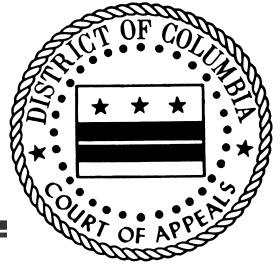


Nos. 23-CM-322 & 23-CM-323



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**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 REPLY BRIEF

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Statutes and other authorities:

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D.C. Code § 24-607	<i>passim</i>
D.C. Code § 24-608	<i>passim</i>

REPLY ARGUMENT

I. Contrary to the government's claim, Johnson's Initial Brief has not "abandoned" the argument that D.C. Code § 24-608 first required a determination that she was mentally ill under the provisions of the Ervin Act before its exclusion for chronic alcoholics can apply.

Oddly, in footnote 5 of its brief ("Gov't Br.") the government claims that "Johnson does not renew her argument [in the court] below that D.C. Code § 24-608 first required a determination that she was mentally ill under the provisions of the Ervin Act [under Chapter 21 of the D.C. Code] before its exclusion [for chronic alcoholics] could apply." Gov't Br. 18, n.5 (claiming that Johnson "has therefore abandoned that argument."). This claim is mistaken. The very point of Johnson's Initial Brief is that the exclusion contained in Section 24-608 for persons who have been determined to be mentally ill did not apply because this provision first requires an adjudication of mental illness under Chapter 21.

First, the "Background" section of the Initial Brief noted that, in the trial court, 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." Br. 13. What would have been the point of noting

this argument if, on appeal, Johnson intended to abandon it? Furthermore, the Initial Brief did not identify any argument by trial counsel other than the one just cited above. For good reason: the above-cited argument was the only one trial counsel made in the trial court regarding the applicability *vel non* of § 24-608's exclusion.

Second, the Background section of Johnson's Initial Brief quoted at length the Superior Court's statement in which it "rejected Johnson's argument that § 24-608 referred to determinations of mental illness under Chapter 21 of the D.C. Code." Br. 14. What would have been the point of noting this ruling if Johnson did not intend to challenge it on appeal?

Third, in its Argument section, the Initial Brief pointed out that "§ 24-608 cross-references Chapter 21, the Chapter of the D.C. Code captioned "Fiduciary Relations and Persons with Mental Illness." Br. 17. What would have been the point of noting that Section 24-608 "cross-references Chapter 21" if Johnson did not intend to rely on Chapter 21 on appeal?

Fourth, the Initial Brief goes on to analyze "several section of Chapter 21," and concludes that these sections "set forth the procedures for adjudicating" a person's mental illness. Br. 18. What would have been the point of analyzing the provisions of Chapter 21 regarding the adjudication of mental illness if Johnson did not intend to argue that a Chapter 21 adjudication of mental illness is what 24-608 requires in

order for its exclusion to apply?

Fifth, Johnson's argument concludes: "In sum, the Superior Court erred in applying § 24-608 to Johnson, because she had not been adjudicated to be mentally ill." Br. 21. Read in the context of the preceding analysis of Chapter 21, this concluding sentence plainly meant that she was arguing that § 24-608 required an adjudication of mental illness under Chapter 21.

Sixth, the next section of Johnson's Brief makes a "public policy" argument, which noted: "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)." Br. 22. Why would the public policy section of Johnson's brief discuss the consequences of an "[a]djudication of mental illness under Chapter 21," if, as the government claims, she was "not renew[ing] her argument" that § 24-608 "first required a determination that she was mentally ill under the provisions of the Ervin Act [in Chapter 21]"? Gov't Br. n. 5, p. 18.

Finally, the Conclusion of Johnson's Initial Brief asked this Court for a remand to the Superior Court "with instructions to hold a hearing and consider the merits of Johnson's motion for alcoholism treatment." Br. 24. If, as the government intimates, Johnson's appeal only intended to challenge whether the trial court had properly

“determined (at the very least implicitly) that Johnson was mentally ill,” why, in her Conclusion, did Johnson *not* seek a remand for a new determination by the trial court on the question whether Johnson was mentally ill?

The answer to all these questions, of course, is that Johnson was arguing to this Court on appeal that the § 24-608 exclusion only applies if there has been a prior determination of mental illness pursuant to the procedures set forth in Chapter 21. Because no such determination had been made – a point the government concedes – the Superior Court erred in denying relief under § 24-607.

Finally, as a matter of law, the government’s waiver contention is difficult to fathom. The government’s Response Brief conceded that the present appeal presents a question of “statutory interpretation” which this Court “review[s] de novo.” Gov’t Br. 18. When this Court interprets a statute de novo, waiver considerations are of little, or no, moment. *See Harman v. United States*, 718 A.2d 114, 116 (D.C. 1998) (rejecting claim that the appellee’s arguments ostensibly not raised in the trial court “may not be heard on appeal,” because the issue on appeal “requires an interpretation of several statutory provisions”); *see also United States v. Fischer*, 64 F.4th 329, 351-52 & n 1 (D.C. Cir. 2023) (Walker, J. concurring) (disagreeing with lead opinion’s position that the court need not reach the meaning of a word in a statute because it “was discussed only peripherally in the parties’ briefs,” because an appellate judge

“must” define a word in a statute if his “vote . . . depends on it.”), *cert. granted*, 2023 WL 8605748 (December 13, 2023).

CONCLUSION

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,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 22, 2024, the foregoing Reply 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

District of Columbia Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a “CF” (criminal felony), “CM” (criminal misdemeanor), “CT” (criminal traffic), and “CO” (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

If you are incarcerated, are not represented by an attorney (also called being “pro se”), and not able to redact your brief, please initial the box below at “G” to certify you are unable to file a redacted brief. Once Box “G” is checked, you do not need to file a separate motion to request leave to file an unredacted brief.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21, amended May 2, 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

(7) The party or nonparty making the filing shall include the following:

- (a) the acronym “SS#” where the individual’s social-security number would have been included;
- (b) the acronym “TID#” where the individual’s taxpayer-identification number would have been included;
- (c) the acronym “DL#” or “NDL#” where the individual’s driver’s license or non-driver’s license identification card number would have been included;
- (d) the year of the individual’s birth;
- (e) the minor’s initials;
- (f) the last four digits of the financial-account number; and
- (g) the city and state of the home address.

- B. Any information revealing the identity of an individual receiving mental health services and/or under evaluation for substance-use-disorder services. *See* DCCA Order No. M-274-21, May 2, 2023, para. No. 2.
- 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.

Initial here

G. I certify that I am incarcerated, I am not represented by an attorney (also called being "pro se"), and I am not able to redact this brief. This form will be attached to the original filing as record of this notice and the filing will be unavailable for viewing through online public access.



Signature

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23-CM-322 & 23 CM 323

Case Number(s)

02/22/24

Date