Nos. 23-CM-322 & 23-CM-323

DISTRICT OF COLUMBIA
COURT OF APPEALS

CONNIE JOHNSON,

Appellant,

2021 CMD 006740

2022 CMD 005169

v.

UNITED STATES,

Appellee.

Appeal from the Superior Court
for the District of Columbia

APPELLANT'S INITIAL BRIEF

Timothy Cone, Esq.
Attorney Appointed by the Court
for Appellant Connie Johnson
1615 New Hampshire Avenue N.W.
4th floor (North)
Washington, D.C. 20009
Tel. (202) 862-4333

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STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the Superior Court of the District of Columbia that disposes of all parties' claims.

ISSUE PRESENTED

Before trial, Johnson moved for alcoholism treatment in lieu of criminal prosecution, pursuant to D.C. Code § 24-607. The Superior Court denied this motion, because (1) a defense expert psychiatrist diagnosed Johnson as both a chronic alcoholic and as a person suffering from two mental illnesses, and (2) D.C. Code § 24-608 provides that "[t]he handling of a chronic alcoholic who has been determined to be mentally ill shall be governed by the provisions of Chapter 5 of Title 21." The Superior Code interpreted § 24-608 to preclude alcoholism treatment for a person who has been diagnosed as suffering from mental illness. But when § 24-608 refers to persons "determined to be mentally ill," the word "determined" refers to an *adjudication* that a person is mentally ill, not to a *diagnosis* by a medical professional. Here, Johnson was not adjudicated mentally ill. This case therefore presents the issue: did the Superior Court err in determining that Johnson was ineligible for alcoholism treatment.

1. Statement of the Case, and Course of Proceedings Below.

The present consolidated appeals (Case Nos. 23-CM-322 and 23-CM-323)

challenge misdemeanor convictions in two District of Columbia Superior Court cases: Case No. 2021 CMD 006740 and Case No. 2022 CMD 005169.

In Case No. 2021 CMD 006740, the two-count Information charged Johnson with unlawfully assaulting Catherine Hawkins, in violation of D.C. Code § 22-404 (Count 1), and with maliciously destroying property, in violation of D.C. Code § 22-303 (Count 2). DE1 ("DE" refers to the docket entry number for the referenced case; unless otherwise indicated, the docket entry number refers to Case No. 2021 CMD 006740, which is consolidated for appeal with Case No. 2022 CMD 005169; the single issue for appeal arises out of identical filings and orders in both cases).

In Case No. 2022 CMD 005169, the two-count information charged Johnson with assaulting Frederick Desilva, in violation of D.C. Code § 22-404 (Count 1) and with violating a stay away order entered by a Superior Court judge, by going to the second floor of the Carroll Apartments at 410 M Street SE in Washington DC (Count 2). DE1 in No. 005169.

In both cases, Johnson moved, on the same date prior to trial, with an identical filing in both cases, for treatment in lieu of criminal prosecution. DE68; DE33. In her motion, Johnson pointed out that D.C. Code § 24-607(b)(1)(A) provides that:

> The Court may, after making the findings prescribed in paragraph (2) of this subsection, commit to the custody of the Mayor for treatment and care up to a specified period

> a chronic alcoholic who . . . is charged with any misdemeanor and who, prior to trial for such misdemeanor, voluntarily requests such treatment in lieu of criminal prosecution for such misdemeanor . . . ."

DE33:2.

The government opposed Johnson's motion, arguing *inter alia* that Johnson had not provided "any objectively determined medical or other objective documentation of alcohol abuse." DE37:3. The Superior Court granted a defense request to appoint Dr. Ronald Koshes as an expert in the field of alcoholism. DE113:1. The defense thereafter submitted a copy of Dr. Koshes' expert report, which, as the Superior Court later noted, "found that Defendant met criteria for 'Alcohol Use Disorder, Severe' and which "also found that Defendant suffers from two mental illnesses – 'PTSD' and 'Major Depression with Anxiety.'" DE113:1.

At a status hearing, the Superior court noted that D.C. Code § 24-608 provides that treatment for alcoholics in lieu or prosecution is only available for "chronic alcoholics who have not been determined to be mentally ill." 01/12/23 Tr. 4. The Superior Court pointed out that Dr. Koshes' report stated that Johnson "qualifies as an individual who is mentally ill." 01/12/23 Tr. 4 On this basis, the Superior Court denied Johnson's motion for treatment of chronic alcoholism in lieu of prosecution. 01/12/23 Tr. 24-25. The Superior Court also ordered a mental health screening.

01/12/23 Tr. 25. On January 31, 2023, a forensic psychologist at the D.C. Department of Behavioral Health ("DBH") submitted a competency screening evaluation of Johnson; it concluded that Johnson was competent for trial. DE102.

Johnson moved for reconsideration of the Superior Court's denial of her motion for alcoholism treatment in lieu of prosecution. DE103. Johnson noted that that the Superior Court had relied on D.C. Code § 24-608, and on the defense expert's diagnosis that Johnson "suffers from mental illness." DE103:2. Johnson argued that § 24-608 referred to persons whom the Commission on Mental Health (hereafter, the "Commission") and the Superior Court had determined, in accord with the procedures set forth at Chapter 21 (also known as the Ervin Act), were mentally ill. DE103:2-3. Johnson pointed out that, unlike such persons, "no § 21-541 petition had been filed against [her], no examination by the Commission had been made, and no hearing has been held on the issue of her mental illness." DE103:4. Therefore, even taking account of Dr. Koshes opinions, Johnson "cannot be considered to be mentally ill as defined under the Ervin Act." DE103:4.

The government opposed Johnson's motion for reconsideration. DE106. The government stated that, in addition to providing evidence of Johnson's eligibility for relief under § 24-607, "Dr. Koshes also established that the Defendant has two mental illnesses – 1) PTSD; and 2) Major Depression and Anxiety." DE106:3. The

government agreed with the court that "either of those conditions disqualify her from seeking relief under § 24-608." DE106:3.

In addition, the government argued that the defense was incorrect to claim that "programs are available under the Mayor's office for people suffering from chronic alcoholism or substance abuse." DE106:6. Finally, the government pointed out that no one today, including Dr. Koshes, uses the term "chronic alcoholic" found in § 24-607. DE106:5-6. Consequently, the government argued, "no one meets (or can meet) the statutory definition." DE106:6.

The Superior Court denied Johnson's Motion for Reconsideration. DE103. The Superior Court reasoned as follows:

> In her Motion to Reconsider, Defendant argues that she "cannot be considered to be mentally ill as defined under the Ervin Act" because no civil petition to the Commission on Mental Health has been filed pursuant to D.C. Code § 21-541, and no civil hearing has been held on such a petition. Def.'s Mot. to Reconsider at 4. However, § 24-608 does not require that a defendant must first have been determined to be mentally ill under the Ervin Act, D.C. Code § 21-501 et seq., in order for the exclusion in § 24-608 to apply. Rather, § 24-608 provides only that 1) the subchapter is limited to "chronic alcoholics who have not been determined to be mentally ill," and 2) "[t]he handling of a chronic alcoholic who has been determined to be mentally ill shall be governed by the provisions of Chapter 5 of Title 21." *In this case, given the finding by Defendant's expert psychiatrist that Defendant suffers from two mental illnesses, in addition to Alcohol Use Disorder,*

> *Psych. Eval. at 8, even if she meets the definition of a "chronic alcoholic," she is precluded from seeking relief under § 24-607. See D.C. Code § 24-608.*

DE110:2 (emphasis added; footnotes omitted).

Both cases then proceeded to bench trial, on successive days, before the Hon. Judge Robert I. Richter.

A. April 12, 2023 Bench Trial.

At the bench trial of the charged November 24, 2021 assault, and destruction of property, Catherine Hawkins testified that on that date she was visiting her father at his second floor apartment at 410 M Street Southeast in Washington DC. 04/12/23 Tr. 12-13. As she arrived she saw Johnson standing outside the building. 04/12/23 Tr. 13. Johnson had blood on her hands and rocks in her hand. 04/12/23 Tr. 14. A building video showed Johnson following Hawkins to Hawkins' father's apartment. 04/12/23 Tr. 16; Gov't Ex. 1. Johnson was yelling at Hawkins. 04/12/23 Tr. 17. Hawkins told Johnson to back up. 04/12/23 Tr. 18. Johnson then swung and hit Hawkins; the rock in her hand glazed Hawkins' face and lip. 04/12/23 Tr. 18. After Hawkins was able to get Johnson on the floor, Johnson bit Hawkins on a finger. 04/12/23 Tr. 19. The prosecution played a video (Gov't Ex 2) in which, Hawkins testified, one sees Johnson swinging at Hawkins with the rock in her hand, and then a tussle between the two. 04/12/23 Tr. 22-23. A security officer then arrived, and

told Johnson she had to go. 04/12/23 Tr. 23. Johnson then swung at Hawkins. 04/12/23 Tr. 23. At that point, Hawkins maced Johnson. 04/12/23 Tr. 23. Johnson then said; "oh, you maced me? I'm going to go bust your car window." 04/12/23 Tr. 24. Hawkins later went outside and saw that her car's back window was busted, and a rock was inside the car. 04/12/23 Tr. 26. Hawkins identified a photograph showing the "busted" windshield of her car. 04/12/23 Tr. 31-32; Gov't Ex. 8.

MPD Sergeant Miriam Wishnick testified that on November 24, 2021 she interviewed Johnson, who "made a spontaneous utterance of 'I did it. I threw the brick. I was angry.'" 04/12/23 Tr. 66-67.

B. April 13, 2023 Bench Trial.

At the bench trial of the charged September 1, 2022 assault and violation of stay away order, Frederick Desilva testified for the government that on that date he was a maintenance mechanic working at the apartments at the Carroll Apartments at 410 M Street, SE in Washington DC. 04/13/23 Tr. 8-9. Desilva testified that on September 1, 2022, he got assaulted by Johnson, a tenant who lives in the building. 04/13/23 Tr. 11. Johnson was banging on a door on the second floor, with a cane. 04/13/23 Tr. 12. Desilva told Johnson to stop banging on the door. 04/13/23 Tr. 12. Johnson followed Desilva in the stairwell and hit him twice with her cane. 04/13/23 Tr. 12.

Desilva called 911; the government played part of an audio recording of this call. 04/13/23 Tr. 14. The government also played video from a hallway camera. 04/13/23 Tr. 17. The video showed Johnson and Desilva in the hallway. 04/13/23 Tr. 18. The hallway video did not capture Johnson in the stairwell striking Desilva with her cane. 04/13/23 Tr. 22.

On cross-examination, Desilva answered as follows:

> Q. And how was her balance? Was [Johnson] stable or unstable?
>
> A. She seemed like she was tipsy.
>
> Q. Tipsy?
>
> A. Like she had been drinking.
>
> Q. Like she had been drinking? Okay.
>
> A. Yes.

04/13/23 Tr. 28-29.

In response to questions posed by the Superior Court, Desilva testified that when Johnson hit him with her cane, it was "like a poke" to his stomach; he demonstrated the poke for the court. 04/13/23 Tr. 34-35.

Turning to the charged violation of a stay away order, the government introduced in evidence a court order. 04/13/23 Tr. 40; Gov't Ex. 1. The Superior

Court took judicial notice of this order as a stay away order regarding the second floor premises at 410 M Street NE.

The defense did not call any witnesses.

The Superior Court found Johnson guilty on both counts charged in the two cases. DE131; DE86 in Case No. 2022 CMD 005169. In Case No. 2021 CMD 006740, the Superior Court imposed a sentence of 30 days incarceration for the assault, and 30 days for the destruction of property, to run concurrent to each other. DE131. In Case No. 2022 CMD 005169, the Superior Court imposed a sentence of 10 days incarceration for the assault, and 30 days for the violation of the stay away order, to run consecutive to each other, and consecutive to the sentences imposed in Case No. 2021 CMD 006740. DE86 in Case No. 2022 CMD 005169.

SUMMARY OF THE ARGUMENT

Under D.C. law, a person charged with criminal misdemeanors, like Johnson, can move the Superior Court to order alcoholism treatment in lieu of criminal prosecution. Here, invoking this law, Johnson moved the Superior Court to order alcoholism treatment in lieu of criminal prosecution. The Superior Court denied this motion, pointing out that while Johnson's psychologist had diagnosed her with alcohol disorder, he had also diagnosed two mental illnesses: PTSD, and Major Depression. The Superior Court noted that D.C. Code § 24-608 provides that

treatment for alcoholism is limited to chronic alcoholics who have not been "determined to be mentally ill." Based on § 24-608, and the defense expert's psychiatric evaluation, the Superior Court denied the motion for alcoholism treatment. This ruling was erroneous.

Section 24-608 only limits alcohol treatment for chronic alcoholics who have "not been *determined* to be mentally ill." (Emphasis added). The word "determined" refers to an *adjudication* of mental illness. Not to a *diagnosis* by a psychologist.

Moreover, as a policy matter, in light of the high rate of co-morbidity of alcoholism with mental illness, it seems unlikely that the drafters of § 24-608 would have intended to make all persons who suffer from mental illness categorically ineligible for alcoholism treatment.

ARGUMENT

I. The Superior Court erroneously denied Johnson's motion for treatment for chronic alcoholism in lieu of criminal prosecution.

A. Standard of Review.

This Court reviews questions of statutory interpretation *de novo*. *Lee v. United States*, 276 A.3d 12, 16 (D.C. 2022).

B. Background.

Prior to trial, Johnson noted that she has a history of alcohol-related arrests, and

that she was intoxicated at the time of the events giving rise to both of the pending criminal cases. DE68:1.[1] Accordingly, Johnson moved pursuant to D.C. Code § 24-607(b)(1)(A)(i) for alcoholism treatment in lieu of criminal prosecution. DE68. This statute provides:

> The Court may, after making the findings prescribed in paragraph (2) of this subsection,[2] commit to the custody of

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[1] At the trial for the charged September 1, 2022 assault, Desilva testified that Johnson was "tipsy . . . [l]ike she had been drinking" when he encountered her on that date. 04/13/23 Tr. 28-29.

[2] Paragraph 2 of § 24-607 provides:

> (2)(A) Before any person may be committed under this subsection, the Court shall, after a medical diagnosis and a civil hearing, find that:
>
> (i) The person is a chronic alcoholic;
>
> (ii) Adequate and appropriate treatment provided by the Mayor is available for the person; and
>
> (iii) In the case of a person described in sub-subparagraph (iii) of subparagraph (A) of paragraph (1) of this subsection, he constitutes a continuing danger to the safety of himself or of other persons.
>
> (B) The Court shall give reasonable notice of such hearing to the person sought to be committed and his attorney. In the case of a person described in sub-subparagraph (iii) of subparagraph (A) of paragraph (1) of this subsection, if the Court does not make the finding described in sub-subparagraph (ii) of subparagraph (A) of this

> the Mayor for treatment and care for up to a specified period a chronic alcoholic who . . . [i]s charged with any misdemeanor and who, prior to trial for such misdemeanor, voluntarily requests such treatment in lieu of criminal prosecution for such misdemeanor.

In support of her motion, Johnson submitted to the Superior Court (under seal) a psychiatric evaluation by Ronald J. Koshes, MD, DFAPA. (A copy of Dr. Koshes' psychiatric evaluation is attached as Exhibit 2 to Johnson's motion to seal, filed in this Court on July 31, 2023). The government opposed Johnson's motion.

The Superior Court denied Johnson's motion in an oral order from the bench, and in a subsequent written order denying Johnson's subsequent motion for reconsideration. 01/12/23 Tr. 24-25; DE100. In so ruling, the Superior Court relied on D.C. Code § 24-608, which provides:

> The provisions of this subchapter shall apply to chronic alcoholics who have not been *determined* to be mentally ill. The handling of a chronic alcoholic who has been determined to be mentally ill shall be governed by the provisions of *Chapter 5 of Title 21*.

DE110 (emphasis added). The Superior Court reasoned that "D.C. Code § 24-608

> paragraph, the Court may sentence the person to a penal institution pending the availability of such treatment, but for a period not to exceed the maximum term of imprisonment authorized for a violation of such § 25-128.

precludes a defendant *with* a mental illness from receiving treatment in lieu of prosecution pursuant to § 24-607." DE110:1-2 (emphasis added). The Superior Court noted the defense argument that Johnson cannot be considered to be mentally ill for purposes of § 24-608 "because no civil petition to the Commission on Mental Health has been filed pursuant to D.C. Code § 21-541, and no civil hearing has been held on such a petition." DE110:2. The Superior Court noted that the report by defense expert Dr. Ronald Koshes found that Defendant meets the criteria for "Alcohol Use Disorder, Severe."[3] This diagnosis indicated that Johnson could be eligible for a hearing, under D.C. Code § 24-607, to determine whether the court should order alcoholism treatment in lieu of criminal prosecution. But the Superior Court noted that Dr. Koshes also found that Defendant "suffers from two mental illnesses – 'PTSD' and 'Major Depression with Anxiety.'" DE110:1 & n. 2 (noting that Dr. Koshes found that the "PTSD and Major Depression symptoms coincide with Ms. Johnson's alcohol use, but since the substance use is concurrent with [her] condition, they are seen as co-morbid disorders, or co-occurring disorders which need concurrent and coordinated treatment." DE110:1 n. 2.

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[3] The January 31, 2023 DBH report regarding Johnson's competency for trial (filed under seal as Exhibit 3 of Appellant's July 31, 2023 filing in this Court) noted (p. 2) that Johnson "admitted that she has a problem with drinking and indicated that she wants outpatient treatment."

The Superior Court rejected Johnson's argument that § 24-608 referred to determinations of mental illness under Chapter 21 of the D.C. Code. :

> . . . [Section] 24-608 does not require that a defendant must have first have been *determined to be mentally ill* under the Ervin Act, D.C. Code § 21-501 *et seq*., in order for the exclusion in § 24-608. Rather, § 24-608 provides only that 1) the subchapter is limited to "chronic alcoholics who have not been determined to be mentally ill," and 2) "[t]he handling of a chronic alcoholic who has been determined to be mentally ill shall be governed by the provisions of Chapter 5 of Title 21." In this case, *given the finding by Defendant's expert psychiatrist* that Defendant suffers from two mental illnesses, in addition to Alcohol Use Disorder, even if she meets the definition of a "chronic alcoholic," she is precluded from seeking relief under § 24-607.

DE110:2 (emphasis added; record citations and footnotes omitted).

C. Contrary to the Superior Court's interpretation, the phrase "determined to be mentally ill" in D.C. Code § 24-608 refers to an adjudication of mental illness, not to a defense expert's diagnosis of mental illness.

For persons, like Johnson, charged with misdemeanors, D.C. Code § 24-607 provides for alcoholism treatment in lieu of criminal prosecutions. Johnson invoked this statute, moving the Superior Court to order alcoholism treatment in lieu of prosecution. DE68; DE33. As noted above, the Superior Court denied this motion, relying on D.C. Code § 24-608, which provides:

> The provisions of this subchapter shall apply to chronic alcoholics who have not been *determined to be mentally ill*. The handling of a chronic alcoholic *who has been determined to be mentally ill* shall be governed by the provisions of Chapter 5 of Title 21.

D.C. Code § 24-608 (emphasis added). The Superior Court thus relied on § 24-608 to foreclose Johnson's motion for alcoholism treatment. This reliance on § 24-608 was misplaced.

Section § 24-608 limits § 24-607 relief to "chronic alcoholics who have not been *determined* to be mentally ill." D.C. Code § 24-608 (emphasis added). The Superior Court applied this limitation to Johnson on the ground that her mental health expert's report, in addition to having diagnosed her as a chronic alcoholic, also diagnosed her "as an individual who is mentally ill." 01/12/23 Tr. 4. In its subsequent written order denying reconsideration, the Superior Court recognized that the defense psychiatric evaluation found that Johnson meets criteria for "Alcohol Use Disorder, Severe." DE110:1. The Superior Court further noted that Dr. Koshes "also found that Defendant suffers from two mental illnesses – "PTSD" and "Major Depression with Anxiety." DE110:1. The Superior Court concluded that given the defense expert's "finding [that] Defendant suffers from two mental illnesses, in addition to Alcohol Use Disorder . . . even if she meets the definition of a 'chronic alcoholic,' she is precluded from seeking relief under § 24-607." *See* D.C. Code §

24-608." DE110:2 (record citations and footnotes omitted). This conclusion was erroneous.

The verb "determined" in § 24-608 refers to an *adjudication* of mental illness. Not to a mere *diagnosis* in an expert report.

First, § 24-607 uses the word "determined" in the following context:

> (a) The Court may, on a petition of the Corporation Counsel on behalf of the Mayor, filed and heard before the period of detention for detoxification and diagnosis expires, order a person to be committed to the custody of the Mayor for inpatient treatment and care if: (1) *the Court determines that the person is a chronic alcoholic* and that as a result of chronic or acute intoxication such person is in immediate danger of substantial physical harm; and (2) such person received notice of the filing of such petition within a reasonable time before the hearing held by the Court. The period of such commitment, computed from the date of admission to a detoxification center, shall not exceed: (1) thirty days in the case of the first or second such commitment within any 24-month period; or (2) ninety days in the case of the third or subsequent such commitment within any 24-month period.

D.C. Code § 24-607(a) (emphasis added). Thus, the text of § 24-607(a) contains the statement: "the Court determines that the person is a chronic alcoholic." This refers to a *court* determination that a person is a chronic alcoholic. Read *in pari materia* with this language in § 24-607(a) – language which immediately precedes it, and which § 24-608 was designed to apply to – § 24-608 also meant its use of the verb

"determine" to refer to a court determination. *See*, *e.g.*, *Dickens v. United States*, 19 A.3d 321, 324-25 (D.C. 2011) (applying the *in pari materia* doctrine to interpret the meaning of the word "intimidate" in one statute according to the word's definition in another related statute).

Second, § 24-608 provides: "The handling of a chronic alcoholic who has been determined to be mentally ill shall be governed by the provisions of *Chapter 5 of Title 21*." D.C. Code § 24-608 (emphasis added). Thus, § 24-608 cross-references Chapter 21, the Chapter of the D.C. Code captioned "Fiduciary Relations and Persons with Mental Illness." Chapter 21 contains several sections governing the determination of mental illness. Section 21-544 is captioned "*Determinations* of Commission; report to court; copy to person affected; right to jury trial." (Emphasis added). This section sets forth the procedures for the Commission to respond, after holding a hearing, to a petition from specified persons (including an individual's "physician" or a "qualified psychologist") stating that the petitioner "has *good reason to believe* that the person is mentally ill." D.C. Code § 21-541 (emphasis added). The Commission, if it "*finds*, after the hearing, that the person with respect to whom the hearing was held is mentally ill," is directed to report this fact to the Superior Court. D.C. Code § 21-544 (emphasis added). *See In re Gaither*, 626 A.2d 920, 924 (D.C. 1993) ("D.C. Code § 21-544 (1989) requires the Commission to hold a hearing

and *determine* whether a person is mentally ill and a danger to herself or others.") (emphasis added);

The next subsection of the statutory scheme is Section 21-545, which is captioned: "Hearing and *determination* by court or jury; order; witnesses; jurors." (Emphasis added). Section 21-545 sets forth the procedures a court must follow to find whether a person is mentally ill. *See Gaither*, 626 A.2d at 924 (noting that under § 21-545(a), "the court shall determine the person's mental condition").

Section 21-547 is captioned: "Judicial determination of petition filed under section 21-546; psychiatrists and qualified psychologists as witnesses." This statute sets forth procedures for adjudicating a petition, under § 21-546, seeking release of a person who has been committed for treatment.

The captions to §§ 21-544, 545 and 547 use the word "determinations" to refer to the adjudication of mental illness. Not to a mere diagnosis of mental illness.

Admittedly, Chapter 21 elsewhere uses the verb "determine" to refer to the conclusions of clinician, *e.g.*, those of a "chief of service or chief clinical officer,", or of a "psychiatrist, qualified physician, or qualified psychologist." *See* §§ 21-512(b), 522(c). And the D.C. Code elsewhere refers to a physical or mental impairment "as determined by qualified medical personnel." D.C. Code § 4-1303.11(b)(1)(C). Or to medically necessary treatment "as determined by a

physician, psychologist, or social worker." D.C. Code § 31-301(10a)(B)(iv). But, in context, these uses of the verb "determine" refer to a medical diagnosis, not to a determination in the legal sense of the term.

While the word "determine" is used colloquially in medical contexts. *see*, *e.g.*, *In re J.W.*, 263 A.3d 143, at 149 n. 6 (D.C. 2021) ("Appellant demanded that Ms. Buchinski take both children to the hospital to determine whether they had strep throat."), the drafters of legislation (such as the drafters of § 24-608) are jurists, and use the word in its precise sense. *See* Webster's New International Dictionary of the English Language (2d ed. 1944), p. 711 (defining "determine" as follows: ". . . 2. To fix conclusively or authoritatively; variously. a. To settle a question or controversy about; to decide by authoritative or judicial sentence; as, the court has *determined* the cause.").

The text of § 24-608 appears to be borrowed from the identical text of Matthews Municipal Ordinances, a legal treatise that sets forth model legislation for municipalities.[4] In this legal context, institutions exercising adjudicatory authority

[4] 3PT1 Matthews Municipal Ordinances § 43:10, Rehabilitation Programs, at Section 8, p. 4 ("Section 8. LIMITATION OF APPLICATION OF CHAPTER. The provisions of this chapter shall apply to chronic alcoholics who have not been determined to be mentally ill. The handling of a chronic alcoholic who has been determined to be mentally ill shall be governed by the provisions of chapter [*number of chapter*] of [*citation of statute*].").

"determine" facts. Medical professionals, by contrast, make a "diagnosis," or offer an "evaluation." *See*, *e.g.*, D.C. Code § 21-502(a) (members of the Commission shall have "not . . . less than five years experience in the *diagnosis* and treatment of mental illness.") (emphasis added); § 21-522 (repeatedly referring to the "diagnosis" of mental illness by clinical professionals); §§ 21-526, 548 (same); D.C. Code § 21-501.01 (making physicians responsible, during treatment, for a "medical evaluation" of a person who is mentally ill). Here, consistent with this phraseology, Dr. Koshes captioned his report: "Psychiatric Evaluation." An expert's *evaluation* is not a *determination*; it is part of the evidence that an adjudicator considers in making a determination. *See*, *e.g.*, *Velasquez v. D.C. Dep't of Employment Services*, 723 A.2d 401, 403 (D.C. 1999) (noting the "impact"of a doctor's report on the "determination of disability" by the Director of the Department of Employment Services); *compare In re J.W.*, 263 A.3d at 157-58 (noting that "appellant's mental capacity and its consequences for her children were sufficiently '*substantiated* with expert testimony'") (emphasis added), *with id*. at 153 (noting that the law "allowed courts to make child custody determinations"); *id.* at 158 (affirming the magistrate judge's "credibility determinations.").

Thus, the verb "determine" typically refers to adjudications. *In Re Taylor*, for example, considered a challenge by pretrial detainees to decisions by a Medication

Review Panel regarding their involuntary medication. 241 A.3d 287 (D.C. 2020). *Taylor* noted that the decision at issue was "primarily a medical (and penological) one that is reasonably committed to a nonjudicial administrative process relying on medical expertise." *Id*. at 302. *Taylor* concluded that the detainees interests were "sufficiently protected by the Hospital's "administrative, medical *determination*." *Id*. at 301 (emphasis added). *Taylor* used the word "determination" because the process leading up to the decision was governed by administrative procedures, and made by an adjudicator: the Medication Review Panel. *See id*. at 305, n. 64.

In this Court's opinions, the word "determine" refers to judicial adjudications. *See*, *e.g.*, *Khan v. Orbis Business Intelligence Ltd.*, 292 A.3d 244, 263 (D.C. 2023) ("we remanded the case to the trial court to determine a reasonable fee award."); *Lee v. United States*, 276 A.3d 12, 16 (D.C. 2022) ("Judge Moran was required to first determine what appellant's maximum sentence would be under § 22-3008."); *In re B.C.*, 257 A.3d 451, 457 (D.C. 2021) (noting (and reversing) "the educational neglect determination" of an associate judge of the District's Child and Family Services Agency); *Gaither*, 626 A.2d at 924-25 ("The court then appropriately scheduled a disposition hearing . . . to determine the least restrictive treatment alternative.").

In sum, the Superior Court erred in applying § 24-608 to Johnson, because she had not been adjudicated to be mentally ill.

D. As a matter of public policy, the drafters of § 24-608 would not have intended categorically to preclude alcoholism treatment for individuals diagnosed with mental illness.

As a policy matter, it makes more sense for the drafters of § 24-608 to have intended to make ineligible for alcoholism treatment only persons adjudicated to have a mental illness, rather than persons diagnosed with mental illness.

An adjudication of mental illness under Chapter 21 may result in an order of commitment to the Department of Mental Health, or to a hospital or another facility, pursuant to D.C. Code § 21-545(b)(2). The mental illnesses of persons who have been adjudicated to have a mental illness under Chapter 21 can be severe, warranting a higher priority treatment than their possible alcoholism. Thus, if, in accord with Chapter 21, a person has been ordered committed to a facility for mental health treatment, and then is charged with a misdemeanor, it does not make sense to leave open the option of alcohol treatment since this alcoholism treatment ought to be subsumed within the psychological treatment the person is already receiving from the facility to which he has been committed under Chapter 21. *See* D.C. Code § 24-608 ("The handling of a chronic alcoholic who has been determined to be mentally ill shall be governed by the provisions of Chapter 5 of Title 21.").

Viewed from a broader perspective, "[m]any individuals who develop

substance use disorders (SUD) are also diagnosed with mental disorders, and vice-versa."[5] Over 60 percent of adolescents with substance use disorders also have mental illnesses. *Id*. "Roughly one-third of individuals struggling with alcohol also suffer from a mental illness."[6] If, as the Superior Court ruled, § 24-608 was intended to foreclose treatment for alcoholism whenever a person also was diagnosed as suffering from mental illness, this provision would broadly preclude treatment for a significant percentage of the affected population, based only on a single diagnosis by a single psychologist. It seems unlikely that the drafters of § 24-608 intended such a rash result.

Moreover, intoxication (like drug addiction) "does not constitute a mental illness within the meaning of the Ervin Act." *Matter of Stokes*, 546 A.2d 356, 363 (D.C. 1988). Consequently, under the Superior Court's interpretation of § 24-608, the large number of persons who excessively drink alcohol to deal with a mental illness – the very persons who most need help – would find themselves excluded from

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[5]https://nida.nih.gov/publications/research-reports/common-comorbidities-substance-use-disorders/part-1-connection-between-substance-use-disorders-mental-illness (cited at Dr. Koshes report, p. 15).

[6]https://www.alcoholrehabguide.org/resources/dual-diagnosis/#:~:text=Roughly%20one%20third%20of%20individuals,suffer%20from%20a%20mental%20illness.&text=Having%20a%20drinking%20problem%20or,develop%20a%20co%2Doccurring%20disorder. (citation omitted).

both alcoholism treatment or mental health treatment – from any form of commitment for treatment. It seems unlikely that the drafters of § 24-608 would have intended this absurd result. *See Jackson v. United States*, 441 A.2d 1000, 1002 (D.C. 1982) (a construction of a statute that leads to an absurd result "must be rejected.").

In addition, if it were the law that a defense expert's concurrent diagnosis of mental illness and alcoholism would preclude alcoholism treatment, this rule could easily be gotten around. Defendants could simply ask their expert to omit mental illness from their psychiatric evaluation, and only address their alcohol disorders.

CONCLUSION

In sum, because the Superior Court incorrectly applied § 24-608 to foreclose § 24-607 treatment, this Court should vacate Johnson's convictions and remand the case to the Superior Court with instructions to hold a hearing and consider the merits of Johnson's motion for alcoholism treatment. *Cf. Clay v. United States*, 255 A.3d 1000 (D.C. 2021) (vacating DUI convictions and remanding case because the Superior Court failed to hold a hearing on defendant's motion for treatment in lieu of prosecution); *Cruz v. United States*, 165 A.3d 290, 296 (D.C. 2017) (vacating Superior Court's denial of motion for alcoholism treatment in lieu of criminal prosecution, because the lower court failed to set forth sufficient reasons in support of its discretionary ruling).

Accordingly Johnson respectfully asks this Court to vacate her convictions, and to remand this case to the Superior Court with instructions to conduct a hearing on her motion for alcoholism treatment in lieu of criminal prosecution.

Respectfully submitted,

s/ *Timothy Cone*
Timothy Cone, Esq.

1615 New Hampshire Avenue NW
4th Floor, North
Washington, D.C. 20009
Appointed Counsel for Appellant Johnson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 2, 2023, the foregoing Initial Brief of Appellant was filed using the electronic filing system of the Court of Appeals and thereby electronically served on all counsel of record.

/s/*Timothy Cone*
Timothy Cone
Counsel for Appellant Johnson

REDACTION CERTIFICATE DISCLOSURE FORM

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21, filed April 3, 2023, and Super. Ct. Crim. R. 49.1, and removed the following information from my brief:

A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
(2) Taxpayer-identification number
(3) Driver's license or non-driver's' license identification card number
(4) Birth date
(5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)
(6) Financial account numbers

B. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when

referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

/s/*Timothy Cone*
Timothy Cone
Counsel for Appellant Johnson