 1991) (en banc); *see McCorkle v. United States*, 100 A.3d 116, 121 (D.C. 2014). Moreover, this Court rejected similar arguments about real-life consequences of sex-offender registration in *Arthur v. United States*, 253 A.3d 134 (D.C. 2021), explaining that *W.M.*'s analysis remains binding. Nor can the *Fallen* Panel decision justify reversing *W.M.*'s holding, as *Fallen* was equally bound by *W.M.*

Perkins has thus shown no plausible procedural error, and certainly no plain error. Nor has he proved that any error "affected [his] substantial rights" by causing him prejudice, given the strong proof that the sodomy was forcible. *See infra* Part II.C. Finally, he has failed to establish that any error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings," since the trial court followed this Court's longstanding rules for addressing § 22-4004 claims.

C. The Trial Court Properly Found Forcible Sodomy Under the Propensity Standard.

Sufficient evidence supported Judge Cordero's finding under the preponderance standard that Perkins's sodomy was "forcible."

Contrary to Perkins's claims, the verdict does not indicate that the jury "credited [Perkins's] account of consensual sex over [G.D.'s] account of forcible sex" (cf. Br. 27; see also *id.* at 4, 15, 26, 41, 45-46, 49-50). At most, the jury's verdict represented a finding of *reasonable doubt* as to the use of force.[12] But the verdict is consistent with the jury thinking that G.D.'s claim of force was proved by clear and convincing evidence, but not quite beyond a reasonable doubt. The verdict thus does not resolve the

[12] Indeed, the verdict does not even represent that finding. As this Court has explained in similar circumstances, a jury's verdict acquitting of vaginal rape while convicting of oral-sex sodomy may indicate a failure of proof either as to vaginal penetration (the first element of rape) or as to force (the second element of rape). *See Greene v. United States*, 571 A.2d 218, 221-22 (D.C. 1990). Here, for example, G.D. "recalled refusing to call or visit a doctor or the rape squad despite the urgings of a friend" (App. 15), which conceivably could have sewed reasonable doubt as to vaginal penetration. *See also supra* note 13. "The jury's acquittal of rape was not inconsistent with a perception of nonconsensual sodomy on this particular record." *Id.* at 222. Further, "inconsistent verdicts may well be a sign of jury leniency or compromise," rather than a finding for the defendant. *Mayfield v. United States*, 659 A.2d 1249, 1255 (D.C. 1995).

question for the SORA proceeding: whether Perkins's sodomy conviction *more likely than not* was forcible.

On this record, the trial court permissibly found forcible sodomy. As Perkins's brief summarized on direct appeal, G.D. and Perkins presented two competing versions of events at trial. According to G.D.'s testimony, Perkins and Leasure forcibly raped and sodomized her: she "said no" to "tricking" for Perkins and Leasure; then "Perkins *forced* her to commit oral sodomy"; then "Perkins and Leasure *ordered her* to remove her clothing which she did"; G.D. heard "Leasure ask Perkins *whether the 'piece' was still under the front seat*"; "Perkins then *forced* her to submit to anal and oral sodomy and finally intercourse"; "[w]hen Perkins announced that he was through, Leasure then led her to the blanket where he *slapped her* and engaged in intercourse"; and finally, "[a]fter Leasure was through, G.D. testified that Leasure *ordered* her to get dressed" (App. 12-13 (emphasis added)). By contrast, according to Perkins, "the complainant readily consented to sexual conduct, first with appellant and then with Leasure" (App. 16). *See also id.* at 30, 40 (elsewhere noting competing testimonies).

Even when reviewing for sufficiency under the reasonable-doubt standard, "where there is a direct conflict between the testimony of defendant and that of a witness for the government, the trier of the facts has a right to accept the version of the government's witness." *Earle v. United States*, 612 A.2d 1258, 1268 (D.C. 1992) (quoting *Brenke v. United States*, 78 A.2d 677, 678 (D.C. 1951)); *see also Cave v. United States*, 75 A.3d 145, 147 (D.C. 2013) (this Court must "respect a trial court's refusal to credit one witness or another when both have presented conflicting testimony"). Even more deference is warranted under the preponderance standard, leaving no room to second-guess Judge Cordero's decision to credit G.D. over Perkins. *See Cox*, 325 A.3d at 378.

Substantial grounds also corroborated G.D.'s account, supporting Judge Cordero's decision to credit her. To begin, there is no apparent reason that G.D. would have gone through the ordeal of fabricating a forcible sexual assault by a stranger, whereas Perkins had obvious bias in offering his own exculpatory testimony. *See Portuondo v. Agard*, 529 U.S. 61, 71 (2000). Further, G.D.'s reporting of the rape to her family and the police (see App. 14-15) corroborated her account. *See Battle v. United States*, 630 A.2d 211, 217 (D.C. 1993).

Physical evidence also pointed to force. At the preliminary hearing, the detective testified that G.D. was taken to the hospital for "injuries to her face"—"bruises" and "redness" (2020 R. 221-22 (6/25/79 Tr. 8-9)). Those injuries were consistent with her reports that Leasure had slapped her (*id.*) and inconsistent with Perkins's claims of non-forced sex.[13] Further, when G.D. led the detective to the place of the assault, the police found her underwear on the ground (2020 R. 219-20 (6/25/79 Tr. 6-7)), again more consistent with G.D.'s account of being ordered to undress and dress, as opposed to Perkins's claims of fully consensual sex.

Perkins's and Leasure's actions after the incident also appeared to reflect consciousness of wrongdoing inconsistent with consensual sex. They searched G.D.'s purse for her identification, forced G.D. to provide her phone number and then called her mother in the middle of the night,

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[13] Perkins's brief on direct appeal says that, on cross-examination, G.D. "recalled refusing to call or visit a doctor or the rape squad despite the urgings of a friend" (App. 15). From the brief, it is not clear if G.D. was describing her actions only before reporting the rape to police, or if she was suggesting (seemingly in contrast with the detective's testimony at the preliminary hearing) that she "refus[ed] to undergo a medical or forensic examination" at all (cf. Br. 47). On the full record, Judge Cordero certainly did not plainly err in finding (App. 98) that G.D. had bruises and injuries consistent with being forcibly assaulted.

and then demanded that G.D. meet them the following afternoon "and bring her girlfriends for his friends," "threaten[ing] her if she failed to do so" (App. 98-99; see also App. 13-14).

Perkins's primary response on appeal is that there was insufficient evidence as to how the sodomy was "forcible" on G.D.'s account, because "nothing in the record described any trial testimony about any specific acts or threats of force" by Perkins (Br. 43; see *id.* at 43-50). But it was Perkins's *own brief* on direct appeal that described G.D. as testifying that "Perkins forced her to commit oral sodomy" and later "forced her to submit to anal and oral sodomy and finally intercourse" (App. 12-13). Now that transcripts are no longer available, he cannot reverse course and question his own summary of G.D.'s testimony.

In any event, Perkins's brief leaves no doubt that G.D. testified to forcible, non-consensual sexual assault. The sex acts all took place after G.D. "said no" to "tricking" for Perkins and Leasure, a clear lack of consent at the outset of the encounter (App. 13). Then Perkins "forced" her to commit oral sex and "ordered" here to take off her clothes; Leasure implicitly threatened her with a gun (asking Perkins if they still had the "piece"); Perkins "forced" submission to oral, anal, and vaginal sex; and

then Leasure "slapped" G.D., had vaginal sex with her, and "ordered" her to get dressed (App. 12-13). *See* App. 30 (government's trial theory was that defendants took G.D. to cemetery to "sexually assault" her).

The testimony at the preliminary hearing confirmed the victim's account of non-consensual contact. When the court at the preliminary hearing asked about the force used, the detective explained that G.D. told him that "[t]hey refused to let her out of the car and they threatened to beat her up if she didn't cooperate," and G.D. submitted because "[s]he thought they were going to hurt her" (2020 R. 220 (6/25/79 Tr. 7)). Indeed, when defense counsel pressed for further information about force, the preliminary-hearing judge cut off the questioning, explaining that "there is plenty here" (2020 R. 227-28 (6/25/79 Tr. 14-15)).

Similarly, in his statement to detectives after his arrest, Leasure appeared to implicate Perkins in a forcible sex assault, saying that "they went to the Cemetery and C/W [complaining witness] *did not want to have sex with his cousin* [Perkins] but did want to have sex with S-1 [Leasure]" (2020 R. 213 (Police Report at 2) (emphasis added); see 2020 R. 196 (SORA Opp. at 2 n.1)). Given Perkins's admission that he had sex

with G.D., Leasure's statement indicated that Perkins's sexual contact with G.D. was not consensual.

Further, Judge Bacon clearly saw compelling evidence of force after sitting through the trial. By denying the motion for judgment of acquittal on the rape counts at the close of the government and defense cases (see App. 15-16), Judge Bacon was concluding that a reasonable juror could find *beyond a reasonable doubt* that Perkins had sexual intercourse with G.D. "forcibly and against her will." *Ballard v. United States*, 430 A.2d 483, 485 (D.C. 1981). And Judge Bacon's near-maximum sentence for sodomy similarly signaled a finding that the sodomy was not consensual. *See Greene v. United States*, 571 A.2d 218, 221-22 (D.C. 1990) (explaining that sentence of three to ten years was appropriate for nonconsensual sodomy, but "the sentence should be considerably lighter [for consensual sodomy] than for nonconsensual sodomy"); *see also* App. 55-56 (Judge Bacon noting "the seriousness of the offense").

Perkins's objections to reliance on hearsay or unsworn statements (Br. 48-50) were rejected by *Cox*, which explained that "it is well settled that a factfinder may consider unobjected-to hearsay" (and there was no objection here), and "[i]n any event, SORA expressly provides for

consideration of the types of evidence that the trial court relied upon in this case" under § 22-4004(c)(1). 325 A.3d at 378; *see also W.M.*, 851 A.2d at 452 & n.28 (noting reliance on 1968 police report).

Because sufficient evidence supports Judge Cordero's finding that the sodomy was forcible, CSOSA properly required Perkins to register as a lifetime sex offender.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Alice Wang, on this 17th day of March, 2025.

/s/

ERIC HANSFORD
Assistant United States Attorney