Appeal No. 24-CO-548

DISTRICT OF COLUMBIA COURT OF APPEALS

BOBBY JOHNSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

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

BRIEF FOR APPELLANT

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DISCLOSURE STATEMENT

Bobby Johnson was represented in the trial court by Adam Thompson, a Staff Attorney with the Public Defender Service for the District of Columbia. The government was represented in the trial court by United States Attorney Matthew M. Graves and Assistant United States Attorneys Peter H. Smith and Victoria D. Boyle. The Honorable James A. Crowell IV presided over the trial court proceedings.

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ISSUE PRESENTED

Did the trial court err in determining that Appellant Bobby Johnson was subject to the recidivism provisions of D.C. Code § 22-1804a, which increase penalties for defendants who have "previously been convicted of 2 prior felonies not committed on the same occasion," and further defines "convicted of 2 felonies" by stating that "[a] person shall be considered as having been convicted of 2 felonies if the person has been convicted of a felony twice before on separate occasions," where Appellant's two priors, although arising from crimes committed on different occasions, were adjudicated on the same occasion as opposed to on separate occasions?

STATEMENT OF THE CASE AND JURISDICTION

Mr. Johnson was convicted by a jury of aggravated assault while armed and related firearms offenses in this case. (App. 193.)[1] At the time of his initial sentencing, he had three prior convictions: two felony drug convictions imposed at the same court hearing (2000-FEL-002017 and 2000-FEL-004120); and a separate conviction for assault with significant bodily injury (2008-CF2-027158). (App.

[1] "(App. ***)" refers to the number stamped page or pages in Appellant's Limited Appendix, which contains portions of the Record on Appeal. "(5/16/24 at **)" refers to the page or pages from the transcript from the trial court proceeding on May 16, 2024.

192−93.) The trial court sentenced Mr. Johnson to an aggregate sentence of 336 months of incarceration. (App. 193.)

After this sentencing, Mr. Johnson's conviction for assault with significant bodily injury in 2008-CF2-027158 was dismissed with the concession of the government due to *Brady*[2] violations. (App. 017.) Mr. Johnson then filed a D.C. Code § 23-110 motion for resentencing in this case, arguing that the sentence previously imposed was premised—at least in part—on a conviction that had been vacated and resentencing was thus warranted. (App. 001.) Ultimately, the trial court granted the motion and ordered resentencing. (App. 191.)

Prior to that resentencing, the judge addressed whether the recidivism provisions of D.C. Code § 22-1804a were applicable. (App. 202−05; 5/16/24 at 7.) Mr. Johnson argued that Section 22-1804a was inapplicable given that his two remaining prior felonies (drug cases 2000-FEL-002017 and 2000-FEL-004120), while arising from offenses "not committed on the same occasion," gave rise to convictions that were imposed at the same hearing, rather than "on separate occasions," as the statute specified.[3] (App. 003; 5/16/24 at 9−10.) The government

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

[3] Specifically, Mr. Johnson entered guilty pleas in both 2000-FEL-002017 and 2000-FEL-004120 at the same hearing, on August 24, 2000, and was sentenced in both cases, again at the same hearing, on November 13, 2000. *See* Dockets in 2000-FEL-002017 & 2000-FEL-004120.

contended that Section 22-1804a did apply because Section 1804a merely required that the convictions arise from different crimes. (App. 070.) The trial court rejected Mr. Johnson's argument and ruled that Section 22-1804a applied at the resentencing. (App. 202; 5/16/24 at 7−10.) At the resentencing, the judge imposed an aggregate sentence of 240 months of incarceration. (App. 207; 5/16/24 at 30.)

Mr. Johnson then filed a timely notice of appeal. (App. 208.) This Court has jurisdiction pursuant to D.C. Code § 11-721(a)(1).

STATEMENT OF FACTS

Bobby Johnson was convicted by a jury in this case of: aggravated assault while armed; possession of a firearm during a crime of violence; unlawful possession of a firearm (prior felon); carrying a pistol without a license outside of his home or business; possession of an unregistered firearm; and unlawful possession of ammunition. (App. 193.) In initially sentencing Mr. Johnson,[4] the court had before it Mr. Johnson's three prior convictions: distribution of cocaine in 2000-FEL-004120; possession with intent to distribute cocaine in 2000-FEL-002017; and

[4] Mr. Johnson was also convicted of mayhem while armed and an attendant possession of a firearm during a crime of violence charge. This Court on direct appeal, however, ruled that those counts merged with the aggravated assault while armed and its attendant possession of a firearm during a crime of violence charge. The sentence recounted above technically was the one initially imposed on remand from the direct appeal (which ultimately did not result in the alteration of time Mr. Johnson actually had to serve).

assault with significant bodily injury in 2008-CF2-027158. (App. 192−93.) The two drug charges arose from different crimes; however, Mr. Johnson entered guilty pleas in the two drug cases on the same day and was sentenced on those cases on the same day. (App. 192.) The court initially sentenced Mr. Johnson to consecutive sentences of: 240 months of incarceration for aggravated assault while armed; sixty months of incarceration for possession of a firearm during a crime of violence; and thirty-six months of incarceration for unlawful possession of firearm. (App. 193.) It imposed concurrent sentences for the remaining firearms and ammunition convictions. (App. 193.) This resulted in an aggregate sentence of 336 months of incarceration. (App. 193.)

Following the initial sentencing in the instant case, Mr. Johnson moved to dismiss one of his prior convictions, 2008-CF2-027158, due to a *Brady* violation. (App. 015.) The government conceded the motion. (App. 017.) On February 25, 2022, then-Chief Judge Anita Josey-Herring granted the motion and dismissed 2008-CF2-027158 due to the government's *Brady* violation. (App. 015−17.)

Mr. Johnson then filed a D.C. Code § 23-110 motion in this case, in which he argued for resentencing due to the vacatur of the assault with significant injury conviction in 2008-CF2-027158. (App. 001.) He made two arguments in support: (1) he deserved resentencing because his prior sentence had been enhanced by the recidivist provision codified D.C. Code § 22-1804a, which no longer should apply

given the dismissal of his conviction in 2008-CF2-027158;[5] and (2) even without the enhancement, his sentence had been premised at least in part on the now-vacated conviction and due process and fundamental fairness thus required resentencing given the dismissal of his conviction in 2008-CF2-027158. (App. 001−12.) The government opposed the motion. (App. 057.)

Ultimately, the court rejected argument one, but agreed with argument two and granted resentencing.[6] It noted that Mr. Johnson had been sentenced based on

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[5] D.C. Code § 22-1804a(a)(1)−(c)(1), states, in relevant part:

> (a)(1) If a person is convicted in the District of Columbia of a felony, having previously been convicted of 2 prior felonies not committed on the same occasion, the court may, in lieu of any sentence authorized, impose such greater term of imprisonment as it deems necessary, up to, and including, 30 years.
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> (b) For the purposes of this section:
>
> > (1) A person shall be considered as having been convicted of a felony if the person was convicted of a felony by a court of (the District of Columbia, any state, or the United States or its territories.
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> (c)(1) A person shall be considered as having been convicted of 2 felonies if the person has been convicted of a felony twice before on separate occasions by courts of the District of Columbia, any state, or the United States or its territories.

[6] As to the first argument, the court noted that Mr. Johnson had previously filed a D.C. Code § 23-110 motion in which he argued that Section 22-1804a should not have applied at his initial sentencing because the government's notice under D.C. Code § 23-111, which requires the government to file an information prior to seeking an enhanced sentence, had been deficient. (App. 195.) The Superior Court (*con't*)

three prior felony convictions, the most serious of which, the assault with significant bodily injury, had since been vacated based upon prosecutorial misconduct. (App. 201.) Concluding that there was, therefore, a "'significant possibility that misinformation infected'" the prior sentencing decision, the judge held that due process required a resentencing at which the prior felony assault would no longer be considered. (App. 202 (quoting *Bradley v. United States*, 107 A.3d 586 (D.C. 2015).)

Prior to resentencing, the judge addressed whether Section 22-1804a still applied to Mr. Johnson's case. (App. 202.) The parties briefed the issue. Mr. Johnson contended it did not. Specifically, he argued that Section 22-1804a imposes two requirements to apply, each rooted in a separate subsection of the governing statute: (1) he must have committed the prior crimes on separate dates, as subsection (a)(1) requires that the enhancing crimes be ones that were "not committed on the same occasion"; and (2) the *convictions* must have occurred on separate occasions, as subsection (c)(1) states that, "A person shall be considered as having been convicted of 2 felonies if the person *has been convicted of a felony twice before on separate*

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and then this Court rejected that claim, ruling that no notice was necessary because Mr. Johnson had not received an enhanced sentence within the meaning of Section 23-111, because his statutory maximum was already thirty-years, which is the maximum sentence allowed by the recidivism provision in any event. (App. 195.) The trial court, pointing to that order, ruled that under the "law of the case" doctrine, it was bound to follow this Court's ruling that Mr. Johnson, at his initial sentencing, had not received an enhanced sentence. (App. 199−200.)

occasions by courts of the District of Columbia, any state, or the United States or its territories." D.C. Code § 22-1804a(a)(1), (c)(1) (emphases added). Although the crimes at issue in his two drug cases (2000-FEL-002017 and 2000-FEL-004120) were committed on separate dates, he had been convicted in both cases at the same hearing; therefore, he argued that Section 22-1804a did not apply. (App. 094−99; 5/16/24 at 9−10.) In its opposition, the government argued that "because defendant's predicate convictions occurred in different cases, he had two prior felonies for which he was convicted 'on separate occasions' despite having been sentenced in each case on the same day." (App. 070.)

In a written opinion, the trial court disagreed with Mr. Johnson and held that he remained eligible for an enhanced sentence under Section 22-1804a at the resentencing. (App. 202.) Specifically, it held that, because Mr. Johnson's prior drug offenses were committed on different occasions, the recidivism statute applied, despite the fact that he pled guilty and was sentenced on the same dates in those cases. The judge thus concluded that Section 22-1804a applied at the resentencing. (App. 205; *see also* 5/16/24 at 7−10.)

In rejecting Mr. Johnson's plain-meaning interpretation of the statute, the court held that the statute was facially ambiguous because, in its view:

> Reading the language together "having previously been convicted of 2 prior crimes of violence not committed on the same occasion," § 22-1804a(a)(1), and "has been convicted of a felony twice before on separate occasions by courts of the District of Columbia, any state, or

> the United States or its territories," § 22-1804a(c)(1), it is unclear if (c)(1) imposes additional requirements for felonies to be counted separately, or if the subsection is merely to establish that the prior convictions may be from any D.C., state, or a federal charge.

(App. 203−04.)

Given its finding of facial ambiguity, the court then looked to legislative history. (App. 204.) It recognized that this Court had interpreted a prior iteration of the statute to require different sentencing dates. (App. 204−05.) It further noted that the Committee on the Judiciary of the Council of the District of Columbia stated in its report its intention to "'maintain[ ] the current policy of allowing the Court to sentence persons convicted of 3 or more felonies to a greater term of imprisonment [than otherwise] authorized for the offense[.]'" (App. 204 (quoting legislative history).) It viewed this as an "intent to maintain the current policy of the statute in general," but believed the legislative history was "silent as to the specific issue" presented, in particular "whether the [Council] intended to maintain or overrule" the controlling interpretation of the prior statute. (App. 204.)

Ultimately, the court focused on what it viewed as the plain meaning of subsection (a)(1), and found that Mr. Johnson, "who was convicted of two felonies, committed months apart, plainly meets the requirement of the statute." (App. 205.) Notably, apart from saying subsection (c)(1) was ambiguous, and noting that a "conviction," which subsection (c)(1) references and a "sentencing," which the prior statute had referenced, are "entirely different events," the court did not construe

subsection (c)(1)'s language that "[a] person shall be considered as having been convicted of 2 felonies if the person has been convicted of a felony twice before on separate occasions by courts of the District of Columbia, any state, or the United States or its territories." Ultimately, the court thus held that the recidivism provision at Section 22-1804a applied in this case, and ruled that it would apply at the resentencing. (App. 205.) Due to this, the court adjusted Mr. Johnson's Sentencing Guideline box for aggravated assault while armed from 72 to 144 months to 72 to 360 months of incarceration. (App. 5/16/24 at 8−9.) The court then resentenced Mr. Johnson to an aggregate sentence of 240 months of incarceration. (App. 207.)[7] Mr. Johnson thereafter filed a timely notice of appeal. (App. 208.)

[7] The court resentenced Mr. Johnson to 180 months of incarceration for the aggravated assault while armed conviction; sixty months of incarceration for the possession of a firearm during a crime of violence conviction; thirty-six months of incarceration for the unlawful possession of a firearm conviction; thirty-six months of incarceration for the carrying a pistol without a license conviction; one-year of incarceration for the possession of an unregistered firearm conviction; and one-year of incarceration for the unlawful possession of ammunition conviction. (App. 207.) The court imposed the aggravated assault while armed and possession of a firearm during a crime of violence sentences consecutive to each other. (App. 207.) It imposed the other offenses concurrent to each other and to the aggravated assault and to the possession of a firearm during a crime of violence sentences. (App. 207.)

SUMMARY OF ARGUMENT

The question presented in this appeal is whether Mr. Johnson—who pled guilty and then was sentenced on the same dates with respect to two drug crimes committed on different occasions—qualified at his resentencing in this case as recidivist under D.C. Code § 22-1804a. He plainly did not.

Under Section 22-1804a, a person qualifies as a recidivist if he was "convicted of 2 prior felonies not committed on the same occasion." D.C. Code § 22-1804a(a)(1). The statute, in subsection (c)(1), further defines the phrase "convicted of 2 felonies": "A person shall be considered as having been *convicted of 2 felonies* if the person has been *convicted of a felony twice before on separate occasions*." D.C. Code § 22-1804a(c)(1) (emphases added). Section 22-1804a thus imposes two requirements before its recidivism provisions apply: (1) the defendant must have been convicted of two prior felonies not committed on the same occasion; and (2) per the definition of "convicted of 2 felonies" in subsection (c)(1), those two convictions must have occurred "on separate occasions."

Under basic rules of statutory construction, the phrase "convicted . . . twice before on separate occasions" has a plain meaning that this Court must ascribe to it. Although Mr. Johnson had two prior felonies arising from different underlying crimes, those convictions occurred at a singular occasion—namely a Superior Court

sentencing hearing on November 13, 2000.[8] Thus, under the plain and ordinary meaning of "convicted . . . twice before on separate occasions" Mr. Johnson did not qualify as a recidivist.

Here there can be no question that the trial court's erroneous conclusion was material to its sentence and that it imposed a greater term of imprisonment "as it deemed necessary," pursuant to the statute. D.C. Code § 22-1804a(a)(1). It resolved the issue after briefing in a substantial written order, in which it concluded that the enhanced penalty provisions of Section 22-1804a applied. In light of its finding, it adjusted upwardly the box under the Sentencing Guidelines it looked to for guidance in deriving its sentence, and imposed a sentence greater than the unadjusted number for both aggravated assault while armed and carrying a pistol without a license. (5/16/24 at 7, 29.) The legal error, therefore, clearly affected the sentence imposed.

This Court has held that "'[m]isinformation or misunderstanding that is materially untrue regarding a prior criminal record, or material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process.'" *Bradley v. United States*, 107 A.3d 586, 588 (D.C. 2015) (alteration in original) (quoting *United States v. Hamid*, 531 A.2d 628, 644

[8] Even were this Court to believe that the word "conviction" refers to the entry of the plea as opposed to the sentencing, that would not matter in this case: those too occurred on the same occasion—at the entry of his pleas on August 24, 2000. *See supra* note 3.

(D.C.1987)). This Court should reverse and order that Mr. Johnson be resentenced in a proceeding uninfected by the erroneous belief that Section 22-1804a applies.

ARGUMENT

The meaning of a statute is a purely legal question and this Court therefore "review[s] questions of statutory construction de novo." *Wynn v. United States*, 48 A.3d 181, 188 (D.C. 2012); *see also Dist. of Columbia v. Morrissey*, 668 A.2d 792, 796 (D.C. 1995). "The primary and general rule of statutory construction is that the intent of the [legislator] is to be found in the language that [it] has used." *Duvall v. United States*, 676 A.2d 448, 452 (D.C. 1996) (citations and quotations omitted). Thus, in construing a statute, this Court "must first look at the language of the statute by itself to see if the language is plain and admits of no more than one meaning." *Id.* (citations and quotations omitted). This Court "will give effect to the plain meaning of a statute when the language is unambiguous and does not produce an absurd result." *Booze Allen Hamilton Inc. v. Dist. of Columbia Off. of Tax & Revenue*, 308 A.3d 1205, 1209 (D.C. 2024) (citation and quotations omitted).

In this case, the at-issue recidivism statute states, in relevant part:

> (a)(1) If a person is convicted in the District of Columbia of a felony, having previously been convicted of 2 prior felonies not committed on the same occasion, the court may, in lieu of any sentence authorized, impose such greater term of imprisonment as it deems necessary, up to, and including, 30 years.
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(b) For the purposes of this section:

(1) A person shall be considered as having been convicted of a felony if the person was convicted of a felony by a court of the District of Columbia, any state, or the United States or its territories.

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(c)(1) A person shall be considered as having been convicted of 2 felonies if the person has been convicted of a felony twice before on separate occasions by courts of the District of Columbia, any state, or the United States or its territories.

D.C. Code § 22-1804a(a)(1)−(c)(1).

As noted, statutory construction starts—and can often end—with the plain meaning of the words used. *See Booze Allen Hamilton Inc.*, 308 A.3d at 1209. Under subsection (a)(1), the recidivism provision may apply if the defendant has "previously been convicted of 2 prior felonies not committed on the same occasion." Mr. Johnson's two drug crimes were not committed on the same occasion. The issue presented here thus turns on subsection (c)(1), which defines the phrase "convicted of 2 felonies" as used in subsection (a)(1): "A person shall be considered as having been *convicted of 2 felonies* if the person has been convicted of a felony *twice before on separate occasions*. . . ." D.C. Code § 22-1804a(c)(1) (emphases added).

"Twice," "before," "separate" and "occasion" are commonly used words with obvious and definite meanings. In pertinent part, Webster's defines "twice" as "on two occasions or in two instances." Webster's New World Dictionary, Third College

Edition 1444 (1988).[9] It defines "before" as "in the past; previously." *Id.* at 125. It defines "separate" as "set apart or divided from the rest or others; not joined, united, or connected; severed." *Id.* at 1223. It defines "occasion" as "a happening; occurrence; the time at which something happens; particular time—on the occasion of our last meeting." *Id.* at 937.

Thus, the plain and ordinary meaning of "convicted . . . twice before on separate occasions" means two *different* "occurrences" or "happenings" that happened "in the past"—not one "joined," "united," or "connected" "occurrence." Thus, Mr. Johnson's convictions, while occurring "before" the instant case, did not take place "on two [occurrence]s or in two instances" "set apart or divided from the rest or others"—rather the convictions clearly occurred at a singular "happening" or "occurrence" that was "joined" and "connected."[10]

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[9] This Court has held that it is "appropriate . . . to look to dictionary definitions to determine the ordinary meaning of [statutory] words." *Tippett v. Daly*, 10 A.3d 1123, 1227 (D.C. 2010).

[10] The conviction referenced in the statute is most likely the sentencing date, as opposed to the date of the guilty verdict or plea, as the "traditional view [is] that a final, appealable judgment of conviction means the sentence." *Langley v. United States*, 515 A.2d 729, 734 (D.C. 1986) (holding that for purposes of impeaching a witness with a prior "conviction" under D.C. Code § 14-305, "conviction" means a "conviction premised on a sentence"). There are, however, some circumstances in which the word "conviction" refers to the date of plea or verdict. *See, e.g.*, *Holloway v. United States*, 951 A.2d 59, 63 (D.C. 2008) (holding that under the Youth Rehabilitation Act the term "'conviction' is the time the verdict is returned or a plea of guilty is taken") (citation and quotations omitted). For Mr. Johnson's (*con't*)

At bottom, Section 22-1804a imposes two requirements before its recidivism provisions come into play. First, subsection (a)(1) requires that the defendant "previously [was] convicted of 2 prior felonies not committed on the same occasion." Second, subsection (c)(1)'s definition of "convicted of 2 prior felonies" requires that the person has been "convicted . . . twice before on separate occasions," rather than on one occasion. Thus, under the plain meaning of "convicted . . . twice before on separate occasions," Mr. Johnson did not qualify as a recidivist under Section 22-1804a.

Two extra-jurisdictional cases—from Maryland and Alaska—which both interpreted the same "separate occasions" language, are quite informative as to the plain meaning of Section 22-1804a. First, in *Lett v. State*, 445 A.2d 1050 (Md. Ct. Spec. App. 1982), the Court of Special Appeals of Maryland considered a Maryland recidivism statute that read:

> "Any person who (1) has been convicted *on two separate occasions* of a crime of violence where the convictions do not arise from a single incident, and (2) has served at least one term of confinement in a correctional institution as a result of a conviction of a crime of violence, shall be sentenced, on being convicted a third time of a crime of violence, to imprisonment for the term allowed by law, but, in any event, not less than 25 years."

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case, however, this Court need not grapple with the question: his plea in each case took place at the same hearing, as did each sentencing. *See supra* note 3.

445 A.2d at 677 (quoting Maryland statute; emphasis added). The trial court refused to apply this statute in Richard Lett's case, reasoning that, "although the appellant had been convicted of two separate crimes of violence and had served one term of confinement, the convictions did not take place on two separate occasions." *Id.* Rather, as found by the trial court: "'He [the appellant] was convicted on only one occasion, namely the date of November 10th,'" and thus "the two convictions did not qualify as separate occasions as provided by" the Maryland recidivism law. *Id.* (quoting trial court; alteration in original).

The Court of Special Appeals affirmed against a government appeal. Applying basic rules of statutory construction, it first stated that "[w]here the statutory language is plain and free from ambiguity and expresses a definite and sensible meaning, the courts are not at liberty to insert or to delete words with a view toward making the statute express an intention which is different from its plain meaning." 445 A.2d at 678−79 (citations and quotations omitted). The court noted that the "Random House Dictionary of the English Language, 1979, defined 'occasion' as 'a particular time, esp. as marked by certain circumstances or occurrences,'" and that the "same dictionary define[d] 'separate' as being 'unconnected; distinct; unique.'" 445 A.2d at 679. The Maryland court therefore concluded "that the term 'two separate occasions' has a plain meaning and is not fairly susceptible of an interpretation other than that of two unconnected, distinct, or

unique times." *Id.* (quoting Maryland statute). Given the plain language and lack of ambiguity in the term "two separate occasions," the court held that it was "prompted to assume that the statute says what it means," and that the defendant thus did not qualify as a recidivist under the law. *Id.* at 680.

Second, in *Wooly v. State*, 221 P.3d 12 (Alaska Ct. App. 2009), the Court of Appeals of Alaska considered a theft recidivism statute that read, in pertinent part, that "a theft of property valued at between $50 and $500 [is] enhanced by one degree—from third-degree theft to second-degree theft—if, within the preceding five years, the defendant has been convicted and sentenced for first-, second-, or third-degree theft '*on two or more separate occasions*.'" 221 P.3d at 13 (quoting Alaska statute; emphasis added). It was undisputed that the defendant had been sentenced for two prior thefts within the five years of the theft then at issue. The defendant had committed the thefts on different days, "but the judgements [sic] for both of these thefts were entered on the same day." *Id.* at 14. The court was thus presented with the question of whether the defendant had previously been convicted of thefts "on two or more separate occasions." *Id.*

Applying ordinary rules of statutory construction, as well as prior Alaskan precedent, and like the Maryland court before it, the *Wooly* court held that the recidivism statute did not apply because the defendant had not been convicted "'on two or more separate occasions.'" 221 P.3d at 19 (quoting Alaska statute). Rather, it

held that a defendant cannot be convicted under the recidivism law "unless, within the five years preceding the defendant's current offense, (1) the defendant was sentenced for first-, second-, or third-degree theft, and then (2) the defendant committed another first-, second-, or third-degree theft and was sentenced for that theft, and then (3) the defendant committed the current theft." *Id.* at 19.

Although these cases are not controlling, they are highly persuasive and show that "convicted . . . twice before on separate occasions" is a phrase with a clear and ordinary meaning. Like Section 22-1804a(c)(1), the Maryland and Alaskan recidivism statutes both used the term "separate occasions." Both of these courts found that defendants identically situated to Mr. Johnson did not fall within the recidivism statutes because their prior crimes, although committed on different occasions, were adjudicated at the same time. This Court should follow the lead of these courts and interpret Section 22-1804a's plain language in the same manner.

In addition to plain language, statutory interpretation is a holistic endeavor, and "effect must be given [to] every word of a statute, and interpretations that operate to render a word inoperative should be avoided." *MEPT St. Matthews, LLC v. Dist. of Columbia*, 297 A.3d 1094, 1097 (D.C. 1994) (citations and quotations omitted). In other words, "[a] basic principle is that each provision of the statute should be construed so as to give effect to all of the statute's provisions, not rendering any

provision superfluous." *Thomas v. Dist. of Columbia Dep't of Employ. Servs.*, 547 A.2d 1034, 1037 (D.C. 1988).

To construe Section 22-1804a simply as requiring that the "2 prior felonies [were] not committed on the same occasion" under subsection (a)(1) without—as urged by the government and ultimately adopted by the trial court below—applying the definition of "convicted of 2 felonies" under subsection (c)(1), would render subsection (c)(1) "superfluous." *See Thomas*, 547 A.2d at 1037. When one considers the statute as a whole it is clear that, while the convictions must arise out of two different crimes, "convicted of 2 felonies" further requires that such convictions have been imposed on separate occasions.

Critically, this plain meaning and holistic interpretation "does not produce an absurd result." *Booze Allen Hamilton Inc.*, 308 A.3d at 1209 (citation and quotations omitted); *see also Wong v. United States*, 314 A.3d 1236, 1241 (D.C. 2004) ("When the language is unambiguous and does not produce an absurd result, this court will give effect to the plain meaning.") (alterations, citations, and quotations omitted). As both a matter of logic and policy, a recidivism statute could alternatively seek to address at least two different concerns. First, a recidivism statute could seek to enhance sentences based on the number of prior crimes: the more crimes one has committed the more the need for punishment and incapacitation. Under such a

statute, the *timing* in which convictions are imposed is irrelevant; what is important is the *number* of prior crimes.

Second, a recidivism statute could seek to enhance sentences due to a defendant's failure to take advantage of prior chances at rehabilitation. As noted by the *Wooly* court, under such a recidivism statute: "'The reason the sanctions become increasingly severe is not so much that the defendant has sinned more than once, but that he is deemed incorrigible when he persists in violations of the law after conviction of previous infractions.'" *Wooly*, 221 P.3d at 15 (quoting *State v. Carlson*, 560 P.2d 26, 28−29 (Alaska 1977)). Under such a recidivism statute, it is the prior "occasions" for rehabilitation, as opposed to the number of prior crimes, that is important. Reading Section 22-1804a(c)(1) under its plain meaning, therefore, does not produce absurd results, because in counting "occasions" it enhances sentences based on prior failed opportunities to rehabilitate. This is far from an absurd result.

Furthermore, the legislative history is consistent with Mr. Johnson's proposed construction. While plain language generally controls, this Court "may also look to the legislative history to ensure that [its] interpretation is consistent with legislative intent." *Booze Allen Hamilton Inc.*, 308 A.3d at 1209 (citations and quotations omitted).

Prior to being rewritten into the form that exists today, the recidivism provision (then codified at D.C. Code § 22-104a (repealed)), stated that "a person shall be considered as having been convicted of two felonies if his initial sentencing under a conviction of one felony preceded the commission of the second felony for which he was convicted." (App. 82.) This Court interpreted that language to mean that a sentence could not be enhanced when the sentences for the "two prior felony convictions were imposed on the same day." *Rogers v. United States*, 419 A.2d 977, 981 (D.C. 1980). When the Council of the District of Columbia replaced the language of Section 22-104a (later codified at Section 22-1804a) with its current language (as amended as to other parts not here relevant) in 1994, little attention was given to this change. But the Committee Report for the Bill did state that the revised law "maintains the current policy of allowing the Court to sentence persons convicted of three or more felonies to a greater term of imprisonment. . . ." Council of the Dist. of Columbia, Comm. on the Judiciary, Rep. on Bill 10-478, *The Repeat Offender Life Without Parole Amendment Act of 1994*, pg. 3 (4/27/1994). Thus, while the legislative history does not explicitly discuss the meaning of "convicted . . . twice before on separate occasions," it does set forth the Council's intent that the then-current policies would continue to control.

The legislature, of course, is presumed to enact statutes with knowledge of prior decisional law. *See Dist. of Columbia Pub. Schs. v. Dist. of Columbia Dep't of*

Employ. Servs., 262 A.3d 213, 223 (D.C. 2021). Thus, by maintaining the "current policy," the Council signaled an intent to keep the outcome of this Court's decision in *Rogers* in place.

Finally, to the extent that this Court finds any ambiguity in the plain meaning of the statutory language or its legislative history, under the rule of lenity "criminal statutes are to be strictly construed and should not be interpreted to extend criminal liability beyond that which the legislature has plainly and unmistakably proscribed." *Ruffin v. United States*, 76 A.3d 845, 852 (D.C. 2013) (alterations, citations, and quotations omitted). Stated otherwise, "penal statutes should be strictly construed against the government or parties seeking to enforce statutory penalties and in favor of the persons on whom penalties are sought to be imposed." *Washington v. Dist. of Columbia Dep't of Pub. Works*, 954 A.2d 945, 948 (D.C. 2008) (citations and quotations omitted).

Thus, even if after the application of the "primary guides"—i.e., plain meaning, holistic interpretation, and legislative history—any "ambiguity remains, that ambiguity should be resolved in favor of the defendant." *Washington*, 954 A.2d at 948. Even, therefore, if the Court finds ambiguity in either the statutory text or the legislative history (which it should not), any ambiguity must be resolved in Mr. Johnson's favor. This is especially true considering that, as explained above, Mr. Johnson's interpretation leads to entirely sensible results.

The trial court's contrary interpretation was fundamentally flawed in a number of respects.[11] First, the court found that subsection (c)(1) was "facially ambiguous" because, in its view, "it is unclear if (c)(1) imposes additional requirements for felonies to be counted separately, or if the subsection is merely to establish that the prior convictions may be from any D.C., state, or a federal charge." (App. 203−04.) The ambiguity the trial court identified, however, simply does not exist. Subsection (b)(1) of the statute already makes clear that "prior convictions may be from any D.C., state, or a federal charge." It states: a "person shall be considered as having been convicted of a felony if the person was convicted of a felony by a court of the District of Columbia, any state, or the United States or its territories." D.C. Code § 22-1804a(b)(1). Subsection (c)(1), by contrast, addresses what it means to have been convicted of "2 prior felonies."

Were subsection (c)(1) written by the legislature merely to establish that a prior conviction can be from the District, any state, the federal system, or a territory, as the trial court's finding of ambiguity suggests, it would simply duplicate subsection (b)(1). The trial court's finding of ambiguity thus ran afoul of the basic rule that "each provision of the statute should be construed so as to give effect to all of the statute's provisions, not rendering any provision superfluous." *Thomas*, 547

[11] The trial court's interpretation, of course, is actually of no moment as this Court has plenary review over this question of law. *See Wynn*, 48 A.3d at 188.

A.2d at 1037; *see also Tuten v. United States*, 440 A.2d 1008, 1010 (D.C. 1982) ("A statute should not be construed in such a way as to render certain provisions superfluous or insignificant.").

Second, the trial court's interpretation of the legislative history was flawed. It noted that Mr. Johnson cited the relevant legislative history, where the Committee on the Judiciary stated the Council's "intent to 'maintain[ ] the current policy of allowing the Court to sentence persons convicted of 3 or more felonies to a greater term of imprisonment.'" (App. 204 (quoting Rep. of Bill 10-478, *supra*, at pg. 3).) The trial court, however, while noting that the "report indicates an intent to maintain the current policy of the statute in general," found that it was "silent" as to "how separate felonies should be counted for enhancement under § 22-1804a," and thus failed "to demonstrate whether the D.C. council intended to maintain or overrule the controlling interpretation of the statute in *Rogers*. . . ." (App. 204.) This conclusion makes no sense. As noted above, the Council is presumed to enact statutes with knowledge of prior decisional law. *See Dist. of Columbia Pub. Schs.*, 262 A.3d at 223. *Rogers* was clear law, and the Council indeed indicated its intent to "maintain[ ] the current policy. . . ." The fact that the Council did not delve into the particulars of any settled case law does not, contrary to the trial court's conclusion, make the Council's intent to maintain current policies unclear.

Ultimately, the court ruled that Mr. Johnson was eligible because he "'ha[d] previously been convicted of 2 prior crimes of violence not committed on the same occasion,'" without—apart from saying it was ambiguous—construing the definitional language in subsection (c)(1) "has been convicted of a felony twice before on separate occasions." (App. 205.) In so doing, the trial court failed to heed the plain language of subsection (c)(1), did not give effect to all of the statute's provisions, misapprehended the legislative history, and ran afoul of the rule of lenity. Because the convictions for the two prior felonies at issue occurred on the same occasion, Mr. Johnson did not fall within the terms of the recidivist statute. The trial court erred by concluding otherwise.

Finally, it is clear that the trial court's error of law infected the sentencing decision. Under the statute, upon a finding of recidivism, the trial court can impose "such greater term of imprisonment *as it deems necessary*, up to, and including, 30 years." Section 22-1804a(a)(1) (emphasis added). The trial court clearly believed that the applicability of Section 22-1804a, and its authorization of a greater term of imprisonment, were relevant to its sentencing decision, as it issued a written order on the question of the statute's applicability, engaging in extensive legal analysis, and concluding that, while Mr. Johnson was entitled to a new sentencing, the recidivist provision applied. (App. 202.) That entire enterprise would have been

unnecessary if the court viewed the applicability of the statute as irrelevant to its sentencing decision.

Furthermore, the court adjusted upwardly Mr. Johnson's boxes under the Sentencing Guidelines, given its view of the applicability of Section 22-1804a, and selected sentences that fell within that upwardly adjusted range. (5/16/24 at 8−9.) Ultimately, it sentenced Mr. Johnson to 180 months of incarceration for the aggravated assault while armed, which is well above the guidelines range that would have guided his decision had the statutory enhancement not applied (which capped at 144 months). (App. 193, 207.) The court likewise sentenced Mr. Johnson to thirty-six months of incarceration for the carrying a pistol without a license conviction, when the guidelines range without the statutory enhancement would have capped out at thirty-two. (App. 193, 207.)

This Court has held that "'[m]isinformation or misunderstanding that is materially untrue regarding a prior criminal record, or material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process.'" *Bradley*, 107 A.3d at 588 (alteration in original; quoting *Hamid*, 531 A.2d at 644); *cf. United States v. Hodge*, 902 F.3d 420, 426 (4th Cir. 2018) ("A sentence is unlawful within the meaning of [the federal habeas statute] when it was enhanced under the [Armed Career Criminal Act] based on three ACCA predicate convictions and one or more of those predicates is invalid.").

Although trial courts have wide discretion in imposing sentence, "[appellate c]ourts must be concerned . . . when the sentencing process [has] created a significant *possibility* that misinformation infected the decision." *Bradley*, 107 A.3d at 598 (citation and quotations omitted). Here, there is more than a "significant possibility" that the trial court's misinterpretation of Section 22-1804a infected its decision in this case and caused it to impose a "greater term of imprisonment" under the recidivism law.

Because Mr. Johnson was not "convicted . . . twice before on separate occasions," he did not meet the definition of "convicted of 2 felonies" for the recidivism statute under subsection (c)(1), and the trial court thus erred in applying Section 22-1804a at his resentencing. The Court should reverse and order resentencing.

CONCLUSION

For the reasons stated above, this Court should vacate Mr. Johnson's sentence and order resentencing without application of the recidivism statute.

Respectfully submitted,

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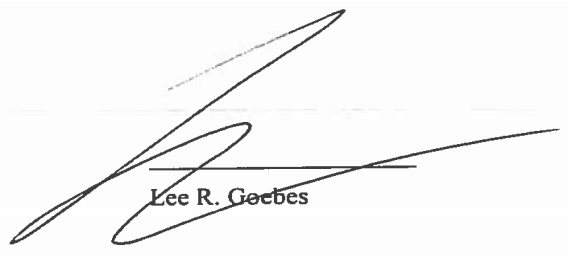

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellant Bobby Johnson was delivered to the Office of the United States Attorney for the District of Columbia through this Court's electronic-service mechanism on this 15th day of November 2024.