DISTRICT OF COLUMBIA COURT OF APPEALS

No. 24-CO-548

Regular Calendar: May 22, 2025

BOBBY JOHNSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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I. Introduction

As Bobby Johnson argued in his initial brief, the trial court misinterpreted the recidivism statute, found that Mr. Johnson was a recidivist, and thus imposed "such greater term of imprisonment as it deem[ed] necessary." D.C. § 22-1804a(a)(1). In particular, although Mr. Johnson had "2 prior felonies not committed on the same occasion," Subsection (a)(1), he did not meet the definition of "having previously been convicted of 2 prior felonies," *id.*, because he had not "been convicted of a felony twice before on separate occasions," Subsection (c)(1). Mr. Johnson thus argued that he is entitled to a new sentencing hearing where the trial court does not apply Section 22-1804a.

In response, the government raises three arguments, none of which hold water. It first argues that this Court's prior decision in *Johnson v. United States*, Nos. 17-CO-95 & 19-CO-890, MOJ (D.C. May 5, 2021) ("*Johnson II*"), triggers the law of the case doctrine, which, according to the government, precludes the current claim. Second, citing the general principle that sentences that are within statutory ranges are largely unreviewable on appeal, and concomitantly recasting Mr. Johnson's claim as one alleging a misapplication of the Sentencing Guidelines, it argues that Mr. Johnson fails to state a claim cognizable in this Court. Third and finally, on the merits, the government advances two contrary interpretations of Section 22-1804a and argues that Mr. Johnson did in fact qualify as a recidivist.

None of these arguments are persuasive. The trial court misinterpreted Section 22-1804a. This was a mistake of law that constituted an abuse of discretion and rendered the entire sentencing procedure invalid as a violation of due process, which are claims both not foreclosed by *Johnson II* and clearly cognizable in this Court. This Court should reverse and remand for a new sentencing where the trial court does not apply Section 22-1804a's mandate that a court sentencing a recidivist may "impose such greater term of imprisonment as it deems necessary," a directive which clearly infected the sentence imposed.

II. Appellant's Claim Is Not Precluded by the Law of the Case Doctrine.

Citing the law of the case doctrine, the government (at 16) first contends that *Johnson II* precludes Mr. Johnson's current claim. In particular, it contends (at 16) that Mr. Johnson's current claim is foreclosed because: (1) *Johnson II* held that he had "not received an enhanced sentence . . . because his sentence complied with the applicable unenhanced statutory penalties" attendant to the aggravated assault while armed statute; and (2) that it further held "meritless" his "claim that the trial court erroneously applied the enhancement to sentence him above the advisory Voluntary Sentencing Guidelines range." Pointing to these holdings, the government contends that Mr. Johnson's current appeal is doomed by *Johnson II*.

The law of the case doctrine, however, is inapplicable because the issues decided in *Johnson II* are distinct from the claim presented here. The claims and

holdings in *Johnson II* centered on a proper interpretation of D.C. Code § 23-111, a statutory provision not at issue in the current appeal. In *Johnson II*, Mr. Johnson argued that he was "entitled to a vacatur of his sentence and a remand for resentencing without a sentencing enhancement because [the] procedures set forth in D.C. Code § 23-111 for the imposition of sentencing enhancements were not followed." MOJ at *3. In rejecting this claim, this Court relied on binding precedent regarding the proper interpretation of Section 23-111, which holds that the statute only applies if the court "imposes a sentence outside 'the normal range of penalties' authorized by statute for 'the substantive offense for which the defendant is convicted.'" MOJ at *3 (quoting *Sanders v. United States*, 809 A.2d 584, 602 (D.C. 2002)). Because the AAWA statute allows for a sentence of up to thirty years, this Court was bound by *Sanders* to reject Mr. Johnson's contention that the government's purported failure to comply with the strictures of Section 23-111 entitled him to a new sentencing. MOJ at *3.

Relatedly, this Court also noted that Mr. Johnson nonetheless "appear[ed] to argue that the trial court enhanced [his] sentence," and therefore Section 23-111 was implicated, because it "acknowledged Mr. Johnson's prior felony convictions and sentenced Mr. Johnson to a term of imprisonment outside the otherwise applicable Sentencing Guidelines range." MOJ at *3. This Court rejected this contention as well, and stated that "this sort of discretionary decision-making

within statutorily authorized ranges was not the object of Congress' concern when it enacted § 23-111." MOJ at *4. Rather:

> [T]he "two-fold" "purposes of the requirements set forth in § 23–111" for the imposition of statutory sentencing enhancements are: "(1) to give the defendant notice so that he may make an informed decision whether to proceed with trial or plead guilty, and (2) to avoid the unfairness of increasing the potential punishment after the trial has begun."

MOJ at *4 (quoting *Robinson v. United States*, 756 A.2d 448, 454 (D.C. 2000)). This Court thus concluded: "Because Mr. Johnson was not subject to increased punishment, we perceive no error *under Section 23-111* with respect to the sentence Mr. Johnson received." MOJ at *4 (emphasis added).

These holdings in *Johnson II* regarding Section 23-111, which were firmly rooted in an interpretation of the language and legislative history of that provision, do not raise a law of the case bar to Mr. Johnson's current argument, as he is not arguing that the government failed to comply with Section 23-111. Likewise, he is not arguing that the trial court misapplied the Sentencing Guidelines. Rather, he is arguing that the trial court misinterpreted Section 22-1804a and that this misinterpretation caused it to "impose such greater term of imprisonment" than it would have had it correctly construed Section 22-1804a.

That claim, of course, was not decided in *Johnson II*; indeed, it could not have been presented considering that Judge Crowell had not interpreted Section 22-1804a in deciding as to whether he should "impose such greater term of

imprisonment as [he] deem[ed] necessary" at the resentencing that—to state the obvious—had not even occurred at the time of *Johnson II*. *Johnson II* held that the prior sentence need not be vacated due to failure to comply with Section 23-111. The appeal here involves a different sentence and a different claim.

The government chiefly relies on *In re Baby Boy C.*, 630 A.2d 670 (D.C. 1993), in support of its law of the case argument. In that case, however, this Court did an extensive analysis of whether or not the biological father's claims on the second appeal were the same as on the first and whether those claims were decided by the prior opinion. It concluded that the biological father's claims presented in the first appeal were *identical* to those presented in the second appeal that had followed a remand from this Court. In stark contrast, *Johnson II* did not address the argument presented in this appeal: whether Judge Crowell misinterpreted Section 22-1804a, causing him to impose "such greater term of imprisonment as [he] deem[ed] necessary." Because that issue was not, and indeed could not have been, presented in *Johnson II*, the government's resort to the law of the case doctrine is unavailing. *See generally In re Estate of Barnes*, 754 A.2d 284, 287 (D.C. 2000).[1]

[1] In fact, this Court has referred to the "law of the case" doctrine as "kindred" to the "law of the court" doctrine, or the "en banc rule." *Lenkin Co. Mgmt. v. Dist. of Columbia Rental Hous. Comm'n*, 677 A.2d 46, 49 (D.C. 1996). Were *Johnson II* a published opinion, the government would be hard-pressed to argue that it foreclosed the claim presented here.

At bottom, there is no law of the case bar to this appeal.[2]

III. Mr. Johnson's Claim Is Not That the Trial Court Misapplied the Sentencing Guidelines, But That It Misinterpreted a Statute, Which Is A Legal Claim Cognizable in this Court.

The government next argues (at 20) that Mr. Johnson has failed to state a claim cognizable in this Court. In particular, it argues (at 20) that Mr. Johnson has no cognizable claim because the trial court had the exclusive authority to fashion a sentence that did not exceed the statutory limit. Relatedly, after reframing Mr. Johnson's claim as one arising from the Guidelines, the government (at 20) further states that the "promulgation of the non-binding Voluntary Sentencing Guidelines did not disturb that ancient axiom" and that this Court has long held that, so long as the ultimate sentence imposed is within statutory limits, any alleged misinterpretations of the Guidelines are not reviewable in this Court.

While it is true that this Court generally does not police the trial courts' authority to fashion sentences within statutory limits, it has long recognized exceptions for procedural errors that render sentencing proceedings wholly invalid

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[2] In a footnote, the government contends (at 19 n.4) that Mr. Johnson's "failure to address this obvious procedural barrier in his opening brief should be treated as an abandonment of any such argument" because the government will not have the "opportunity to respond . . . in writing." This claim is wholly without merit. Mr. Johnson could not predict what the government might say in response, and had no duty, upon punishment of abandonment, to preemptively address in his initial brief any possible argument the government might make, no matter its strength. Indeed, the reality that the government does not have the opportunity to respond to counter-arguments made in replies is present in virtually every case.

as a matter of due process. *See, e.g.*, *Bradley v. United States*, 107 A.3d 586 (D.C. 2015). Here, the trial court's misinterpretation of Section 22-1804a was just such a procedural error. And, while this Court has recognized sentencing courts' discretion in crafting sentences, and has therefore declined to review sentences for "excessiveness" or "reasonableness," *Saunders v. United States*, 975 A.2d 165, 167 (D.C. 2009); *Johnson v. United States*, 628 A.2d 1009, 1015 (D.C. 1993), it has recognized that a court can abuse its discretion in a manner that merits correction, which is the nub of the issue here. *See*, *e.g.*, *Houston v. United States*, 592 A.2d 1066, 1068 (D.C. 1991) ("Adherence to a uniform policy instead of exercising choice is precisely what this court has recognized as an abuse of discretion.").

As to due process, Mr. Johnson does not dispute that the "refusal of the courts of this jurisdiction to review on appeal sentences which are within statutory limits, *upon the ground that such sentences are too severe*, is of long standing." *In re L.J.*, 546 A.2d 429, 434 (D.C. 1988) (emphasis added). Again, as a general matter, this Court does not review sentences for "excessiveness" or "reasonableness." *Saunders*, 975 A.2d at 167; *Johnson*, 628 A.2d at 1015. But this Court and others have held that appellate courts *can* review an otherwise legal sentence if there was a due process defect in the sentencing process itself.

Thus, in *Bradley* this Court held that a resentencing was warranted where the trial court relied on materially false information regarding the defendant's criminal

history in imposing sentence. 107 A.3d at 598; *see also United States v. Malcolm*, 432 F.2d 809, 816 (2d Cir. 1970). This Court thus has recognized that the limited nature of sentencing review "does not mean, of course, that the sentencing process (as distinguished from the severity of a statutorily authorized sentence) is immune from appellate scrutiny." 546 A.2d at 434 (citing *Dorszynski v. United States*, 418 U.S. 424 (1974); *United States v. Stoddard*, 553 F.2d 1385 (D.C. Cir. 1977)).

While acknowledging cases such as *Bradley*, the government (at 25) attempts to limit them to situations involving material mistakes of fact, such as a "trial court['s conclusion] that [a defendant] had previously been convicted of a crime for which he was never found guilty." There is no basis for such a limitation. When this Court has described the role of the appellate court in reviewing sentences, it has never suggested that its previous decisions finding review appropriate even when such sentence fell within statutory limits occupy the field.

To the contrary, it has specifically described the *Bradley* situation as an *example* in a non-exhaustive list. It stated in *In re L.J.*:

> As we have previously recognized, appellate review of the sentencing process is in order where, *for example*, it is contended that the sentencing judge relied on improper or inaccurate information, that the defendant was not represented by counsel at sentencing, that the prosecutor violated his agreement not to allocute at sentencing or that a stiffer sentence was imposed because a defendant asserted his innocence at trial.

546 A.2d at 434−35 (emphasis added). Decisions such as *In re L.J.* show that there are multiple instances where this Court can find a defect in the sentencing process

itself, and this Court has not, as the government suggests, limited the rationale of cases like *Bradley* solely to material mistakes of fact. A situation anlogous to *Bradley* is presented here. The trial court's misintepretation of Section 22-1804a, which clearly caused it to "impose such greater term of imprisonment as it deem[ed] necessary," was a defect in the sentencing process itself and thus is violative of due process and correctable by this Court.

In addition to the due process construct, this Court has also applied traditional "abuse of discretion" principles as part of its review of the "sentencing process." *See Houston*, 592 A.2d at 1067–68 (D.C. 1991) (reversing sentence imposed because trial court's adherence to a uniform policy constituted an abuse of discretion) (citing *Johnson v. United States*, 398 A.2d 354, 363 (D.C. 1979)). It is of course axiomatic that a "trial court's use of judicial discretion must be grounded upon correct legal principles," and a trial court's exercise of discretion premised on incorrect legal principles is an abuse of discretion. *Jordan v. Jordan*, 14 A.3d 1136, 1146 (D.C. 2011); *accord In re J.D.C.*, 594 A.2d 70, 75 (D.C. 1991) ("[A] trial court abuses its discretion when it rests its conclusions on incorrect legal standards."). This Court in *In re L.J.*, in stating that the "the sentencing process (as distinguished from the severity of a statutorily authorized sentence) is [not] immune from appellate scrutiny," relied on the District of Columbia Circuit's decision in *Stoddard*. And *Stoddard*, in enumerating examples of appropriate

sentencing review, cited to cases in which legal error infected a judge's discretionary decision. 553 F.2d at 1389 n.20 (citing *United States v. Ingram*, 530 F.2d 602 (4th Cir. 1976) (sentence vacated despite no-benefit finding because sentencing discretion was negated by judge's statement that he would never use Youth Corrections Act for a particular class of offenses); *United States v. Dancy*, 510 F.2d 779 (D.C. Cir. 1975) (remand for resentencing because sentencing judge believed himself bound by recommendation in Section 5010(e) report). Such is the claim Mr. Johnson has presented here. The suggestion that the Court lacks authority to consider it is contrary to precedent.

In addition to its artificial limitation of cases such as *Bradley* and *In re L.J.*, the government spills much ink in trying to recast Mr. Johnson's argument as a claim that the trial court misapplied the Sentencing Guidelines. Relying on *Speaks v. United States*, 959 A.2d 712 (D.C. 2008), and *R.W. v. United States*, 958 A.2d 259 (D.C. 2008), it argues (at 23) that this "Court has recognized since the earliest stages of the Voluntary Sentencing Guidelines that a trial court's misunderstanding or misapplication" of a Guidelines provision "provides no grounds for reversal on appeal." This assertion may be accurate, but it does not advance the government's argument because Mr. Johnson's claim does not rest on a contention that the trial court misunderstood or misinterpreted the Guidelines.

In *Speaks* this Court held that the trial court's purported misinterpretation of the Guidelines provisions related to concurrent verse consecutive sentences did not provides grounds for an appeal where the sentences imposed fell within statutory limits. 959 A.2d at 718. Likewise, in *R.W.* this Court rejected a claim that the trial court had misinterpreted a Guidelines provision that provided for an upward departure in cases where the complaining witness is especially vulnerable. In so doing, this Court relied on the statutory provision that states that the Guidelines "'shall not be binding on judges [and] shall not create any legally enforceable rights in any party.'" 958 A.2d at 265 (quoting D.C. Code § 3-105(a)–(c)). The Court further endorsed the approach of Maryland Court of Special Appeals when it stated, "'Whether . . . a trial judge scrupulously follows, outrageously flouts or clumsily misapplies the sentencing guidelines is simply none of our appellate business, unless . . . such flouting or misapplying should coincidentally trigger one or more of our more limited and traditional reasons for reviewing a sentence.'" *Id.* at 266 (quoting *Teasley v. State*, 458 A.2d 93, 94 (Md. Ct. Spec. App. 1983)).

Those cases do not advance the United States's case here because, contrary to the government's attempt to recast it, the claim is not that the trial court misinterpreted a Guidelines provision. The claim is that the trial court misinterpreted Section 22-1804a, a question of law cognizable in this Court, and

falling within the "more limited and traditional reasons for reviewing a sentence," that *R.W.* acknowledged merited different treatment. 958 A.2d at 266.

Indeed, while the government spends some seven pages setting up (and then knocking down) the strawman of Mr. Johnson's supposed Guidelines-dependent argument, he did not raise any such claim in his initial brief. Rather, he spent all of one paragraph mentioning the Guidelines (at 26), as part of his illustration of how the trial court's error of law infected the sentence it imposed.

After arguing that the trial court had misconstrued the recidivism statute, Mr. Johnson set out—in what amounted to a harm argument—to show (at 25) that it "is clear that the trial court's error of law infected the sentencing decision."[3] As noted, upon finding that Section 22-1804a applies, a trial court can impose a greater term of imprisonment "as it deems necessary." Mr. Johnson argued in his initial brief (at 25) that 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. The primary indicator of this was the trial court's written order—issued after it ordered additional rounds of briefing from the parties—on the question of the statute's applicability, where it engaged in extensive legal

[3] The government's harm argument (at 48) solely rests on its misconstruction of the claim as a Sentencing Guidelines appeal. Apart from that misconstruction, the government has no argument rebutting Mr. Johnson's claim on harm.

analysis, and concluded that, although Mr. Johnson was entitled to a new sentencing, the recidivist provision applied.

Mr. Johnson further pointed to the trial court's upward adjustment under the Guidelines as additional evidence that the trial court's belief in the applicability of Section 22-1804a infected the sentence he imposed. That argument, however, does not turn Mr. Johnson's claim into one grounded in the Guidelines. Unlike the appellants in *Speaks* and *R.W.*, Mr. Johnson is not claiming that the trial court misinterpreted or misapplied any Guidelines provision. Rather, Mr. Johnson's claim is a straightforward one: the trial court misinterpreted Section 22-1804a, which—no different than a material misunderstanding of a fact such as a defendant's criminal record or the improper use of a uniform policy—infected its decision, rendered the sentencing procedure invalid, and requires resentencing. This is a claim cognizable in this Court.

IV. On the Merits, the Court Should Reject the United States's Proposed Interpretations of Section 22-1804a.

Finally, on the merits of the statutory construction issue, the government offers two different—and indeed mutually exclusive—interpretations of Section 22-1804a. The government contends (at 34) that Subsections (a)(1) and (c)(1) do not constitute separate requirements, but rather "two distinct avenues for the third-strike felony enhancement to apply," although it does not grapple with—or even address—the fact that Subsection (c)(1) is a definitional provision that must be

applied to the language in subsection (a)(1). Alternatively, the government (at 32) accepts that Subsections (a)(1) and (c)(1) announce separate and mutually indispensable requirements, but nonetheless argues that, even though Mr. Johnson's convictions were entered at the same court hearing,[4] he was "convicted of a felony twice before on separate occasions" because there were two judgment and commitment orders that the judge entered seriatim. The Court should reject the government's proposed constructions as: the suggestion that the two subsections articulate alternative criteria ignores the language and structure of Section 22-1804a; and the argument regarding the judgment and commitment orders stretches the meaning of "separate occasions" beyond the breaking point.

The government contends that Mr. Johnson is wrong to read Section 22-1804a as requiring the satisfaction of both Subsections (a)(1) and (c)(1). Rather,

[4] The government notes (at 31) that Mr. Johnson cited in his brief to the dockets in 2000-FEL-002017 and 2000-FEL-004120 for the proposition that he pled guilty in both cases at the same hearing on August 24, 2000, and that he was then later sentenced in both cases at the same hearing on November 13, 2000. The government recognizes (at 31) that it "may be a fair inference that the two cases were heard in the same hearing," but notes that the dockets in the two cases do not "definitively establish[ ]" it. Counsel can represent that he attempted to obtain a transcript of the hearings from August 24, 2000, and November 13, 2000, but was informed by the Court Reporting Division that—due to the age of the cases—it was unable to produce such transcripts. It is, of course, the overwhelming practice in Superior Court to hear cases resolved in such global pleas at a single hearing for both the plea and sentencing, and it is thus more than a "fair inference" that that practice was followed here. In any event, considering that it was the government who was seeking application of Section 22-1804a, it had the burden to show that the convictions occurred "on separate occasions" as per Subsection (c)(1).

the government argues (at 34) that "Subsections (a)(1) and (c)(1) can be read harmoniously to announce two distinct avenues for the third-strike felony enhancement to apply."[5] Its only support for its position that these are two separate and distinct "criteria" for qualification as a recidivist is the fact that the language at issue appears in separate subsections.

The structure of Section 22-1804a shows that Subsection (c)(1) is not, however, a separate but parallel way to qualify as a recidivist, but rather a *definitional section* that defines what "convicted of 2 felonies" means. Subsection (a)(1) states that a defendant convicted of a felony is subject to the recidivist provision if he "ha[s] previously been convicted of 2 prior felonies not committed on the same occasion. . . ." Then (c)(1) defines what the phrase "convicted of 2 felonies means"—namely, "has been convicted of a felony twice before on separate occasions. . . ." This Court has the obligation to read the statute as written, and to apply the definitional section crafted by the legislature. *Dist. of Columbia v.*

[5] It argues (at 35) that under (a)(1), the recidivist provision would apply if the prior crimes were "*committed* at different times." It then argues that under (c)(1), the provision would also apply if the priors came from "*convictions* for felonies entered against him or her at different crimes," and "would permit the third-strike provision to apply notwithstanding when the defendant committed the underlying felonies." It thus proposes (at 36) that Section 22-1804a would apply to defendants who had been convicted of two crimes committed on the same occasion, such as: defendants separately convicted in both federal and state court for violations of federal and state laws committed simultaneously; defendants convicted in two different states for a continuing course of conduct committed on a single occasion; and defendants separately convicted in the same jurisdiction of felonies committed on one occasion that were separately indicted or severed for trial.

Beretta, 872 A.2d 633, 651 (D.C. 2005). Subsection (a)(1) and (c)(1), by their plain language, thus do not set forth alternate ways of qualifying as a recidivist. Subsection (a)(1) sets forth the criteria, and subsection (c)(1) defines its terms.[6]

The government's alternative argument (at 32) accepts that Subsections (a)(1) and (c)(1) "announce separate and mutually indispensable requirements to qualify for the enhancement under Subsection (a)(1)," as Appellant contends. Here, the government is reduced to arguing (at 34) that Mr. Johnson's convictions should be classified as occurring "on separate occasions" even though they were entered at the same hearing, because—under "the physical laws of time and space"—the judge could not sign both judgment and commitment orders at the same time. In a flawed series of logical steps that no legislator could have contemplated, the government (at 33−34) contends that, because "on separate occasions" means with "some time separation between the acts," the "opposite" would be events occurring

[6] The government's proposed interpretation is also inconsistent with the title of the Bill that became the at-issue statute, which illustrates the purpose of this recidivism statute. *See generally Holy Trinity Church v. United States*, 143 U.S. 457, 462 (1892) ("Among other things which may be considered in determining the intent of the legislature is the title of the act."); *cf.* 2A Norman J. Singer & Shambie Singer, Sutherland's Statutes and Statutory Construction § 47:3 (7th ed. 2014) ("A [bill's] title which illuminate statutory meaning is one available tool . . . which can help clarify ambiguous phrases."). The Committee on the Judiciary titled the Bill *The Repeat Offender Life Without Parole Amendment Act of 1994*. *See* Council of the District of Columbia, Committee on the Judiciary, Rep. on Bill 10-478, *The Repeat Offender Life Without Parole Amendment Act of 1994*, pg. 1 (4/27/1994). It would be odd indeed to label a "repeat offender" someone who—for instance as suggested by the government (at 36)—was "[s]eparately convicted in the same jurisdiction of felonies committed on a single occasion."

"simultaneously," and because it is "logistically impossible" to sign two judgment and commitment orders "simultaneously" if the convictions are recorded in separate judgments, they have necessarily occurred on "separate occasions." Thus, in the government's view, the meaning of "twice before on separate occasions" would turn on the existence or not of separate case numbers and whether there were one or two judgment and commitment orders, even when the imposition of the sentences occurred at the same hearing.[7]

It strains credulity, however, to think that the Counsel would have the statute turn on such a labored interpretation of "convicted twice before on separate occasions." Words of a statute "should be construed according to their ordinary sense and with the meaning commonly attributed to them." *Dist. of Columbia v. Place*, 892 A.2d 1108, 1111 (D.C. 2006). Nobody applying the ordinary sense and common meaning of "convicted twice before on separate occasions" would include a singular hearing where a judge signs two, as opposed to one, judgment and commitment orders. Rather, such a singular hearing would obviously constitute a singular "occasion" at which the defendant was convicted.[8]

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[7] It is worth noting that "the oral pronouncement of sentence constitutes the judgment of the court," not the written judgment and commitment order. *Gray v. United States*, 585 A.2d 164, 166 (D.C. 1991). It is thus not at all clear why the government is so laser focused on the judgment and commitment orders.

[8] The same would be true were the critical phase the entry of the plea, and were multiple pleas of guilty entered at a single plea hearing.

The government contends (at 40−41) that Mr. Johnson's interpretation would lead to "absurd results," as, according to the government, it "would make the sentencing enhancement turn on the whims of a calendar clerk's scheduling decisions rather than on the substantive nature of the defendant's criminal history," in particular whether the "convictions for two felonies committed on separate occasions occurred in hearings separated by a single day."[9] But as the United States itself recognizes (at 41 n.14), in instances where two cases are—either formally or informally—consolidated, "a defendant's pending cases are almost always scheduled for and heard in a single hearing, including for dispositions by pleas and sentencings." And the reason underlying the court rule and practice cited by the government (at 41 n.14), whereby all pending cases against the same defendant are assigned to the same judge and the same court-appointed counsel is clear: "Global pleas" resolving multiple cases occur with regularity in Superior Court. *See, e.g.*, *Brooks v. United States*, 130 A.3d 952, 959 (D.C. 2016); *In re Samad*, 51 A.3d 486, 494 (D.C. 2012). And it is, as the government acknowledges, the overwhelming practice for such cases to be resolved at a singular hearing. It

[9] It bears noting that the government's construction itself would lead to odd results. According to this interpretation, Section 22-1804a would apply if a defendant's prior offenses not committed on the same occasion were charged in separate indictments, thus resulting in two judgment and commitment orders even if entered at the same hearing, but would not apply when the same prior offenses were charged in the same indictment, thus resulting in only one judgment and commitment order. The applicability of Section 22-1804a should not turn on such happenstance.

was against this background that the City Council drafted Subsection (c)(1), and there is every reason to think that the practice informed its decision to differentiate between convictions that occur on "separate occasions" and those which do not.[10]

Finally, the government responds to Appellant's reliance on persuasive analyses from out-of-jurisdiction cases by citing a number of cases it believes to be more helpful to this Court. But the cases it cites involve materially different statutes and offer no useful guidance.[11]

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[10] There is no reason to think—as posited by the government (at 41 n.14)—that if this Court adopts Mr. Johnson's construction, "it would upend that efficient process and likely result in serial plea hearings and sentencings over the course of two or more days." In fact, an adoption of the government's interpretation would lead to unnecessary negotiation regarding whether the counts in a global plea resolution occur in one case number or two, as under the government's theory, that inconsequential difference could matter to recidivism calculations down the line.

[11] The government (at 44) cites *State v. Hopkins*, 484 N.W.2d 549 (Wis. 1992), but the argument rejected by the Wisconsin court was the contention that the phrase "convicted of a misdemeanor on 3 separate occasions" meant separate offense occasions, not occasions of conviction. 484 N.W.2d at 806. While the *Hopkins* court described an earlier case, *State v. Wittrock*, 350 N.W.2d 647 (Wis. 1984), which had held that "convicted of a misdemeanor on three separate occasions" did not require that the three convictions occur in three separate court appearances, *Wittrock* grounded that holding in clear legislative history—obviously not present here—showing "'a concern with the *quantity of crimes* rather than with the time of conviction.'" 484 N.W.2d 809 (quoting *Wittrock*). The government also cites *State v. Kintz*, 238 P.3d 470 (Wash. 2010), where the court interpreted a stalking statute with an element that the behavior needed to occur "repeatedly," which was further defined as "on two or more separate occasions." The purposes and rationales behind stalking and recidivism statutes are obviously quite different; moreover, it is unclear how the Washington court's holding that "separate occasions" meant "a distinct, individual, noncontinuous occurrence or incident" undermines Mr. Johnson's arguments.

Conversely, its attempts to distinguish the cases cited in Appellant's opening brief fall flat.[12]

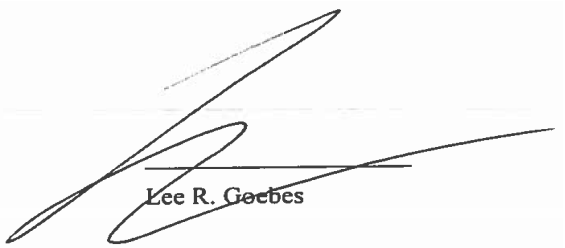
* * *

For the reasons stated above and in Appellant's principal brief, this Court must remand for a new sentencing hearing.

[12] The government notes (at 45) that the holding in *Lett v. State*, 445 A.2d 1050 (Md. Ct. Spec. App. 1982), was later "undid" by legislation passed by the Maryland General Assembly. That may be true, but it does not undermine the correctness of the *Lett* decision and its interpretation of strikingly similar language "has been convicted on two separate occasions." 445 A.2d at 680. The government further argues (at 46−47) that *Wooly v. State*, 221 P.3d 12 (Alaska Ct. App. 2009), is "of limited help" to Mr. Johnson because its holding was "undermined by *Tulowetzke v. Div. of Motor Vehicles*, 743 P.2d 368 (Alaska 1987), in which the Alaska Supreme Court later interpreted the meaning of 'prior convictions.'" But *Wooly* postdates *Tulowetzke* and *Tulowetzke* thus cannot "undermine" it. In fact, *Wooly* distinguished *Tulowetzke* because that case interpreted a statute employing the term "previously convicted," while the statute at issue in *Wooly*—akin to Section 22-1804a—used the term "on two or more separate occasions." 221 P.3d at 18.

Respectfully submitted,

Jaclyn S. Frankfurt, Bar No. 415 252
Lee R. Goebes Bar. No. 494 596



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Appellant Bobby Johnson has been served through this Court's electronic filing system on the United States Attorney's Office for the District of Columbia, on this 5th day of May, 2025.