BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 24-CO-548

BOBBY JOHNSON, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

Cr. No. 2009-CF3-15607

MATTHEW M. GRAVES
United States Attorney

CHRISELLEN R. KOLB
NICHOLAS P. COLEMAN
VICTORIA BOYLE
* DYLAN M. ALUISE
D.C. Bar # 90018755
Assistant United States Attorneys

* Counsel for Oral Argument
601 D Street, NW, Room 6.232
Washington, D.C. 20530
Dylan.Aluise@usdoj.gov
(202) 252-6829

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II. Whether this Court should vacate Johnson's legal sentences and remand for resentencing based on his claim that the trial court miscalculated the non-binding Voluntary Sentencing Guidelines, when this Court has consistently refused to review a trial court's alleged misapplication of the Guidelines in imposing a legal sentence.

III. Whether D.C. Code § 22–1804a(a)(1), which permits a trial court to enhance a sentence for a defendant's third felony conviction when he "previously . . . convicted of 2 prior felonies not committed on the same occasion," applies when Johnson was convicted of a third felony after he was previously convicted of two felonies committed months apart.

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COUNTERSTATEMENT OF THE CASE

Appellant Bobby Johnson was charged by indictment in 2010 with assault with intent to kill while armed (AWIKWA) (D.C. Code §§ 22–401, 22–4502), aggravated assault while armed (AAWA) (D.C. Code §§ 22–404.01, 22–4502), mayhem while armed (MWA) (D.C. Code § 22–406, 22–4502), three counts of possession of a firearm during crime of violence (PFCOV) (D.C. Code § 22–4504(b)), possession of a firearm after having previously been convicted of a crime punishable by imprisonment for a

term exceeding one year (FIP) (D.C. Code § 22–4503), carrying a pistol without a license (CPWL) (D.C. Code § 22–4504(a)), possession of an unregistered firearm (UF) (D.C. Code § 7–2502.01), and unlawful possession of ammunition (UA) (D.C. Code § 7–2506.01(3)) (Record on Appeal (R.) 14 (Docket)).[1]

Following a jury trial before the Honorable Michael L. Rankin, Johnson was acquitted of AWIKWA but convicted of the lesser included charge of assault with a dangerous weapon (ADW); he was also convicted of all other charges (R. 25 (Docket)). In January 2011, Judge Rankin sentenced Johnson to an aggregate term of 336 months' incarceration (Judgment & Commitment Order, *United States v. Bobby Johnson*, No. 2009-CF3-15607 (D.C. Super. Ct. Jan. 6, 2011)).[2] Johnson appealed, and this Court affirmed his convictions but remanded with instructions for the trial court to vacate the ADW and MWA offenses as merged with the AAWA conviction and to resentence Johnson accordingly. *(Bobby)*

[1] All citations to the Record (R.) refer to the PDF number; all citations to Appellant's Appendix (A.) refer to the bates-stamped page number.

[2] The unpublished dockets and orders referenced in the brief are attached to the government's motion to supplement the record.

Johnson v. United States ("Johnson I"), 107 A.3d 1107, 1109–14 (D.C. 2015).

Upon resentencing Johnson in January 2017, Judge Rankin vacated the ADW and MWA convictions but reimposed otherwise identical sentences for the remaining counts, resulting in the same aggregate sentence of 336 months' incarceration (Am. Judgment & Commitment Order, *United States v. Bobby Johnson*, No. 2009-CF3-15607 (D.C. Super. Ct. Jan. 3, 2017)). Johnson unsuccessfully attacked his conviction in a D.C. Code § 23–110 motion and then filed an appeal challenging the denial of that motion and a separate appeal claiming that the trial court erroneously enhanced his sentence under the D.C. Code § 22–1804a third-strike felony sentencing enhancement statute. In a consolidated, unpublished Memorandum Opinion, this Court rejected Johnson's claims and upheld his convictions and sentences. Mem. Op. & Judgment, *(Bobby) Johnson v. United States ("Johnson II")*, Case Nos. 17-CO-95 & 19-CO-890 (D.C. May 5, 2021).

Following that appeal, Johnson successfully moved to vacate a prior conviction from 2009 (A. 15–17) and then filed a second motion in this case under D.C. Code § 23–110 seeking a new sentence (A. 1). The

government opposed (A. 57). The Honorable James A. Crowell IV, who had been reassigned to Johnson's case, granted Johnson's motion, vacated his sentence, and ruled that he would calculate Johnson's Voluntary Sentencing Guidelines range for resentencing using the D.C. Code § 22–1804a enhancement based on Johnson's two remaining prior felony convictions (A. 189–206). On May 16, 2024, Judge Crowell resentenced Johnson to an aggregate term of 240 months by reducing his AAWA sentence and ordering certain counts to run concurrently instead of consecutively (5/16/24 Transcript (Tr.) 12–14, 26–33; see A. 207). On June 15, 2024, Johnson filed a notice of appeal (A. 208–10).

Johnson's Prior Convictions

On November 13, 2000, Johnson was convicted pursuant to a guilty plea in Case No. 2000-FEL-4120 for distributing cocaine on December 2, 1999 (A. 56; see Docket, *United States v. Bobby Johnson*, No. 2000-FEL-4120 (D.C. Super. Ct.); see also A. 70). That same day, Johnson was also convicted pursuant to a guilty plea in Case No. 2000-FEL-2017 of possessing cocaine on March 27, 2000, with the intent to distribute it (A. 54; see Docket, *United States v. Bobby Johnson*, No. 2000-FEL-2017 (D.C. Super. Ct.); see also A. 70). The trial court entered Johnson's

convictions in those two cases in separate Judgment & Commitment Orders (A. 54, 56).

On November 12, 2009, Johnson was convicted of assault with significant bodily injury in Case No. 2008-CF2-27158 (see Docket, *United States v. Bobby Johnson*, No. 2008-CF2-27158 (D.C. Super. Ct.)).

The Trial, Sentencing, and Resentencing

Prior to the start of Johnson's 2010 trial, the government filed notice under D.C. Code § 23–111 that Johnson had previously been convicted of at least two felonies and that upon his conviction in this case he would qualify for the discretionary third-strike felony sentencing enhancement under D.C. Code § 22–1804a (A. 52). The notice listed Johnson's three prior felony convictions in Case Nos. 2000-FEL-2017, 2000-FEL-4120, and 2009-CF2-27158 (*id.*).

As the Court summarized in *Johnson I*, the evidence at Johnson's trial showed:

> At the time of the shooting, the victim [Shaun Gladden] was scheduled to testify at trial against [appellant Johnson's] brother, Jonathan "Bow Wow" Johnson. On his way to play basketball on July 15, 2009, the victim walked around a corner and saw appellant [Johnson]. "I just looked at him and then that's when he must have saw me, and he was like, what's up, homey, and then immediately he whipped out [a gun] and just started shooting." "[T]he first ones I felt was in

> my butt. And then once I got shot in my right leg, I ain't feel no more. I just felt me trying to drag myself behind—on the side of the building."
>
> The victim sustained several injuries. One bullet "lacerated the rectum, and it had gone in and there are several blood vessels in this area which were bleeding." The victim still used a colostomy bag at trial. In addition, a bullet fractured the victim's right knee and tibia, causing mobility problems that persisted until at least the date of trial. The victim stated that his leg "was never going to be like God intended it to be" and that he would need to undergo further operations to save his leg.

Johnson I, 107 A.3d at 1109–10.

Following *Johnson I*, the trial imposed on Johnson a 336-month aggregate prison sentence: 240 months for AAWA, 60 months for PFCOV, and 36 months for FIP, all to run consecutively; and 60 months each for two additional counts of PFCOV, 36 months for CPWL, and one year each for UF and UA, all to run concurrent to each other and to his AAWA sentence (Am. Judgment & Commitment Order, *United States v. Bobby Johnson*, Case No. 2009-CF3-15607 (D.C. Super. Ct. Jan. 3, 2017)).

Johnson II

Johnson appealed that 336-month sentence claiming, among other things, that the trial court had erroneously applied the three-strike sentencing enhancement. In *Johnson II*, this Court rejected that claim as

meritless. *Id.* at 3–4. The Court explained that the D.C. Code §§ 22–1804a, 23–111 enhancement procedures apply "only if the trial court imposes a sentence outside the normal range of penalties authorized by statute for the substantive offense for which the defendant is convicted." *Id.* at 3 (cleaned up). Applying that principle, the Court held that Johnson was not given an enhanced sentence because his sentence complied with the applicable unenhanced statutory limits. *Id.* As the Court explained, Johnson "already faced a thirty-year statutory maximum penalty for his conviction for [AAWA]," the D.C. Code § 22–1804a(a)(1) enhancement only permitted a trial court to sentence an eligible defendant to imprisonment up to 30 years, and thus Johnson's "aggregate 336-month sentence . . . did not exceed this statutory limit." *Id.*

The Court likewise rejected Johnson's claim that the trial court erroneously applied the three-strike enhancement to sentence him outside the otherwise applicable Voluntary Sentencing Guidelines range. *Johnson II* at 3–4. In reaching that decision, this Court again held that "Johnson was not subject to increased punishment," that the discretionary calculation of non-binding Guidelines ranges was not "the object of Congress's concern when it enacted § 23–311," and thus there

was "no error . . . with respect to the sentence Mr. Johnson received." *Id.* at 4.

Johnson's 2022 Section 23-110 Motion

The Parties' Arguments

In 2022, following *Johnson II*, Johnson successfully moved under D.C. Code § 23–110 to vacate his conviction in Case No. 2008-CF2-27158 for due-process violations (A. 15–17). That conviction had been one of the three predicate felony convictions that the government referenced in its D.C. Code § 23–111 notice for this case to satisfy D.C. Code § 22–1804a(a)(1)'s requirement of two prior felony convictions (A. 52). Johnson then moved under D.C. Code § 23–110 in this case to vacate his sentence, claiming that it was wrongfully enhanced under D.C. Code § 22–1804a due to vacatur of the conviction in Case No. 2008-CF2-27158, and sought resentencing (A. 1–56).

The government opposed that motion, arguing that Johnson's claim was procedurally barred, that his sentence was lawful absent an enhancement, that there was no due-process violation because the sentencing court did not reference the vacated conviction in sentencing Johnson, and that his two other prior felony convictions would in any

event qualify him for the enhancement under the plain text of D.C. Code § 22–1804a(a)(1) (A. 57–83).

In reply, Johnson argued that his two prior felony convictions did not count as separate convictions under D.C. Code § 22–1804a(a)(1) because, although he committed those felonies on separate occasions, he was convicted of those offenses on the same date, which he claimed would not comply with § 22–1804a(c)(1) (A. 84–135).[3]

The Trial Court's Decision

Invoking the law-of-the-case doctrine, the trial court first found that *Johnson II* dictated that Johnson had not been given an enhanced sentence under D.C. Code § 22–1804a (A. 190–91, 196–200). The court, however, granted Johnson's motion to vacate his sentence on due-process grounds because the government had referenced Johnson's since-vacated conviction during its initial allocution (*id.* at 191, 200–02). The court accordingly vacated Johnson's sentence and ordered resentencing (*id.*).

[3] The parties submitted supplemental briefing on whether Johnson's motion should be denied as successive based on *Johnson II*'s holding that Johnson was not given an enhanced sentence (A. 136–88). The parties also presented oral argument on Johnson's motion on August 4, 2023 (see generally 8/4/23 Tr.).

Having ordered Johnson's resentencing, the court then determined that his applicable "sentencing guidelines should reflect the enhancement under [D.C. Code] § 22–1804a" (A. 202). And while the court used that enhancement to calculate Johnson's Voluntary Sentencing Guidelines range, it did not, however, apply the enhancement to alter any of the applicable *statutory* sentencing ranges (cf. *id.* at 202–05; see also *id.* at 193 (listing the unaltered statutory maximum penalties)).

In reaching the conclusion that the third-strike enhancement applied to Johnson's Voluntary Sentencing Guidelines range, the court observed that D.C. Code § 22–1804a(a)(1) provides that a defendant is eligible for the enhancement if he was "previously convicted of two prior felonies not committed on the same occasion" (A. 202 (quoting D.C. Code § 22–1804a(a)(1)). It then found that Johnson had committed his two prior felonies on separate occasions months apart (*id.* at 203). Despite the language in Subsection (a)(1), the court reasoned that the enhancement statute is "facially ambiguous" because it is "unclear if subsection (c)(1) imposes [an] additional requirement" that the defendant be convicted of those felonies on separate dates (*id.* at 202–04). To help resolve the

ambiguity, the court observed how the "prior version of the statute, and case law interpreting it, required separate sentencing dates," but that the D.C. Council amended it to "remove[ ] any mention of sentencing dates and insert[ ] the language 'not *committed* on the same occasion'" (*id.* at 204–05 (quoting D.C. Code § 22–1804a(a)(1)) (emphasis in original)). The court thus reasoned that this legislative change eliminated the condition that different sentencing dates are required for felonies to be counted as separate predicate offenses for D.C. Code § 1804a(a)(1) (*id.* at 205). Because Johnson had previously been convicted of two felonies committed months apart, the court determined that those convictions "plainly meet[ ] the requirements of the statute," and that his Voluntary Sentencing Guidelines range should be increased under D.C. Code § 22–1804a(a)(1) (*id.* at 205; see *id.* at 193, 202).

Resentencing

At the resentencing hearing on May 16, 2024, Judge Crowell reiterated that he was applying the D.C. Code § 1804a enhancement to Johnson's applicable Voluntary Sentencing Guidelines range to increase the range for AAWA from "72 to 144 months" to "72 to 360 [months]" (5/16/24 Tr. 7–9; see also *id.* at 8 (referencing the Guidelines calculations

on it its written order (A. 193))). On agreement of the parties, the court also vacated two of Johnson's three PFCOV counts because they merged (*id.* at 12–14).

Before announcing Johnson's new sentence, Judge Crowell explained that the "nature and circumstances of this offense"—"attempt[ing] to murder a Government witness with a firearm"—"illustrate[d] [Johnson's] wholesale disregard for the justice system" (5/16/24 Tr. 26–28). Also noting Johnson's extensive criminal history and repeated violations of parole, Judge Crowell reasoned that these factors "weigh[ed] in favor of a significant sentence" (*id.* at 28). Judge Crowell then concluded that a "sentence of 20 years" was appropriate (*id.* at 29). To arrive at that 240-month sentence, the court lowered Johnson's previous 240-month sentence for AAWA to 180 months, reimposed the same consecutive 60-month sentence for the single merged count of PFCOV, and reimposed the same sentences for FIP, CPWL, UF, and UA and ordered them to run concurrently each other and to Johnson's other sentences (*id.* at 29–32; see A. 207).

SUMMARY OF ARGUMENT

This Court in *Johnson II* already considered Johnson's argument that his prior 336-month sentence was erroneously enhanced under D.C. Code § 22–1804a and held that Johnson had not received an enhanced sentence because each of his sentences complied with the applicable unenhanced statutory penalty. After receiving a *reduced* and still indisputably legal sentence upon resentencing, Johnson attempts to claim yet again that his now-lower sentence was erroneously enhanced under the exact same statutory scheme. This Court already ruled on and foreclosed that claim in *Johnson II*. Indeed, to rule in Johnson's favor would require this Court effectively to reverse and overrule *Johnson II*. Under the law-of-the-case doctrine, this Court should adhere to its prior decision and deny Johnson's claim as procedurally barred.

Beyond that procedural bar, Johnson also fails to state a legally cognizable claim for reversal. This Court has long adhered to the practice of not reviewing legal sentences imposed by trial courts absent narrow exceptions, such as procedural defects. It has also consistently recognized that the Voluntary Sentencing Guidelines are not binding and confer no legal rights on defendants. This Court has thus steadfastly refused to

review claims that a trial court misapplied the Guidelines. It has also flatly rejected arguments, like Johnson's, that a trial court's misapplication of the non-binding Voluntary Sentencing Guidelines could form a procedural error warranting reversal of a legal sentence. Each of Johnson sentences are legal under the applicable unenhanced penal statutes. And, as *Johnson II* establishes, he did not receive any enhanced punishment. Johnson's claim thus turns solely on the trial court's application of the D.C. Code § 22–1804a enhancement to calculate his Voluntary Sentencing Guidelines range. Because Johnson received a legal sentence and cannot state a claim absent reference to the court's application of the Voluntary Sentencing Guidelines, which confer upon him no legal rights, this Court should follow its well-established precedents to reject his claim on that basis alone.

Even if Johnson could clear those threshold hurdles, his claim is meritless because he qualified for the third-strike felony sentencing enhancement under D.C. Code § 22–1804a(a)(1). That provision states that a defendant is eligible for the enhancement if he "ha[d] previously been convicted of 2 prior felonies not committed on the same occasion." Johnson's prior convictions for offenses committed months apart plainly

fit that criterion. Contrary to Johnson's argument, Subsection (c)(1) of the statute did not render him ineligible for the enhancement. That Subsection separately provides that a defendant "shall be considered as having been convicted of 2 felonies if [he] has been convicted of a felony twice before on separate occasions." Even if Subsection (c)(1) could be read as providing a second set of mandatory criteria for Subsection (a)(1)'s enhancement to apply, it does not follow that "separate occasions" under Subsection (c)(1) must mean "separate dates" of conviction. Rather, as this Court has recognized in interpreting similar statutory language, separate occasions means that there must be some time separate between two acts. That is, the acts cannot occur simultaneously. As here, when a defendant is convicted in two separate cases pursuant to two separate final judgment and commitment orders, he cannot have been convicted in those cases simultaneously. On the other hand, Johnson's interpretation would conflict with the legislative history of the statute, which abolished a sequential sentencing requirement; would produce absurd and arbitrary results not grounded in any legislative or policy rationale; and would contradict state supreme court opinions in other jurisdictions interpreting similar statutory language.

Finally, even if Johnson could establish that the trial court erred in applying the enhancement to calculate his Voluntary Sentencing Guidelines range, it would be harmless. Johnson received a legal sentence that the court found appropriate under the circumstances and his substantive rights could not have been affected by the error because the Guidelines confer no such rights.

ARGUMENT

I. Johnson's Claim is Procedurally Barred by *Johnson II* and the Law-of-the-Case Doctrine.

In *Johnson II*, this Court rejected Johnson's claim that his prior 336-month sentence was erroneously enhanced by the trial court's application of the D.C. Code § 22–1804a(a)(1) third-strike felony sentencing enhancement. *Id.* at 3–4. This Court held that, as a matter of law, Johnson had not received an enhanced sentence under that statute because his sentence complied with the applicable unenhanced statutory penalties. *Id.* It further found meritless Johnson's claim that the trial court erroneously applied the enhancement to sentence him above the advisory Voluntary Sentencing Guidelines range. *Id.* at 3–4. Instead, as this Court concluded, there could be no reversable error on that basis because Johnson "was not subject to increased punishment." *Id.* at 4.

Johnson now claims yet again that his now-*reduced* sentence was erroneously enhanced by the trial court's alleged misapplication of the exact same sentencing enhancement. That claim is entirely foreclosed by *Johnson II*. Johnson does not grapple with this binding decision or its obvious conflict with his claim. And, indeed, there is no way to reconcile this Court's holding in *Johnson II* that Johnson's 336-month sentence was not enhanced by D.C. Code § 22–1804a(a)(1) because it complied with the applicable unenhanced statutes with Johnson's claim that his *reduced* 240-month sentence was similarly enhanced. There is equally no way to square any claim that the trial court committed reversable error by applying that enhancement to calculate Johnson's non-binding Voluntary Sentencing Guidelines range with this Court's prior holding in *Johnson II* that this could not be a basis for reversal.

As this Court has long recognized:

> [T]he law of the case principle . . . precludes reopening questions resolved by an earlier appeal in the same case. . . . The general rule is that if the issues were decided, either expressly or by necessary implication, those determinations will be binding on remand and on a subsequent appeal."

In re Baby Boy C., 630 A.2d 670, 678 (D.C. 1993) (cleaned up). The doctrine is limited "only where (1) the first ruling has little or no finality,

or (2) the first ruling is clearly erroneous in light of newly presented facts or a change in substantive law." *Id.* (cleaned up). Absent one of those narrow exceptions, "once the court has decided a point in a case, that point becomes and remains settled unless or until it is reversed or modified by a higher court." *Kritsidinas v. Sheskin*, 411 A.2d 370, 371 (D.C. 1980) (citation omitted). The doctrine imposes a procedural bar that prevents a litigant from asking the Court to reconsider the same question of law that has previously been litigated and "serves the judicial system's need to dispose of cases efficiently by discouraging judge-shopping and multiple attempts to prevail on a single question." *Id.* (cleaned up).

This Court's holding in *Johnson II* that Johnson did not receive an enhanced sentence and its attendant reasoning control here. It would not be possible to find in Johnson's favor that his reduced 240-month sentence, which falls within all applicable unenhanced statutory ranges, without effectively reversing and overruling *Johnson II*. The Court cannot, consistent with *Johnson II*, hold that Johnson's 240-month sentence is enhanced when it previously held that his 336-month sentence could not have been enhanced. It would likewise be impossible to find in Johnson's favor that the trial court erred in considering that

enhancement in calculating the non-binding Voluntary Sentencing Guidelines without similarly reversing and overruling *Johnson II*. This Court's prior decision in *Johnson II* thus squarely settles the claim that Johnson raises in this appeal.

Johnson identifies no exception to the law-of-the-case doctrine that would justify a departure from its procedural bar. If Johnson wanted to seek reversal of *Johnson II*, the opportunity to do so was through a petition for rehearing and/or rehearing en banc. D.C. Court of Appeals R. 35(c), 40(a)(1). The time for doing so has long since lapsed. *Id.* Accordingly, the Court should not entertain Johnson's claims which fundamentally conflict with its binding holdings in *Johnson II*. *See In re Baby Boy C.*, 630 A.2d at 678. And it should reject any invitation from Johnson to issue an opinion that would effectively reverse and overrule *Johnson II*. *See id.* ("[W]hen this court has considered an issue of law which is dispositive of the case before it, . . . that precedent must be followed unless and until it is overruled by the court en banc") (citing *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971)).[4]

[4] Johnson's failure even to address this obvious procedural barrier in his opening brief should be treated as an abandonment of any such (continued . . .)

II. Johnson Fails to State a Cognizable Claim to Reverse His Legal Sentence Based on an Alleged Misapplication of the Non-Binding Voluntary Sentencing Guidelines.

This jurisdiction has long recognized the principle that trial courts have the exclusive authority to fashion a sentence and that this Court has "no jurisdiction in respect of the exercise of that power, provided it does not exceed the statutory limit." *Raymond v. United States*, 26 App. D.C. 250, 257 (D.C. Cir. 1905); *accord In re L.J.*, 546 A.2d 429, 434–35 (D.C. 1988) (citations omitted). The 2004 promulgation of the non-binding Voluntary Sentencing Guidelines did not disturb that ancient axiom nor this Court's practice of refusing to review a defendant's legal sentence, absent extremely limited exceptions like cognizable procedural errors. *See R.W. v. United States*, 958 A.2d 259, 265–68 (D.C. 2008), *as amended* (Mar. 5, 2009); *see also In re L.J.*, 546 A.2d at 434–35 (citations omitted).

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argument. *See Bardoff v. United States*, 628 A.2d 86, 90 n.8 (D.C. 1993). In particular, Johnson should not be permitted to reveal his argument for the first time in his reply brief, when the government will have no opportunity to respond to it in writing. *See Stockard v. Moss*, 706 A.2d 561, 566 (D.C. 1997) ("It is the longstanding policy of this court not to consider arguments raised for the first time in a reply brief.") (cleaned up).

As this Court recognized in *Johnson II*, a sentence is not enhanced under D.C. Code §§ 22–1804a, 23–111, unless it exceeds the maximum unenhanced statutory penalty for that offense. *Johnson II* at 3–4 (citing *Gray v. United States*, 147 A.3d 791, 809 (D.C. 2016) for its holding that a defendant's sentence is not enhanced when it falls "within the normal sentencing ranges for [his] offenses"). That holding and reasoning control here and establish that Johnson was not sentenced pursuant to any statutory enhancement. Johnson does not—and cannot—claim on appeal that he received an illegal sentence above the unenhanced statutory maximum for any of his offenses, notwithstanding application of D.C. Code § 22–1804a. And he thus cannot claim, contrary to *Johnson II*, that he received an enhanced sentence. Indeed, as summarized below, each sentence he received falls within the original, unenhanced statutory sentencing range, and even his *aggregate* sentence of 20 years falls well below AAWA's individual 30-year cap:

Charge (Count)	**May 2024 Sentence (A. 207)**	**Unenhanced Statutory Maximum Sentence**
PFCOV (2)	**60 months**	**180 months** (*60 months mandatory minimum*) D.C. Code § 22–4504(b)
AAWA (3)	**180 months**	**360 months**

Charge (Count)	May 2024 Sentence (A. 207)	Unenhanced Statutory Maximum Sentence
		D.C. Code §§ 22–404.01, 22–4502(a)(1))
FIP (4)	**36 months**	**120 months** (*12 months mandatory minimum*) D.C. Code § 22–4503(b)(1)
CPWL (8)	**36 months**	**120 months** D.C. Code § 22–4504(a)(2)
UF (9)	**12 months**	**12 months** D.C. Code §§ 7–2502.01, 7–2507.06(a)
UA (10)	**12 months**	**12 months** D.C. Code §§ 7–2506.01, 7–2507.06(a)

Consistent with this Court's longstanding practice, it should decline to review Johnson's indisputably legal sentence. *See, e.g.*, *In re L.J.*, 546 A.2d at 434–35. And it should reject Johnson's attempt (see Appellant's Brief (Br.) 26–27) to circumvent that prudential practice by claiming that the trial court sentenced him based on misapplying the enhancement to calculate his Voluntary Sentencing Guidelines. While the trial court did use the D.C. Code § 22–1804a enhancement to calculate the applicable Voluntary Sentencing Guidelines—and not the *statutory* sentencing ranges—that decision is not a basis for reversal, even if potentially

erroneous. *See Speaks v. United States*, 959 A.2d 712, 717–20 (D.C. 2008); *R.W.*, 958 A.2d at 265–68; *see also* Voluntary Sentencing Guidelines Manual at H–2 & n. 84 (2023) (explaining Guidelines calculation when D.C. Code § 22–1804a(a)(1) applies). Indeed, this Court reached the same conclusion in *Johnson II*, which controls here both in its generally applicable reasoning and its binding nature as law of this case. *Johnson II* at 3–4.

This Court has recognized since the earliest stages of the Voluntary Sentencing Guidelines that a trial court's misunderstanding or misapplication of that non-binding sentencing aid provides no grounds for reversal on appeal. *See Speaks*, 959 A.2d at 717–20; *R.W.*, 958 A.2d at 265–68. D.C. Code § 3–105 provides both that the Voluntary Sentencing Guidelines are not binding on trial courts and that they "shall not create any legally enforceable rights." *Id.* § 3–105(a), (c).[5] And, as this Court recognized in *Speaks*, the impact of D.C. Code § 3–105 is that legal

[5] The Voluntary Sentencing Guidelines themselves also explicitly recognize that "[s]entences under the Guidelines, just like sentences before the Guidelines, are **not** appealable except when they are unlawful." D.C. Sentencing Commission Voluntary Sentencing Guidelines Manual at 1 & n.4 (2023) (citing D.C. Code § 3–105(c); *Speaks*, 959 A.2d at 717–20; *R.W.*, 958 A.2d at 265–66) (emphasis in original).

sentences cannot be challenged on appeal on the grounds that "they are not compliant with the guidelines." 959 A.2d at 719. Thus, a defendant may not claim on appeal that the trial court erred by imposing a statutorily legal sentence even if based on misapplication of the Guidelines. *Id.* at 717–20; *see R.W.*, 958 A.2d at 265–68. Yet, that is precisely what Johnson attempts to do here by claiming that the trial court erroneously "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" (Br. 26). That is the exact type of claim foreclosed by D.C. Code § 3–105, *Speaks*, 959 A.2d at 717–20, and *R.W.*, 958 A.2d at 265–68.

Johnson again tries to avoid application of this Court's longstanding practice by attempting to cast his claim as a broader challenge to the trial court's sentencing process and supposed reliance on misinformation (see Br. 26–27). That also fails. To be sure, this Court has recognized that it may review a legal sentence if there was a due-process defect in the sentencing process, such as a trial court fashioning a sentence in reliance on materially inaccurate factual information. *See Caldwell v. United States*, 595 A.2d 961, 966–67 (D.C. 1991) ("[D]ue

process is violated when the sentencing judge relies on material false assumptions as to any facts relevant to sentencing.") (cleaned up); *In re L.J.*, 546 A.2d at 434–35 (citations omitted); *cf. R.W.*, 958 A.2d at 266 ("[W]e have long followed the rule that sentences within statutory limits are unreviewable aside from constitutional considerations.") (cleaned up). To state a claim for sentencing based on material misinformation, though, an appellant must identify specific "facts or evidence" underlying the trial court's sentencing decision and demonstrate that they are "materially false or unreliable." *R.W.*, 958 A.2d at 267–68 (citations omitted). This rule would, for example, permit a defendant to appeal a sentence if the trial court concluded that he had previously been convicted of a crime for which he was never found guilty. *Townsend v. Burke*, 334 U.S. 736, 740–41 (1948).

But that is not the case here. The supposed misinformation that Johnson points to is not a materially false factual or evidentiary matter but rather the trial court's alleged misapplication of *accurate* information about Johnson's criminal history to calculate his Voluntary Sentencing Guidelines range (see Br. 11, 26–27). Johnson does not—and cannot—dispute that he was previously convicted of two felonies in Case Nos.

2000-FEL-4120 and 2000-FEL-2017. And he does not, as he must, identify any materially false or unreliable factual or evidentiary information in the record that the court relied on in rendering its sentencing decision. *See R.W.*, 958 A.2d at 267–68.

Instead, the nature of Johnson's claim mirrors what this Court has considered and rejected multiple times. First, in *R.W.*, as here, the defendant challenged his legal sentence on appeal based on a claim that the trial court erroneously departed from the applicable Voluntary Sentencing Guidelines range based on accurate factual information. 958 A.2d at 262–63, 265–68. Without reaching the merits of that Guidelines calculation, this Court found the very basis of this type of claim insufficient for appellate review. *See id.* at 265–68. As the Court recognized, the Guidelines are "entirely voluntary" and thus trial judges "are free to apply or ignore them as they see fit without interference by this Court." *Id.* at 265 (citing, inter alia, D.C. Code § 3–105). Accordingly, as *R.W.* held:

> Whether . . . a trial judge scrupulously follows, outrageously flouts or clumsily misapplies the sentencing guidelines is simply none of our appellate business, unless . . . [it] coincidentally trigger[s] one . . . of [the] more limited and traditional reasons for reviewing a sentence.

Id. at 265–66 (cleaned up). And, as *R.W.* reasoned, a trial court's reliance on accurate information in supposedly misapplying those Guidelines would not qualify for such an exception. *Id.* at 267–68.

This Court again in *Speaks* rejected an argument analytically identical to the one Johnson raises here. 959 A.2d at 717–20. As here, the defendant in *Speaks* argued that the trial court's alleged "erroneous interpretation of the guidelines" was a reversible procedural error because it resulted in the sentencing judge imposing a legal, yet above-Guidelines sentence based on "improper or inaccurate information." *Id.* at 718–19. Like Johnson, the defendant in *Speaks* failed to identify any material misinformation underlying that supposedly erroneous interpretation and application of the Voluntary Sentencing Guidelines. *Id.* at 717–20. This Court again rejected the premise that a trial court's alleged misinterpretation of the Guidelines based on accurate facts and evidence would amount to a cognizable procedural error. *Id.* at 719–20. And, adhering to the principles explained in *R.W.*, it again held that a defendant cannot attack his legal sentence on appeal based on an ostensible misapplication or misinterpretation of the Voluntary Sentencing Guidelines. *Id.*

R.W. and *Speaks* compel the same conclusion here. Johnson received a legal sentence. He fails to point to any material misinformation in the record underlying the trial court's sentencing decision. Instead, he argues that the trial court's misunderstanding of a statute caused it to miscalculate his Guidelines range. Johnson accordingly fails to articulate a claim absent reference to the court's application of the non-binding Voluntary Sentencing Guidelines, which confer upon him no legal rights. This Court should therefore follow its long-established prudential rule refusing to review such claims. *See Speaks*, 959 A.2d at 717–21; *R.W.*, 958 A.2d at 265–86.

III. Johnson Was Eligible for the Repeat Felony Offender Sentencing Enhancement.

Even if the Court were to reach the merits of Johnson's claim, he would not prevail. The trial court correctly determined that Johnson, who was previously convicted for distributing cocaine in December 1999 and for possessing cocaine with the intent to distribute in March 2000, qualified for the third-strike sentencing enhancement applicable to

felony offenders who have "previously been convicted of 2 prior felonies not committed on the same occasion." D.C. Code § 22–1804a(a)(1).[6]

This Court reviews issues of statutory interpretation de novo. *Richardson v. United States*, 927 A.2d 1137, 1138 (D.C. 2007) (citation omitted). To interpret the meaning of a statute, the Court's inquiry begins with the text. *See id.* (citation omitted). If the text is unambiguous in the context of the statute and does not produce an absurd result, then the plain meaning of the language controls. *Cardozo v. United States*, 315 A.3d 658, 664 (D.C. 2024) (en banc) (citations omitted). If, however, the Court determines there is some ambiguity, then it searches for an "interpretation that makes sense of the statute . . . as a whole," and may "turn to legislative history to ensure that [its] interpretation is consistent with the legislative intent." *Richardson*, 927 A.2d at 1138 (citations omitted); *see In re Macklin*, 286 A.3d 547, 553 (D.C. 2022).

D.C. Code § 22–1804a provides 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

[6] A substantially similar statutory interpretation issue was raised in *Marlon A. Wilson v. United States*, Case No. 22-CO-43, which is currently under consideration by this Court.

> sentence authorized, impose such greater term of imprisonment as it deems necessary, up to, and including, 30 years.
>
> . . .
>
> (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;
>
> . . .
>
> (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), (b)(1), (c)(1).

As the text reveals, to qualify for the enhancement under Subsection (a)(1), a defendant must have been "convicted of 2 prior felonies not *committed* on the same occasion." D.C. Code § 22–1804a(a)(1) (emphasis added). With separate offense dates and separate criminal case numbers, Johnson indisputably *committed* the felonies underlying his convictions in Case Nos. 2000-FEL-2017 and 2000-FEL-4120 on separate occasions, as contemplated by Subsection (a)(1).

Johnson, though, claims that, notwithstanding the plain text of Subsection (a)(1), he cannot qualify for that enhancement because Subsection (c)(1) separately provides 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." D.C. Code § 22–1804a(c)(1) (emphasis added). As Johnson points out, he was convicted of the offenses underlying Nos. 2000-FEL-2017 and 2000-FEL-4120 on the same date.[7]

Although the statute does not define the terms "2 felonies" or "separate occasions," there are two ways to read Subsections (a)(1) and (c)(1) harmoniously and in a manner that gives full meaning to both. Neither interpretation results in Johnson's disqualification from the third-strike sentencing enhancement in Subsection (a)(1).

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[7] Johnson asserts (Br. 2 n.3) that he pled guilty in both Case Nos. 2000-FEL-2017 and 2000-FEL-4120 at the same hearing on August 24, 2000, and that he was then sentenced in both cases at the same hearing on November 13, 2000. For support, he cites to the docket in both cases. While the docket in each case shows that hearings occurred in that respective case on those dates, the docket in Case No. 2000-FEL-2017 does not reflect that the court heard Case No. 2000-FEL-4120 at those same hearings and vice versa. Although it may be a fair inference that the two cases were heard in the same hearings, that is not definitively established by Johnson's citation to the dockets for those cases. Ultimately, however, whether the cases were called at the same hearing is not dispositive. As explained infra, Johnson was ultimately not convicted in these two separate cases simultaneously in the same final judgment and commitment order, and thus D.C. Code § 22–1804a(c)(1) does not prohibit application of the sentencing enhancement.

First, accepting Johnson's premise that Subsections (a)(1) and (c)(1) announce separate and mutually indispensable requirements to qualify for the enhancement under Subsection (a)(1), Johnson's two prior convictions meet both criteria. Under that reading of the statute, Subsection (a)(1) would require that defendants commit the predicate felonies on separate occasions, while Subsection (c)(1) would require those convictions be entered on separate occasions. This interpretation would give full effect to both Subsections and not render either superfluous (as Johnson incorrectly argues (Br. at 19)). For example, Subsection (a)(1) would require the predicate offenses to be committed separately and would prohibit the enhancement from applying to a defendant who committed two crimes at the same time but was either charged or tried separately, resulting in convictions entered in two judgment and commitment orders. And Subsection (c)(1) would require that a defendant be convicted of the predicate offenses separately and would disqualify from enhancement a defendant who committed felonies on separate occasions but was charged with those offenses in a single case number and convicted pursuant to a single judgment and commitment order.

Johnson, though, suggests without citing any binding authority that under Subsection (c)(1) convictions of offenses in separate cases that were entered in separate judgment and commitment orders that happened to be executed on same date cannot be considered convictions on "separate occasions" (Br. 10–11). Not so.

Though the statute does not define the term "convicted," this Court has recognized that criminal convictions become final upon entry of a judgment and commitment order. *See G.W. v. United States*, 323 A.3d 425, 431 n.5 (D.C. 2024) (citations omitted); D.C. Super. Ct. Crim. R. 32(f). Likewise, while the statute also does not define "occasion," "same occasion," or "separate occasions," this Court has interpreted the substantively similar phrase "on more than one occasion" to mean "at two or more distinct times" with "some time separation between the acts." *United States v. Smith*, 685 A.2d 380, 385 (D.C. 1996) (citations omitted). It follows then that the opposite of events that occur at two or more distinct times with temporal separation would be events occurring simultaneously. *Cf. Simultaneously*, Oxford English Dictionary, https://doi.org/10.1093/OED/1120287286 (defining "simultaneously" as "[a]t the same time; coincidentally").

Applying that framework and the physical laws of time and space, it is logistically impossible for a sentencing judge to enter convictions by signing and executing final judgment and commitment orders in two separate cases simultaneously. Thus, when a defendant commits felonies on separate occasions, even when they might occur on the same day, he meets the criteria for Subsection (a)(1). And when a defendant is convicted of those felonies in separate cases in separate final judgment and commitment orders, even when they are executed on the same day, he meets the criteria for Subsection (c)(1).[8] Because Johnson committed his drug-trafficking felonies on different occasions and because he was charged with those felonies in different cases and convicted via separate final judgment and commitment orders (A. 54, 56), he meets the criteria under this interpretation of the statute.

Second, and alternatively, Subsections (a)(1) and (c)(1) can be read harmoniously to announce two distinct avenues for the third-strike felony enhancement to apply. Thus, under Subsection (a)(1), one class of

[8] Again, this interpretation accordingly does not, as Johnson claims (Br. at 19), render either subsection "superfluous"—each plays a different role in determining a defendant's eligibility for an enhanced sentence.

defendants, such as Johnson, would qualify if his or her two prior strikes came from felonies *committed* at different times. That enhancement would apply regardless of the timing of his convictions for those offenses. Separately, under Subsection (c)(1), a different class of defendants would qualify if his or her two prior strikes came from *convictions* for felonies entered against him or her at different times. This avenue would permit the third-strike enhancement to apply notwithstanding when the defendant committed the underlying felonies.[9] The Subsection (c)(1) route would include, for example, defendants who were:

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[9] Johnson's proffered interpretation also goes beyond the plain text of Subsection (c)(1) to arrive at his preferred result. He proposes to read Subsection (c)(1)'s language that a defendant "shall be considered as having been convicted of 2 felonies if [he] has been convicted of a felony twice before on separate occasions" as providing the negative implication that a defendant *shall not* otherwise qualify for the enhancement. He thus tacitly invokes the interpretive canon expressio unius est exclusio alteris: "when a legislature makes express mention of one thing, the exclusion of others is implied." *Odeniran v. Hanley Wood, LLC*, 985 A.2d 421, 427 (D.C. 2009) (cleaned up). That canon, however, applies only when the context and structure of the statute support the negative implication. *See J.P. v. District of Columbia*, 189 A.3d 212, 218–19 (D.C. 2018) (noting that the canon has force "only when the items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice . . . .") (cleaned up). The statute here plainly does not support that reading because Subsection (c)(1) does not purport to announce the exclusive qualification criteria for the enhancement, as Subsection (a)(1) also

(continued . . .)

(1) Separately convicted in both federal district court and state court for violations of federal and state law committed simultaneously, such as convictions for armed narcotics trafficking in violation of federal law and carrying a pistol without a license in violation of state law;

(2) Separately convicted of felonies in two different states for a continuing course of conduct committed on a single occasion, such as a conviction in Maryland state court for kidnapping a person in Maryland and a conviction in D.C. Superior Court for transporting that victim into D.C. and committing an assault; or

(3) Separately convicted in the same jurisdiction of felonies committed on a single occasion that were either separately indicted or severed for trial, such as separate trials for carjacking a vehicle and felony murder of a pedestrian struck when the defendant escaped in the stolen vehicle.

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provides the criteria. *See, e.g.*, *Ortiz v. Randstad Inhouse Servs., LLC*, 2024 WL 1070823, at *3 (9th Cir. Mar. 12, 2024) (declining to interpret the word "shall" to imply exclusive criteria under the expressio unius negative-implication canon). Johnson's implicit negative implication argument conflicts with that structure.

This interpretation of the statute is also faithful to the D.C. Council's deliberate decision to structure the law by separating Subsections (a)(1) and (c)(1). *See Eaglin v. District of Columbia*, 123 A.3d 953, 956 (D.C. 2015) ("[S]tatutory interpretation . . . at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter.") (cleaned up). If the Council had intended for both criteria to apply in all situations, there is no reason why it would choose to separate the conditions into separate subsections. Indeed, it could have easily written into a single subsection that eligible defendants must have both committed felonies on separate occasions and been convicted of those felonies on separate dates. But it did not. *See Long v. United States*, 312 A.3d 1247, 1262 (D.C. 2024) ("As in any field of statutory interpretation, it is [this Court's] duty to respect not only what [the legislature] wrote but, as importantly, what it didn't write.") (cleaned up); *cf. In re J.B.S.*, 237 A.3d 131, 147 (D.C. 2020) ("[I]t is not within the judicial function to rewrite the statute, or to supply omissions in it . . . .") (cleaned up).[10]

[10] Under this alternative interpretation of the statute, Johnson would still qualify for the enhancement under Subsection (a)(1) even if this (continued . . .)

On the other hand, Johnson's interpretation—that the statute prohibits a defendant from qualifying for a sentencing enhancement under Subsection (a)(1) unless he was convicted on separate dates—conflicts with not just the text and structure of the law but also the legislative history and purpose of the statute. *See generally Washington v. District of Columbia*, 137 A.3d 170, 174 (D.C. 2016) (looking at statute's "object and policy" to determine meaning) (cleaned up). The version of this third-strike felony sentencing enhancement statute prior to 1994 explicitly required of the two predicate convictions that the defendant's "initial sentencing under a conviction of 1 felony precede[ ] the commission of the 2nd felony for which he was convicted." D.C. Code § 22–104a(a), (b)(2) (1993); *see Rogers v. United States*, 419 A.2d 977, 981 (D.C. 1980). But in the Repeat Offender Life Without Parole Amendment Act of 1994, the D.C. Council struck that sequencing requirement. *See* D.C. Law 10–194 (Oct. 7, 1994).

Legislatures are presumed to be aware of existing statutes, *United States v. Brown*, 422 A.2d 1281, 1284 (D.C. 1980) (citations omitted), and

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Court accepted Johnson's premise that Subsection (c)(1) would require separate dates of conviction.

thus courts attach significance the legislature's substantive changes to a statutory scheme when interpreting the changed language in a statute, *Animal Legal Def. Fund v. Hormel Foods Corp.*, 258 A.3d 174, 184 (D.C. 2021) (citations omitted). *See also generally (Arthur) Johnson v. United States*, 225 U.S. 405, 415 (1912) ("A change of language is some evidence of a change of purpose[.]"). The D.C. Council's decision to eliminate that language and replace it with the current text expanded the statute's applicability and revealed its intent to dispose of a strict sequencing requirement for the commission and conviction of the qualifying felonies.[11] Had the Council wanted to retain that strict sequencing requirement, it would have retained that language. But it did not; and there is no need to read into the current "separate occasions" language a

[11] Indeed, when drafting the modern version statute, the D.C. Council declined to adopt a proposal that the bill be amended to require that a defendant's "initial sentencing under a conviction of one felony precede[ ] the commission of the second felony for which he was convicted." D.C. Council, Committee on the Judiciary, Report on Bill 10-478 at Exh. 6 (April 28, 1994) ("Committee Report").

requirement that the predicate convictions must have occurred on separate days.[12]

Johnson's interpretation would not only contravene the legislative history and purpose of the statute, but it would also lead to strange results without any apparent policy justification. Under his view, a defendant would be eligible for the enhancement if his convictions for two felonies committed on separate occasions occurred in hearings separated by a single day.[13] Thus, he would have been eligible for the enhancement

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[12] Further revealing the D.C. Council's intent to broaden the applicability of the enhancement statute is the explanation in the Committee Report that the legislation is intended to address the "perception in the community . . . that the District of Columbia's criminal justice system is a failure, and that persons who commit crimes are seldom punished." Committee Report at 2–3. To combat that perception, the Report described how the legislation "allow[s] the Court to sentence persons convicted of 3 or more felonies to a greater term of imprisonment authorized for the offense . . . ." *Id.* at 3. Unlike the interpretation we offer above, Johnson's reading of the statute narrows its scope and conflicts with the Council's stated purpose of ensuring that defendants convicted of three felonies face the possibility of harsher punishment. *See Am. Stud. Ass'n v. Bronner*, 259 A.3d 728, 745 (D.C. 2021) (noting that the Court may look to an ambiguous statute's purpose and legislative history for guidance "to ensure that [its] interpretation is consistent with legislative intent") (cleaned up).

[13] A more accurate statement of the law, though, would be that the defendant's convictions were finalized in judgment and commitment orders executed on consecutive days.

had his felony conviction in No. 2000-FEL-2017 been entered the day after the conviction in No. 2000-FEL-4120, despite having committed both crimes months prior to the entry of those convictions. That reading of the statute 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. Surely, the D.C. Council could not have intended for such random applications of the statute. *See Cardozo*, 315 A.3d at 672 (noting that this Court avoids "possible interpretation[s that] would lead to absurd consequences which the legislature could not have intended," or that would lead to "unreasonable" or "implausible results") (cleaned up).[14]

[14] This scenario would not be particularly far-fetched or unlikely to occur. D.C. Super. Ct. Crim. R. 101(c)(3)(A) requires that the clerk assign all criminal cases against the same defendant to the same judge. Defendants who have court-appointed counsel are similarly appointed the same counsel across his or her pending cases in most cases. Thus, as a matter of both procedure and efficiency, a defendant's pending cases are almost always scheduled for and heard in a single hearing, including for dispositions by plea and sentencings. Should the Court find in Johnson's favor, it would upend that efficient practice and likely result in serial plea hearings and sentencings over the course of two or more days to resolve a defendant's separate pending cases.

The rationale Johnson offers (Br. 19–20) for equating "separate occasions" of conviction with "separate dates" fails to justify reading the statute in manner that would produce such arbitrary and unpredictable results. According to Johnson, the statute seeks to address "prior failed opportunities to rehabilitate," which he asserts makes paramount "prior 'occasions' for rehabilitation, as opposed to the number of prior crimes." That reasoning is fatally flawed at two levels.

First, it fails as a matter of logic because separate dates of conviction would not require a rehabilitative opportunity between conviction of the first strike and commission of the second strike. Under Johnson's reading, a defendant could qualify for the enhancement if he committed two felonies on separate occasions *before* he was ever convicted of either offense, as long as the convictions for those two felonies fell on separate days. Such a scenario would not advance any conceivable rehabilitative policy goal between the first two strikes that, according to Johnson, must underlie the statute. Indeed, whether a defendant is convicted on the same or different dates for two felonies he already committed does not make him any less culpable for committing both crimes. And, even more critically, the timing and order of convictions

for the first two strikes does nothing to alter the deterrence rationale for the defendant's subsequent commission of a *third* strike, which is the ultimate goal of the enhancement statute.

Second, and equally important, the D.C. Council expressly eliminated from the statute the conviction sequencing that would support the supposed rehabilitative rationale Johnson invokes. While the statute used to require a defendant be sentenced for his first strike before he commits a second strike, the Council removed that language in 1994. *See* D.C. Law 10–194 (Oct. 7, 1994). Apparently, in its efforts to expand the scope of the third-strike law, the Council deemed it appropriate to no longer require an opportunity to rehabilitate between strike one and strike two. *See Animal Legal Def. Fund*, 258 A.3d at 184. Johnson does not point to any text in the statute preserving that requirement. And no similar rehabilitative goal reasonably could be furthered by a requirement that convictions be entered on separate dates.

Contrary to Johnson's contention, application of the enhancement turns not on whether a defendant committed a second strike after being convicted for his first strike but rather on the defendant committing a third strike after having already been convicted of two. Indeed, as

Johnson concedes (Br. 19–20), focusing on the number of prior convictions would be a rational and legitimate policy goal of a third-strike sentencing enhancement statute. Accordingly, if a defendant previously committed two felonies and/or was separately convicted of those felonies prior to committing his third offense, then he qualifies for the sentencing enhancement upon his conviction of a third felony. This reading not only aligns with the text, history, and policy goals of the statute but allows the enhancement to apply predictably and consistently. *Cf. Cardozo*, 315 A.3d at 672.

Moreover, this Court would enjoy good company in reaching the conclusion that separate occasions of conviction in this context would not require separate dates of conviction if those convictions were entered in separate cases. For example, the Wisconsin Supreme Court rejected a position like the one that Johnson advances in holding that "the language 'convicted of a misdemeanor on 3 separate occasions,'" in a repeat offender statute "did not require that the . . . convictions occur in . . . separate court appearances." *State v. Hopkins*, 484 N.W.2d 549, 550–52 (Wis. 1992)) (citation omitted). The Washington Supreme Court also rejected the argument that the term "separate occasions" excludes events

occurring on the same date. *State v. Kintz*, 238 P.3d 470 (Wash. 2010) (en banc). Rather, *Kintz* held that "the term 'separate occasions' . . . is unambiguous," and "the only reasonable interpretation of the term is a distinct, individual, noncontinuous occurrence or incident," and that "no minimum amount of time must elapse between the occurrences, provided they are somehow separable." *Id.* at 476–77 (cleaned up). As explained above, that interpretation is consistent with this Court's interpretation of similar language in *Smith*, 685 A.2d at 385, and with the interpretations we outline supra.

On the other hand, Johnson's reliance (Br. 15–18) on opinions by intermediate appellate courts in other jurisdictions is largely unhelpful. In *Lett v. State*, 445 A.2d 1050 (Md. Ct. Spec. App. 1982)), the Maryland intermediate appellate court interpreted the phrase "convicted on two separate occasions" in a recidivist sentencing statute to require counting as only one strike a defendant's convictions on the same date of separately committed offenses. *Id.* at 1056–57. That same year, however, the Maryland General Assembly enacted legislation that undid the impact of that decision by providing that defendant would qualify for the enhancement if his second felony "strike" was committed after a charging

document was filed for the first strike. *See Garrett v. State*, 474 A.2d 931, 940 & n.4 (Md. Ct. Spec. App. 1984). Thus, convictions of the two separately committed offenses on the same date would permit the enhancement to apply. Moreover, as the Maryland Court of Special Appeals recognized, that legislative intervention would have "cleared up the ambiguity" related to the language interpreted in *Lett*. *Garrett,* 474 A.2d at 940–41. Given the latent ambiguity and the intervening legislative action, *Lett* lends only minimal help to Johnson in establishing that a person must be convicted on separate dates to be convicted in two cases on "separate occasions."

Wooley v. State, 221 P.3d 12 (Alaska Ct. App. 2009), is also of limited help to Johnson. In interpreting the meaning of "convicted and sentenced on two or more separate occasions," the intermediate Alaskan appellate court acknowledged the language's ambiguity but found that it intended to codify an older Alaska Supreme Court opinion reasoning that subsequent strikes under habitual offender statutes should only count if committed after the conviction in a prior case. *See Wooley*, 221 P.3d at 15–19 (citing *State v. Carlson*, 560 P.2d 26, 28–29 (Alaska 1977)). That holding does little to aid the interpretation of D.C. Code § 1804a, which

the D.C. Council amended in 1994 to expressly remove the sequential sentencing rationale animating *Wooley*. And the impact of *Wooley* is further undermined by *Tulowetzke v. Div. of Motor Vehicles*, in which the Alaska Supreme Court later interpreted the meaning of "prior convictions" in a habitual DUI offender statute and determined that convictions entered simultaneously for separate offenses qualified as separate strikes. 743 P.2d 368, 370–71 (Alaska 1987).

The Court should also reject Johnson's argument (Br. 22) that the rule of lenity should apply to resolve the statutory question in his favor due to its alleged ambiguity. The rule applies "only where the statutory language, structure, purpose, and history leave the intent of the legislature in genuine doubt." *Holloway v. United States*, 951 A.2d 59, 65 (D.C. 2008) (cleaned up). It is thus intended only to address situations where a penal statute remains "grievously ambiguous" after applying traditional rules of statutory interpretation, such that "the court can make no more than a guess as to what the statute means." *Lee v. United States*, 276 A.3d 12, 18–19 (D.C. 2022) (cleaned up).[15] That is not the case

[15] And, even when applied, the rule does not "require courts to give criminal statutes their narrowest possible interpretation, and cannot (continued . . .)

here. Even if there is some tension between Subsections (a)(1) and (c)(1), that does not make the statute grievously ambiguous and leave the Court hopelessly guessing at what the statute might mean. *Cf. id.* On the contrary, the plain language and structure of the provisions at issue, the legislative history of the statute, and the interpretive support provided by state supreme courts reading similar statutes all show that any ambiguity in the statute can easily be resolved by application of either of the interpretations we advance above. And, as explained above, under either reading, the trial court correctly determined that the enhancement should apply to its calculation of Johnson's Voluntary Sentencing Guidelines.

Finally, even if the Court finds that the trial court erred in applying the D.C. Code § 22–1804a(a)(1) enhancement to calculate Johnson's Voluntary Sentencing Guidelines range, any error would harmless. As discussed above, the Guidelines confer no legal rights to Johnson and the trial court's sentence indisputably complies with the applicable unenhanced sentencing statutes. Because the trial court issued what it

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substitute for common sense or the policy underlying a statute." *Alvarez v. United States*, 576 A.2d 713, 715 (D.C. 1990) (citation omitted).

deemed to be an appropriate sentence and was authorized under statute to impose that sentence, none of Johnson's substantial rights could be affected by the trial court's erroneous interpretation of the statute and application of that statute to calculate Johnson's Voluntary Sentencing Guidelines.

CONCLUSION

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

Respectfully submitted,

MATTHEW M. GRAVES
United States Attorney

CHRISELLEN R. KOLB
NICHOLAS P. COLEMAN
VICTORIA BOYLE
Assistant United States Attorneys

/s/
DYLAN M. ALUISE
D.C. Bar # 90018755
Assistant United States Attorney
601 D Street, NW, Room 6.232
Washington, D.C. 20530
Dylan.Aluise@usdoj.gov
(202) 252-6829

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, Jaclyn S. Frankfurt, Esq., and Lee R. Goebes, Esq., on this 14th day of January, 2025.

/s/
DYLAN M. ALUISE
Assistant United States Attorney