

BRIEF FOR APPELLEE

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DISTRICT OF COLUMBIA  
COURT OF APPEALS

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

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CONNIE JOHNSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

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

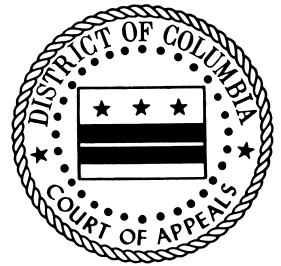
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Cr. Nos. 2021-CMD-6740 & 2022-CMD-5169



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## **ISSUE PRESENTED**

Whether the trial court abused its discretion in denying appellant Connie Johnson's motion for alcohol treatment in lieu of incarceration pursuant to D.C. Code § 24-607, where: (1) the defense expert's report diagnosed Johnson with certain mental illnesses; (2) at a hearing on the motion, defense counsel proffered to the trial court that the defense expert would testify that Johnson was mentally ill; (3) based on the defense expert's report and proffered testimony, defense counsel conceded that Johnson was mentally ill; (4) the trial court accepted Johnson's concession and determined (at a minimum, implicitly) that Johnson was mentally ill; and (4) therefore, the court correctly concluded that Johnson was not entitled to relief under D.C. Code § 24-607 because D.C. Code § 24-608 limited the application of D.C. Code § 24-607 "to chronic alcoholics who have not been determined to be mentally ill."

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BRIEF FOR APPELLEE

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**COUNTERSTATEMENT OF THE CASE**

On November 25, 2021, in Criminal Case No. 2021-CMD-6740, appellant Connie Johnson was charged by information with simple assault against Catherine Hawkins, in violation of D.C. Code § 22-404, and destroying property (DP), in violation of D.C. Code § 22-303 (Record on Appeal in No. 23-CM-322 (1R.) 1). On September 2, 2021, in Criminal Case No. 2022-CMD-5169, Johnson was charged by information with simple assault against Frederick DeSilva, and contempt for violating her

conditions of release in Case No. 2021-CMD-6740, in violation of D.C. Code § 23-1329 (Record on Appeal in No. 23-CM-323 (2R.) 1).

On November 3, 2022, in both criminal cases, Johnson filed a motion for alcohol treatment in lieu of criminal prosecution pursuant to D.C. Code § 24-607(b)(1)(A)(i) (1R. 15; 2R. 7). On November 9, 2022, the government filed its opposition to Johnson's motion (2R. 9, 10). On January 12, 2023, a hearing was held before the Honorable Rhonda Reid Winston, and Judge Reid Winston orally denied the motion (1R. A at 14; 2R. A at 9; 1/12/23 Transcript (Tr.) 18, 24-25). On January 23, 2023, Johnson filed a motion to reconsider the denial of his motion for treatment in lieu of prosecution (1R. 18; 2R. 12). The government opposed Johnson's motion to reconsider (1R. 19; 2R. 13). In a written order issued on February 2, 2023, Judge Reid Winston denied Johnson's motion to reconsider (1R. 21; 2R. 15).

On April 12, 2023, in Case No. 2021-CMD-6740, Johnson was tried before the Honorable Robert I. Richter, who found Johnson guilty as charged (1R. A at 16; 4/12/23 Tr. Excerpt 20-22). On April 13, 2023, in Case No. 2022-CMD-5169, Johnson also was tried before Judge Richter,

who again found Johnson guilty as charged (2R. A at 12; 4/13/23 Tr. 51-53).

On April 13, 2023, in Case No. 2021-CMD-6740, Judge Richter sentenced Johnson to 30 days of incarceration for simple assault and 30 days of incarceration for DP; he further ordered that these sentences run concurrently with each other and consecutively to the sentence imposed in Case No. 2022-CMD-5169 (1R. 24; 4/13/23 Tr. 65). In Case No. 2022-CMD-5169, Judge Richter sentenced Johnson to 10 days of incarceration for simple assault and 30 days of incarceration for contempt; he further ordered that that these sentences run consecutively to each other and consecutively to the sentence imposed in Case No. 2021-CMD-6740 (2R. 17; 4/13/23 Tr. 65). Johnson filed a timely notice of appeal in both cases on April 14, 2023 (1R. 25; 2R. 18).

## **The Trial in Case No. 2021-CMD-6740**

### ***The Government's Evidence***

On November 24, 2021, Catherine Hawkins went to visit her father, who lived on the second floor of an apartment building located on M Street in Southeast, D.C. (4/12/23 Tr. 12). Upon arriving at her father's apartment building, Hawkins saw Johnson standing outside (4/12/23 Tr.



13, 35). Johnson lived on the fourth floor of the building, and Hawkins had known Johnson for about 10 years (4/12/23 Tr. 13, 16, 34). Hawkins parked her car in front of the building, and when she got out of her car, she noticed that Johnson had blood on her hands and was holding rocks (4/12/23 Tr. 14, 35, 38, 58). Hawkins went inside the building and informed the security guard at the front desk that she was going to check on her father (4/12/23 Tr. 14).

Hawkins went to her father's apartment on the second floor, and so too did Johnson (4/12/23 Tr. 15-17). As Hawkins was knocking on the door, Johnson was right behind her yelling at her father (4/12/23 Tr. 16-17, 35, 39-40). Her father opened the door, and Hawkins asked Johnson to leave (4/12/13 Tr. 17). Hawkins noticed a rock in Johnson's hand and told Johnson to back up because she did not want Johnson to follow her into the apartment (4/12/13 Tr. 17, 39-40). Johnson then raised her hand, as if she were going to throw the rock at Hawkins's father, but she did not throw it (4/12/23 Tr. 17). Johnson instead swung at Hawkins, and the rock in Johnson's hand grazed Hawkins's face and lip (4/12/23 Tr. 18, 41, 57-60). Hawkins swung back at Johnson, knocked her to the ground, and held her down (4/12/23 Tr. 18-19, 23, 41-43, 58-59). As the two women

tussled, Hawkins tried to get the rock out of Johnson's hand (4/12/23 Tr. 23, 59). Hawkins's father came out of his apartment to help her, and he was able to get the rock from Johnson (4/12/23 Tr. 19, 23, 55-56, 59). At some point, while Hawkins had Johnson on the ground, Johnson bit her finger (4/12/23 Tr. 19, 55, 57).

The security guard arrived on the scene and told Hawkins and Johnson to stop fighting (4/12/23 Tr. 23, 42, 44, 52-53). Hawkins got off Johnson, and after Johnson stood up, the security guard instructed Johnson to leave, but Johnson refused (4/12/23 Tr. 23-24). Johnson swung at Hawkins again, and Hawkins swung back at Johnson (4/12/23 Tr. 24). The security guard kept telling Johnson to leave, but Johnson would not leave and continued to lunge toward Hawkins (4/12/23 Tr. 24, 59). Hawkins sprayed one burst of mace at Johnson to try to get her to leave but missed (4/12/ 23 Tr. 24, 45-46, 53, 59-60). Johnson stated, "Oh, you maced me? I'm going to bust your car window," and left (4/12/23 Tr. 24-25, 60). Hawkins called 911 immediately after Johnson left (4/12/23 Tr. 24-25, 44-45). Hawkins then went outside to examine her car and saw that her back window shield was busted and there was a rock on the floor of her car (4/12/23 Tr. 26, 30-32, 54-55).

Sergeant Miriam Wishnick of the Metropolitan Police Department (MPD) responded to a call for an assault at an apartment building and was directed to the second floor (4/12/23 Tr. 62-65). While two other officers were speaking with the victim, Sergeant Wishnick spoke with Johnson (4/12/23 Tr. 65-66). Johnson told Sergeant Wishnick, in reference to the broken car window, “I did it. I threw the brick. I was angry. I cut my hand. You can see I’m bleeding.” (4/12/23 Tr. 67-68.).<sup>1</sup>

### ***The Trial Court’s Verdict***

The trial court found Johnson guilty of simple assault and destroying property (4/12/23 Excerpt Tr. 20-22). The trial court credited the testimony of Hawkins, finding her to be “a fully credible witness” who did not exaggerate and admitted to her conduct (4/12/23 Excerpt Tr. 20). As to the simple assault, the court found that Johnson was the initial aggressor by swinging at Hawkins with a rock, which fortunately only resulted in “a grazing blow” (4/12/23 Excerpt Tr. 20-21). As to destroying property, the court found that Johnson told Hawkins that she was going to break her car window; it could be reasonably inferred from “the timing

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<sup>1</sup> The defense did not present any evidence (4/12/23 Excerpt Tr. 3).

and circumstance” that Johnson broke the car window; and Johnson admitted to the police that she had broken the car window (4/12/23 Excerpt Tr. 21-22).

## **The Trial in Case No. 2022-CMD-5169**

### ***The Government’s Evidence***

Court records reflected that on November 25, 2021, Johnson was released in Case No. 2021-CMD-6740 and ordered to stay away from the second floor of her apartment building, and Johnson was advised of the stay-away order in court (4/13/23 Tr. 40-41).

On September 1, 2021, Frederick DeSilva, who worked as a maintenance mechanic for D.C. Housing Authority at Johnson’s apartment building, was informed by one of his contractors of an ongoing incident on the second floor of the building (4/13/22 Tr. 9-12, 24-25). DeSilva went to the second floor and saw Johnson, whom he had known for approximately 10 years, standing outside Hawkins’s father’s apartment, and banging on the door with her cane (4/13/22 Tr. 11-13, 25-26). Johnson “seemed like she was tipsy” and had been drinking (4/13/22 Tr. 28). DeSilva told Johnson to stop banging on the door and warned that if she continued to bang on the door, he would call the police because

she was damaging government property (4/13/22 Tr. 12, 27). Johnson became belligerent and yelled at him (4/13/22 Tr. 12, 22). DeSilva walked away, but Johnson followed him and continued to yell at him, saying, “You all going to stop putting your hands on me” (4/13/22 Tr. 12, 27, 29-31). DeSilva, however, had never put his hands on her and did not know what Johnson was talking about (4/13/23 Tr. 12, 27-28). When DeSilva reached the stairwell, Johnson poked him with her cane twice in his stomach (4/13/23 Tr. 12, 22-23, 33-37). DeSilva called 911 and walked out of the stairwell towards the elevator (4/13/23 Tr. 12-18, 33, 38). As DeSilva was on the phone with 911 and getting on the elevator, Johnson put his hand on his shoulder and pushed him (4/13/23 Tr. 12, 18-20, 29-30). DeSilva went to the lobby and waited for the police (4/13/23 Tr. 12).

### ***The Trial Court’s Verdict***

In finding Johnson guilty of contempt and simple assault, the trial court credited the testimony of DeSilva, finding him to be “a perfectly credible witness” (4/13/23 Tr. 51-53). As to the contempt, the court found that the stay-away order made it “crystal clear” that Johnson was to stay away from the second floor of her apartment building; Johnson was present and advised of the stay-away order in court; and Johnson violated

that order by going to the second floor of her apartment building on September 1, 2022 (4/13/23 Tr. 51-52). As to the simple assault, the court found that Johnson's conduct in twice poking DeSilva in the stomach with her cane constituted an assault (4/13/23 Tr. 52-53). Shortly after DeSilva told Johnson to stop banging on the door with her cane, Johnson became belligerent and started yelling at DeSilva, and the trial court noted that it was in this "hostile setting" that Johnson poked DeSilva with her cane in his midsection "with some force" (4/13/23 Tr. 53).<sup>2</sup>

### **Johnson's Motion to Consider Treatment in Lieu of Prosecution**

In her motion, Johnson voluntarily requested that she be committed to the custody of the Mayor for treatment for her chronic alcoholism in lieu of criminal prosecution under D.C. Code § 24-607(b)(1)(A)(i) (1R. 15 at 1-2; 2R. 7 at 1-2). Johnson informed the court that she intended to seek the appointment of an alcoholism expert to

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<sup>2</sup> The trial court found that Johnson's pushing of DeSilva on the shoulder appeared to be "more of a touching by someone who[ was] trying to get his attention in an obnoxious way" and "wouldn't characterize it as a shove or a push" (4/13/23 Tr. 53). Accordingly, it could not find beyond a reasonable doubt that this touching was so offensive as to constitute an assault (4/13/23 Tr. 53).

make a medical diagnosis (1R. 15 at 4; 2R. 7 at 4). She further requested that the court hold a civil hearing on her motion and make the requisite findings pursuant to D.C. Code § 24-607 (b)(2)(A) (1R. 15 at 2, 4; 2R. 7 at 2, 4).

In its opposition, the government argued that Johnson was not eligible for treatment in lieu of prosecution under D.C. Code § 24-607 because she had failed to meet her burden of establishing (1) a medical diagnosis of chronic alcoholism; and (2) the availability of an adequate or appropriate treatment program provided by the Mayor into which she could be placed (2R. 9 at 2-3).

A hearing was conducted on Johnson's motion before Judge Reid Winston on January 12, 2023 (1R. A at 14; 2R. A at 9). At the outset of the hearing, Judge Reid Winston and the government both noted that they had received the psychiatric report submitted by the defense expert Dr. Ronald Koshes, who had diagnosed Johnson as a chronic alcoholic and with certain mental illnesses (1/12/23 Tr. 2-4, 7, 18).<sup>3</sup> Defense

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<sup>3</sup> Specifically, Dr. Koshes determined that the defendant met the criteria for Alcohol Use Disorder Severe (1R. 18 at 2; 1R. 21 at 1; 2R. 12 at 2; 2R. 15 at 1). He also determined that she suffered from Post-Traumatic (continued . . . )

counsel informed the court that, in addition to Dr. Koshes's report, the defense expected to call Dr. Koshes to testify about Johnson's chronic alcoholism (1/12/23 Tr. 3). The defense also expected to call a representative from the D.C. Department of Behavioral Health (DBH) to establish that treatment programs for chronic alcoholics were available under the Mayor's office (1/12/23 Tr. 5, 10-11).

Judge Reid Winston then brought to the parties' attention D.C. Code § 24-608 (1/12/23 Tr. 3-4). That section provides that the provisions of subchapter 1, which includes D.C. Code § 24-607, "shall apply to chronic alcoholics who have not been determined to be mentally ill" and 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" (1/12/23 Tr. 4). In light of § 24-608, the court reasoned that if Johnson was also mentally ill, as indicated in Dr. Koshes's report, Johnson would not be entitled to the relief she was requesting in her motion (1/12/23 Tr. 4-6, 15, 18). The court thus suggested that defense counsel ask Dr. Koshes whether "he would opine that [Johnson] is someone who has a

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Stress Disorder (PTSD) and Major Depression with Anxiety (1R. 18 at 2; 1R. 21 at 1; 2R. 12 at 2; 2R. 15 at 1).



mental illness as defined in the code,” and if Dr. Koshes answered that question in the affirmative, that would resolve the issue (1/12/23 Tr. 8).

After consulting with Dr. Koshes, defense counsel proffered that Dr. Koshes had informed him that “Ms. Johnson does suffer from a mental illness” and that her mental illness went “hand-in-hand with her alcoholism” and was “a comorbidity issue” – i.e., “[h]er mental illness contribute[d] to her alcoholism” (1/12/23 Tr. 11-12). Thus, according to Dr. Koshes, both issues needed to be addressed and treated at the same time (1/12/23 Tr. 12; see also 1R. 18 at 2; 2R. 12 at 2).

Given Johnson’s concession that she had a mental illness, the court concluded that a hearing was unnecessary because § 24-607 was not applicable to Johnson; instead, pursuant to § 24-608, the provisions of Chapter 5 of Title 21 controlled in cases such as hers where there were comorbidities of mental illness and chronic alcoholism (1/12/23 Tr. 12-15, 18, 23-25). Defense counsel agreed with the court’s interpretation of the statute (1/12/23 Tr. 12-15, 23). Accordingly, Judge Reid Winston denied

Johnson's motion for treatment in lieu of prosecution pursuant to D.C. Code § 24-607 and set the case for trial (1/12/23 Tr. 15, 18, 24-25).<sup>4</sup>

In her motion to reconsider, Johnson argued that the court had erred in denying his motion for treatment in lieu of incarceration because no determination had been made that she suffered from a mental illness under the provisions of Chapter 5 of Title 21 – i.e., D.C. Code § 21-501 et seq., also known as the Ervin Act – as required by D.C. Code § 24-608 (1R. 18 at 2-4; 2R. 12 at 2-4). For example, Johnson noted that no petition for judicial commitment pursuant to D.C. Code § 21-541 had been filed against her, and the D.C. Family Court's Mental Health Commission had

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<sup>4</sup> Defense counsel, out of an abundance of caution, requested a competency screening for Johnson (1/12/23 Tr. 18-23). Judge Reid Winston granted his request and ordered a competency evaluation (1/12/23 Tr. 24-25). A competency screening evaluation of Johnson was conducted by the D.C. Department of Behavioral Health (DBH) on January 23, 2023, and a report was filed on January 31, 2023 (1R. 20; 2R. 14). The DBH forensic psychologist conducting the evaluation opined that Johnson was competent to proceed to trial (1R. 20 at 4; 2R. 15 at 4). The report further noted that DBH records indicated Johnson had been diagnosed with Major Depressive Disorder, PTSD, and alcohol abuse, and attended a day program 5 days a week with community-based mental health services via PSI, a core service agency (1R. 20 at 2; 2R. 15 at 4). At a mental observation hearing on February 2, 2023, defense counsel stated that he had seen the report and requested that the case be scheduled for trial (2/2/23 Tr. 3).

not conducted an examination or held a hearing on the issue of her mental health pursuant to D.C. Code § 21-542 (1R. 18 at 3-4; 2R. 12 at 3-4).

The government opposed Johnson's motion to reconsider, contending that Johnson had conflated the requirements of D.C. Code § 24-608 and D.C. Code § 21-501 et seq. (1R. 19 at 3-4; 2R. 13 at 3-4). Contrary to Johnson's assertions, the government argued that D.C. Code § 24-608 did not require the provisions of the Ervin Act be satisfied before the court could deny her motion for treatment in lieu of prosecution under D.C. Code § 24-607 (1R. 19 at 4; 2R. 13 at 4). Rather, the plain language of D.C. Code § 24-608 made clear that because Johnson was mentally ill, she was ineligible for relief under D.C. Code § 24-607 (1R. 19 at 3; 2R. 13 at 3).

In her written order denying the motion to reconsider, Judge Reid Winston rejected Johnson's argument and held that:

[D.C. Code] § 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 [D.C. Code] § 24-608 to apply. Rather, [D.C. Code] § 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 [Johnson]’s expert psychiatrist that [Johnson] 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 D.C. Code § 24-607 (1R. 21 at 2; 2R. 15 at 2 (footnotes omitted) (quoting D.C. Code § 24-608)).

## **SUMMARY OF ARGUMENT**

The trial court did not abuse its discretion in denying Johnson’s motion for treatment of chronic alcoholism in lieu of incarceration, pursuant to D.C. Code § 24-607. D.C. Code § 24-608 limits the application of D.C. Code § 24-607 “to chronic alcoholics who have not been determined to be mentally ill.” At the hearing on Johnson’s motion, the defense submitted its psychiatric expert’s report diagnosing Johnson with certain mental illnesses, and defense counsel proffered that the defense expert would testify that Johnson was mentally ill. Based on the expert report and proffered testimony, defense counsel conceded that Johnson was mentally ill. The trial court accepted Johnson’s concession and determined (at a minimum, implicitly) that Johnson was mentally ill. Accordingly, the trial court correctly concluded that D.C. Code § 24-608 precluded Johnson from seeking relief under D.C. Code § 24-607.

## ARGUMENT

### **The Trial Court Properly Denied Johnson’s Motion for Treatment in Lieu of Prosecution.**

Johnson contends that that the trial court erroneously applied D.C. Code § 24-608 to foreclose her motion for alcohol treatment in lieu of prosecution under D.C. Code § 24-607 (Brief for Johnson at 10-25). Her contention is without merit.

#### **A. Standard of Review and Applicable Legal Principles.**

D.C. Code § 24-607 provides in pertinent part that “[t]he [c]ourt may . . . commit to the custody of the Mayor for treatment and care for up to a specified period of time a chronic alcoholic who . . . [i]s charged with any misdemeanor and who, prior to trial . . . , voluntarily requests such treatment in lieu of criminal prosecution.” D.C. Code § 24-607(b)(1)(A)(i). “To order such discretionary relief, however, the court must first find, ‘after a medical diagnosis and a civil hearing,’ that ‘[t]he [defendant] is a chronic alcoholic’ and that ‘[a]dequate and appropriate treatment provided by the Mayor is available for the [defendant].’” *Cruz v. United States*, 165 A.3d 290, 293-94 (D.C. 2017) (quoting D.C. Code § 24-607(b)(2)(A)). A chronic alcoholic is defined as “any person who

chronically and habitually uses alcoholic beverages to the extent that: (A) [t]hey injure his health or interfere with his social or economic functioning; or (B) [h]e has lost the power of self-control with respect to the use of such beverages.” D.C. Code § 24-602(1).

D.C. Code § 24-608 provides a limitation on the application of D.C. Code § 24-607. Section 608 states in full:

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. Chapter 5 of Title 21 of the D.C. Code is entitled “Hospitalization of Persons with Mental Illness” and is known as the Ervin Act. *See* D.C. Code § 501 et seq. “Civil commitment is governed by the Ervin Act, and in order to involuntarily commit an individual the record must demonstrate by clear and convincing evidence that ‘the person is mentally ill and, because of that mental illness, is likely to injure himself or others if not committed.’” *In re Gaskins*, 265 A.3d 997, 1001 (D.C. 2021) (quoting D.C. Code § 21-545(b)(2)). Voluntary commitment for inpatient and outpatient mental health treatment is also

governed by the Ervin Act. *See* D.C. Code §§ 21-511, -512; *In re Peterson*, 984 A.2d 192, 193-96 (D.C. 2009).

This Court “review[s] the denial of a motion for treatment in lieu of prosecution for abuse of discretion.” *Clay v. District of Columbia*, 255 A.3d 1000, 1003 (D.C. 2021) (citing *Cruz*, 165 A.3d 290, 293-94). Questions of statutory interpretation are quintessential issues of law, which are reviewed de novo. *Robert Siegel, Inc. v. District of Columbia*, 892 A.2d 387, 393 (D.C. 2006). “[W]here a trial court makes an error of law, it infects the exercise of discretion.” *Henson v. United States*, 122 A.3d 899, 902 (D.C. 2015).

## **B. Discussion**

Johnson contends that “[t]he verb ‘determined’ in § 24-608 refers to an *adjudication* of mental illness,” i.e., a “court determination” of mental illness, and “[n]ot to a mere *diagnosis* in an expert report” (Brief for Johnson at 10, 15-17)).<sup>5</sup> Johnson claims that the trial court merely relied

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<sup>5</sup> On appeal, Johnson does not renew her argument below 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 could apply (1R. 18 at 2-4; 2R. 12 at 2-4 (citing D.C. Code §§ 21-541, -542)). She has therefore abandoned that argument. *See Bardoff v. United States*, 628 A.2d 86, 90 n.8 (D.C. 1993). In any event, as the trial court correctly ruled, it is  
(continued . . . )

on the defense expert's diagnosis and there was no adjudication of mental illness by the court (*id.* at 15-16, 21). She is wrong. Johnson conceded that she was mentally ill based on her expert's diagnosis, and the trial court determined – at the very least implicitly – that Johnson was mentally ill given that concession. Accordingly, the trial court did not err in concluding that D.C. Code § 24-607 did not apply to Johnson.

D.C. Code § 24-608 limits the application of D.C. Code § 24-607 to “chronic alcoholics who have not been determined to be mentally ill,” and further provides that “[t]he handling of [ ] chronic alcoholic[s] who ha[ve] been determined to be mentally ill shall be governed by [the Ervin Act].” D.C. Code § 24-608. Because of the use of the passive voice in § 24-608, the provision does not explicitly spell out who must make the

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entirely without merit. The plain language of D.C. Code § 24-608 makes clear that D.C. Code § 24-607 only “appl[ies] to chronic alcoholics who have not been determined to be mentally ill.” D.C. Code § 24-608 further states that “[t]he handling of a chronic alcoholic who has been determined to be mentally ill shall be governed by the provisions of [the Ervin Act].” One ordinary meaning of the verb to govern is “to control.” See <https://www.merriam-webster.com/dictionary/govern>. Thus, by its plain terms, D.C. Code § 24-608 merely provides that hospitalization or treatment for a chronic alcoholic who is mentally ill is controlled by the provisions of the Ervin Act, as the trial court correctly ruled. It does not require that § 24-608 be applied unless an adjudication *already* has been made under the Ervin Act.



determination of mental illness. It is reasonable to conclude, however, that the trial court, which is tasked with deciding the ultimate issue whether to grant a defendant's motion for treatment in lieu of prosecution, must determine whether the defendant is mentally ill before deciding whether the exclusion in § 24-608 applies, just as the trial court must also determine whether the defendant is a chronic alcoholic before deciding whether to grant relief under § 24-607. *See Cruz*, 165 A.3d at 293 (“[T]he decision whether to grant treatment in lieu of prosecution is committed to the discretion of the trial court. . . . To order such discretionary relief, however, the court must first find . . . that “[t]he [defendant] is a chronic alcoholic.”) (citing D.C. Code § 24-607(b)(2)(A)).

Here, the defense expert's report diagnosed Johnson with Major Depression, PTSD, and Alcohol Use Disorder Severe. *See supra* note 3. At the hearing, after speaking with the expert, defense counsel proffered to the trial court that the expert had confirmed that “Ms. Johnson does suffer from a mental illness” (1/12/23 Tr. 11-12). There was no other evidence presented besides the defense expert's report and proffered testimony on the issue, and neither party challenged the expert's diagnosis. To the contrary, defense counsel explicitly conceded that

Johnson was mentally ill (1/12/23 Tr. 11-12, 14, 23 (“She is mentally ill, as we admitted and we submitted.”)). The trial court accepted the defense concession, and thus determined (at the very least, implicitly) that Johnson was mentally ill (1/12/23 Tr. 12-13, 18, 24-25). Accordingly, the trial court correctly ruled that, as a chronic alcoholic who was mentally ill, Johnson was precluded from seeking relief under D.C. Code § 24-607 and properly denied her motion.

Finally, Johnson contends that “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” (Brief for Johnson at 22-24). As discussed *supra*, we do not dispute that the trial court ultimately must determine whether a defendant is mentally ill under D.C. Code § 24-608 before it can limit the application of D.C. Code § 24-607. But the statute does not specify what form that “determination” must take, much less specify that it must amount to a formal “adjudication” following a hearing. In any event, the trial court made such a determination in this case based on Johnson’s concession that she

is mentally ill – and Johnson never proffered that she would be able to establish otherwise.<sup>6</sup>

Johnson similarly errs in arguing that because many persons who suffer from alcoholism also suffer from mental illnesses, the Council must have intended that only formal adjudications of mental illness would be excluded from § 24-607 (Brief for Johnson at 23-24). But if the Council had wanted to limit the scope of § 24-607, it logically would have restricted its application to certain *kinds* of mental illness rather than merely adding formal procedural steps. That the Council did not impose such substantive restrictions indicates that it understood that defendants suffering from mental-health comorbidities would not be eligible for alcoholism treatment instead of criminal punishment. The trial court therefore did not abuse its discretion in denying Johnson’s motion for treatment in lieu of prosecution pursuant to D.C. Code § 24-607, without recourse to some unspecified additional judicial procedures.

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<sup>6</sup> For the same reason, any possible procedural error committed by the trial court would be harmless under any standard of review. Given that Johnson conceded she suffered from a “mental illness,” no additional amount of “adjudication” would have made her eligible.

## CONCLUSION

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

Respectfully submitted,

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/s/

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# 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 a 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 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.

Initial Here

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\_\_\_\_\_/s/  
Signature

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23-CM-322 & 23-CM-323  
Case Number(s)

November 1, 2023  
Date

## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Timothy Cone, Esq., on this 1st day of November, 2023.

/s/

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Assistant United States Attorney