No. 24-CO-346

DISTRICT OF COLUMBIA
COURT OF APPEALS

JOHN SWAIN,

Appellant,

2023 CNCSLD 000017

v.

UNITED STATES,

Appellee.

Appeal from the Superior Court
for the District of Columbia

APPELLANT'S INITIAL BRIEF

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STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the Superior Court of the District of Columbia that disposes of all parties' claims.

STATEMENT OF THE ISSUES

Issue 1. Whether the Superior Court incorrectly ruled that it lacked jurisdiction to adjudicate Swain's challenge to the determination by the District of Columbia's Court Services and Offender Supervision Agency that he was subject to lifetime sex offender registration.

Issue 2. (This Court may elect not to reach this second issue, because the Superior Court it did not address the merits of Swain's challenge to lifetime sex offender registration). To justify Swain's lifetime sex offender registration, the government claimed in the court below that his prior federal conviction for possession of child pornography qualifies as a "registration offense." But the statute the government invoked limits lifetime sex offender registration to offenders whose convictions required proof of "acts proscribed by [D.C. Code] § 22-3102." Swain's federal conviction for possession of child pornography did not qualify as a "registration offense" because it did not require proof of an act proscribed by § 3102.

1. Background, Statement of the Facts, and Course of Proceedings.

In 2012, a two-count federal Information filed in the United States District

Court for the District of Columbia charged Swain with distribution of child pornography (Count 1) and possession of child pornography (Count 2), in violation of 18 U.S.C. §§ 2252A(a)(2) and 2252A(a)(5)(B). Docket Entry ("DE") 7, Exhibit 1. Swain pled guilty to both counts. DE7, Exhibit 2. The federal judge (Hon. James E. Boasberg) sentenced Swain to concurrent terms of 96 months, to be followed by concurrent 120 months of supervised release. DE7, Exhibit 3, pp. 3-4. The Judgment's "Special Conditions of Supervision" included the following provision:

> Sex Offender Registration – You shall comply with the Sex Offender Registration requirements for convicted sex offenders in any state or jurisdiction where you reside, are employed, carry on a vocation, or are a student.

DE7, Exhibit 3, p. 5.

Upon release from incarceration, Swain resided in the District of Columbia, where the District of Columbia's Court Services and Offender Supervision Agency ("CSOSA") notified him that, under District of Columbia law, he was subject to lifetime registration. DE7, Exhibit 4, p. 1, 3. This notification informed Swain that he could seek judicial review of this registration determination by filing a motion for Judicial Review in DC Superior Court. DE7, Exhibit 4, p. 1. Swain timely filed such a motion in DC Superior Court, claiming that he was not required under D.C.'s Sex Offender Registration Act ("SORA") to register as a sex offender in the District of

Columbia. DE1. The government opposed Swain's motion, arguing that (1) the Superior Court lacked jurisdiction "to modify petitioner's conditions of supervised release," and (2), if the court had jurisdiction, "CSOSA correctly categorized petitioner as subject to lifetime registration." DE7:1. The government argued that Swain was subject to lifetime registration based on his two federal convictions. DE7:7-8 (citing D.C. Code § 22-4002(b)(4)). In his Reply, Swain clarified that his Motion challenged CSOSA's determination under D.C. Code § 22-4002 that Swain "is a Class A sex offender who has to register for life." DE10:3-4.

In additional briefing authorized by the Superior Court (DE12), the government again argued that Swain qualified for lifetime registration under D.C. Code § 22-4002(b)(4), because he was convicted of registration offenses. DE13:8-9. Swain filed a Rebuttal, countering the government's view. DE14.

The Superior Court issued a judgment in which it did not reach the merits of whether CSOSA incorrectly determined that Swain was subject to lifetime registration. DE15. Instead, the Superior Court denied Swain's motion "for lack of jurisdiction." DE15.1. The Superior Court stated that Swain sought "judicial review of the terms of his supervised release," and found that the Superior Court "does not have jurisdiction over an offender serving supervised release imposed by a federal district court." DE15:3. The Superior Court added: "As part of his sentence, the

[federal] district judge imposed several special conditions of supervision . . . including the requirement that Petitioner comply with the sex offender registration requirements in any state or jurisdiction he chooses to live in." DE15:3. The Superior Court concluded: "This court cannot review the federal court's actions." DE15:3. Swain filed this timely appeal. DE17.

SUMMARY OF THE ARGUMENT

Issue I: The Superior Court erroneously ruled that it lacked jurisdiction, because it had jurisdiction over the issue ultimately presented by Swain, and briefed by both parties: whether CSOSA incorrectly determined that Swain was subject to lifetime registration as a sex offender.

Issue II: Under D.C. law, an offender is subject to lifetime registration if he has been convicted of "two or more" prior qualifying convictions. Swain's prior child pornography distribution conviction so qualifies, but his possession conviction does not. The government claimed that Swain's prior possession conviction qualified, because it required proof of "acts proscribed by D.C. Code § 22-3102." But Swain's possession conviction was based on the fact that police found child pornography on his computer. It did not require proof of *acts* by Swain. Section 3102, moreover, defines "possession" to require proof that a defendant "accessed" images. Swain's federal conviction did not require proof that he *accessed* images.

ARGUMENT

I. The Superior Court had jurisdiction.

A. Standard of Review.

"Whether the trial court has subject matter jurisdiction is a question of law which this court reviews *de novo*." *Grayson v. AT&T Corp.*, 15 A.3d 219, 228 (D.C. 2011).

B. The Superior Court had jurisdiction to review CSOSA's determination that Swain was subject to lifetime sex offender registration under D.C. law.

In his Motion pursuant to D.C. Code § 22-4004, Swain challenged CSOSA's determination that he must register as a sex offender, yet did not initially specify that he was challenging CSOSA's determination that he was subject to a *lifetime* registration requirement. DE3. However, the government understood that this was the issue he intended to present: its Opposition to Swain's Motion noted that CSOSA was "requiring lifetime registration," claimed that this determination was "unquestionably correct," and argued that, based on Swain's prior federal convictions, "CSOSA correctly classified petitioner as a Class A registrant *subject to lifetime registration*." DE7:8 (citing D.C. Code § 22-4002(b)(4)) (emphasis added).

Swain filed a Reply, in which he stated: "[T]his Court certainly has jurisdiction

to hear and rule on [Swain's] challenge to CSOSA's determination that [Swain] is a Class A sex offender *and must register for life*." DE10:3 (emphasis added). *See* DE10:3-4 ("Movant does not seek from this Court a modification of his federal supervised release conditions. What the movant seeks in his challenge is for a ruling that strikes down CSOSA's determination that the movant is a Class A sex offender *who has to register for life* whenever he is in or works or has some other nexus to the District of Columbia.") (emphasis added).

The parties continued to brief this lifetime registration issue in additional briefing specifically authorized (DE12) by the Superior Court. *See* DE13:6-9 (Government Response to Petitioner's Reply) (addressing the text, guidelines, and legislative history of § 22-4002(b)(4) and claiming that they supported CSOSA's determination that Swain had to register as a sex offender for life); DE14 (Rebuttal to Government Response to Reply) (rebutting the government's lifetime registration arguments).

The government's arguments made clear that it was on notice that Swain was challenging CSOSA's determination that he was subject to lifetime registration. The Superior Court's authorization of additional briefing on the lifetime registration issue removed any doubt on whether it had jurisdiction over the case. This authorization operated, by analogy to civil procedure, like a Superior Court grant of leave to amend

a complaint under Superior Court Rule 15(a)(3). This Rule liberally authorizes trial courts to grant leave to amend a complaint. And, once a complaint is amended, the Superior Court has jurisdiction over the new claims in the complaint, as amended. *See, e.g., Giron v. Dodds*, 35 A.3d 433, 439 (D.C. 2012) (holding that the Superior Court properly asserted jurisdiction over the separate claim added in the plaintiff's amended complaint). Likewise, here, the Superior Court had jurisdiction over the motion, as amended to incorporate a challenge to lifetime registration.

Once the Superior Court was presented with the question whether CSOSA correctly determined that Swain was subject to lifetime registration as a sex offender, it unquestionably had jurisdiction over this question. *See, e.g., In re Stanley Doe,* 855 A.2d 1100, 1102 (D.C. 2004) (noting that the Superior Court adjudicated a movant's challenge to CSOSA's registration determination under § 22-4004(a)(1)(A)(iv)); *In re WM*, 851 A.2d 431, 436 (D.C. 2004) ("When CSOSA makes the initial determination, it is subject to judicial review in Superior Court.") (citing § 22-4004). In fact, the D.C. statute that establishes judicial review of CSOSA determinations expressly refers to this very issue:

> If the Court concludes that the person is not required to register under this chapter or is not required to register for life under this chapter, the Court shall enter an order certifying that the person is not required to register under this chapter or *is not required to register for life under this*

> *chapter* and shall provide the Agency with a copy of that order.

D.C. Code § 22-4004(c)(2) (emphasis added).

The Superior Court stated that "[a]s part of [Swain's] sentence, the [federal] district judge imposed several special conditions of supervision . . . including the requirement that [Swain] comply with the sex offender registration requirements in any state or jurisdiction he chooses to live in." DE15:3. But Swain's motion did not challenge the judgment of the federal district court. As the government's opposition recognized, Swain's motion challenged whether CSOSA's lifetime registration requirement was a correct application of District of Columbia law. DE7:1, 7-8.

Moreover, the judgment of the federal district court did not address the *duration* of Swain's eventual registration as a sex offender. The federal judgment simply provided: "Sex Offender Registration - You shall comply with the Sex Offender Registration requirements for convicted sex offenders in any state or jurisdiction where you reside, are employed, carry on a vocation, or are a student." DE7, Exhibit 3, p. 5. Thus, the federal judgment left it up to the District of Columbia (or any other state or jurisdiction in which Swain would reside) to determine Swain's registration requirement. Swain's motion challenged CSOSA's lifetime registration determination on the ground that it was incorrect under District of Columbia law.

DE1; DE10. The Superior Court had jurisdiction over this issue.

II. Because possession is not a "registration offense," Swain was not subject to lifetime sex offender registration.

A. Standard of Review.

The Superior Court did not reach the merits of Swain's challenge to lifetime registration, an issue of statutory interpretation, which would be reviewable *de novo*. *Wemhoff v. District of Columbia*, 887 A.2d 1004, 1007 (D.C. 2005). If this Court agrees with Swain on the jurisdictional issue discussed above, it can elect to simply reverse the Superior Court's erroneous lack-of-jurisdiction finding, and remand this case to the Superior Court with instructions to adjudicate Swain's motion on its merits. Yet because this Court may affirm a lower court judgment on a ground "not raised or considered below," *Sheetz v. District of Columbia*, 629 A.2d 515, 519 n. 6 (D.C. 1993), Swain's argument in this Section II aims to forestall this Court from affirming the decision below based on an alternative ground, namely that Swain's challenge to life registration lacks merit – a government argument made below but left unaddressed by the Superior Court. Should this Court agree with Swain on his argument in this Section II, Swain invites this Court to reverse the Superior Court's order on the merits, not just on the issue of jurisdiction. Again, this Court may elect to remand this case with instructions for the Superior Court to consider, in the first

instance, whether Swain's challenge to lifetime registration has merit.

B. The federal offense of possession of child pornography is not a "registration offense" because it does not require proof of "acts proscribed by § 22-3102."

Under subsection (a) of D.C. Code § 22-4002, a convicted sex offender is subject to a 10-year sex offender registration term, whereas, for other sex offenders, subsection (b) mandates lifetime registration; subsection (b) provides as follows:

> (b) The registration period shall start when a disposition described in § 22-4001(3)(A) occurs and continue throughout the lifetime of a sex offender who:
>
> > (1) Committed a registration offense that is a lifetime registration offense;
> >
> > (2) Was determined to be a sexual psychopath under §§ 22-3803 through 22-3811;
> >
> > (3) Has been subject on 2 or more occasions to a disposition described in § 22-4001(3)(A) that involved a felony registration offense or a registration offense against a minor; or
> >
> > (4) Has been subject to *2 or more dispositions described in § 22-4001(3)(A)*, relating to different victims, each of which involved a felony registration offense or a registration offense against a minor.

D.C. Code § 22-4002(b)(1)-(4) (emphasis added).

In the Superior Court, the government expressly conceded that "Subsections

(b)(1) and (b)(2) [of § 4002(b)] do not apply in the instant case because petitioner was neither convicted of a 'lifetime registration offense,' nor was he determined to be a 'sexual psychopath." DE13:7-8. The government also conceded that subsection (b)(3) does not apply to Swain, because it recognized that this subsection only applies to offenders who committed an offense "on 2 or more occasions," and, as the government acknowledged, "2 or more occasions" means "two or more trials or plea proceedings." DE13:708 (quoting Appendix A to 28 C.F.R. 811). *See United States v. Hawkins*, 261 A.3d 914, 916 n. 3 (D.C. 2021) (noting the government's concession at oral argument that the term "occasions" in § 22-4002(b)(3) refers to "separate cases" and not to "being sentenced on multiple counts within a single case."). Here, Swain was convicted of two counts in a *single* case: *United States v. Swain*, No. 12-CR-00186-JEB (D.D.C.). *See* DE7:2 n. 1 & Exhibit 3. Swain was not convicted in two or more trials or plea proceedings, and is therefore not subject to lifetime sex offender registration under subsection (b)(3).

Thus, the government is relying on the final subsection of the statute, subsection (b)(4). DE7:8; DE13:7-8. As just noted above, this provision provides for lifetime registration for an offender who:

> (4) Has been subject to *2 or more dispositions described in § 22-4001(3)(A)*, relating to different victims, each of which involved a felony registration offense or a

registration offense against a minor.

D.C. Code § 22-4002(b)(4) (emphasis added). This provision, as the italics above highlight, applies only to offenders who have been subject to "2 or more" dispositions which involve a registration offense.

The term "dispositions" refers to convictions. *See Hawkins*, 261 A.3d at 919 (stating that "[t]here can be no doubt" that the statutory scheme "interchangeably" uses the phrase "subject to [a] disposition" and "was convicted."). Thus, the government is claiming that Swain's two prior child pornography convictions in Case No. 12-CR-00186-JE in the United States District Court for the District of Columbia, one for *distribution*, in violation of 18 U.S.C. § 2252A(a)(2), and a second one for *possession,* in violation of 18 U.S.C. § 2252A(a)(5)(B), each qualify as convictions for purposes of Subsection (b)(4). DE13:3 (relying on Swain's "federal convictions for possessing and distributing child pornography").

Swain does not contest that his 2252A(a)(2) *distribution* conviction counts as a "registration offense." But he disagrees that his § 2252A(a)(5)(B) *possession* conviction so qualifies. Before turning to this argument, it is helpful to understand the grounds for Swain's concession that his prior *distribution* conviction counts as a "registration offense."

Under D.C. Code § 22-4001(8)(G), a federal conviction qualifies as a

registration offense if it involved conduct that is "substantially similar" to the conduct described in a list of District of Columbia criminal statutes – a list which includes D.C. Code § 22-3102(b); Section 4001(8)(C) provides:

> (C) Any of the following offenses where the victim is a minor: acts proscribed by § 22-1312 (lewd, indecent, or obscene acts), acts proscribed by § 22-2201 (obscenity), *acts proscribed by § 22-3102 (sexual performances using minors)*, acts proscribed by § 22-1901 (incest), acts proscribed by § 22-2001 (kidnaping), and acts proscribed by §§ 22-2701, 22-2701.01, 22-2703, 22-2704, 22-2705 to 22-2712, 22-2713 to 22-2720, 22-2722 and 22-2723 (prostitution; pandering);

D.C. Code § 22-4001(8)(C) (emphasis added).

Thus, § 22-4001(8)(C) defines a "registration offense" by reference, *inter alia*, to "acts proscribed by § 22-3102." Thus, § 22-4001(8)(C) requires consideration of the *acts* proscribed by D.C. law.

The provision's focus on *acts* is illustrated by this Court's decision in *In re Doe*. In that case, this Court rejected the defendant's challenge to CSOSA's determination that his prior federal conviction – for having traveled in interstate commerce for the purpose of engaging in a sexual act with a minor – constituted a "registration offense" under D.C. Code § 22-4001(8), and therefore subjected him to sex offender registration for 10 years. 855 A.2d at 1101-03. *In re Doe* concluded that the defendant's violation of this federal statute, 18 U.S.C. § 2423(b), qualified

as "registration offense" under D.C. Code § 22-4001. 855 A.2d at 1107.

In so holding, the opinion discussed the registration statute's legislative history, noting that it explained that the statute "eschews 'element-by-element comparisons' between offenses in D.C. and similar offenses elsewhere." *Id.* at 1104 (quoting legislative history). The opinion noted approvingly the Superior Court's finding that the "conduct" underlying the defendant's federal offense was substantially similar to at least two D.C. Code offenses that require registration. *Id.* at 1105. The decision further noted that the D.C. registration statute "sought to deemphasize distinctions between the definitions of sex offenses in different jurisdictions." *Id.* at 1107. Rejecting the defendant's argument that the federal statute "merely criminalizes the act of *crossing state lines* with a particular intent, while the D.C. offenses criminal completed or attempted *sexual acts* with a minor." *Id* at 1107, the opinion reasoned that "it was enough that [the defendant] was convicted in federal court of committing *a substantial act* to accomplish his intention to sexually abuse a child." 855 A.2d at 1107 (third emphasis added; brackets omitted).

Doe thus relied on defendant's *substantial act* underlying his federal conviction to find that the federal offense qualified as a D.C. registration offense. What made the defendant's prior federal conviction qualify as a registration offense under D.C.

law was that the *act* that resulted in his federal conviction was also a "substantial act" under D.C. law proscribing attempted sexual conduct. *Id.* at 1107, n. 12 (finding that defendant's "conduct" was indistinguishable from that of persons convicted of criminal attempts to commit sexual assaults in other jurisdictions).

Turning to the *distribution* conviction in the present case, Swain concedes that the distribution of child pornography to another person requires proof of "acts." As the government points out, § 22-3102 makes it unlawful to "transmit . . . a sexual performance by a minor." DE13:4. As the government further notes, this statute provides that the term "'transmit' includes distribution". DE13:4 (quoting D.C. Code § 22-3102(d)(3)). As part of his guilty plea to distribution, Swain acknowledged his repeated electronic transmission of child pornography via Yahoo Instant Messenger to an undercover agent as the basis of his distribution offense. *See* DE13, Exhibit 6 pp. 2-4. Swain thereby admitted to having engaged in *acts*.

But the federal offense of *possessio*n did not require proof of acts.

In the court below, the government noted that the federal offense possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B), is "substantially similar to D.C. Code § 22-3102." DE13:3. Based on the purported similarity between the federal and D.C. child pornography possession statutes, the government claimed that Swain's possession offense qualifies as a "registration offense" under

D.C. Code § 4001(8)(G). DE13:3. But, as noted above, this element-by-element comparison, based on the definitions of the offenses, is not sufficient. *See In re Doe*, 855 A.2d 1101, 1104 (D.C. 2004) ("subparagraph (G) [of § 4001(8)] eschews 'element-by-element comparisons' between offenses in D.C. and similar offenses elsewhere.") (quoting legislative history). The ultimate inquiry is whether a conviction under the federal offense required proof of "*acts* proscribed by § 22-3102 (sexual performances using minors)." § 22-4001(8)(C) (emphasis added). The federal conviction did not require such proof.

To begin with, Count 2 of the Information charged that Swain "did . . . knowingly possess . . . matter that contained an image of child pornography." DE7, Exhibit 1 p. 2. Count 2 merely alleged possession. It did not allege that Swain committed any acts. The Supreme Court's decision in *United States v. Bailey* made clear that mere possession of an object does not connote an act. 516 U.S. 137, 144 (1995), *superseded by statute on other grounds as recognized by Welsh v. United States*, 578 U.S. 120, 133 (2016). *Bailey* interpreted the term "use" in 18 U.S.C. § 924(c)(1), and held that the "use" of a firearm "must connote more than mere possession of a firearm." *Bailey* vacated the convictions of two defendants because evidence that one defendant's firearm was found in a locked car trunk, and that another defendant's firearm was found in a footlocker in a bedroom closet, was not

proof that the defendants "had actively employed the firearm." *Id.* at 151. *Bailey* held that "mere possession" does not establish use; instead, to prove "use," the prosecution "must show *active employment* of the firearm." *Id.* at 144 (emphasis added). *See Welsh*, 578 U.S. at 133 (*Bailey* "held as a matter of statutory interpretation that the 'use' prong punishes only 'active employment of the firearm" and not mere possession). In other words, unlike "use," mere possession does not connote an act.

Further, the Statement of the Offense to which Swain admitted to in his guilty plea to the federal possession offense did not admit that Swain committed any acts. It states: "Upon a preliminary review of the desktop computer and storage devices (including CDs and DVDs) [at Swain's residence], the forensic examiner found 23 unique videos and 88 unique images of child pornography." DE13, Exhibit 6 p. 6. The absence of any reference to Swain committing any acts is consistent with the federal rule that mere "constructive possession" – "ownership, dominion or control over an illegal item itself or dominion or control over the premises in which the item is found" – suffices to prove guilt under the federal statute. *United States v. Terrell*, 700 F.3d 755, 765 (5th Cir. 2012) (affirming 18 U.S.C. § 2252(a)(5)(B) conviction based on the defendant's "constructive possession" of images "found on his laptop computers").

Third, in contrast to the federal statute, the D.C. Code's definition of possession expressly requires an act. It provides:

> "Possess," "possession," or possessing" *requires accessing* the sexual performance if electronically received or available.

D.C. Code § 22-3102(d)(1) (emphasis added). As noted above, the conduct Swain admitted to when he entered his federal plea did not include "accessing the sexual performance."

Moreover, the overall statutory context confirms that it is the *acts* for which a defendant was convicted that determine whether he is subject to sex offender registration. In addition to § 3102, *each* of the other qualifying offenses listed in § 22-4001(8)(C) expressly refer to "acts." *See* D.C. Code § 22-4001(8)(C). This statute lists offenses which require proof of acts, such as "lewd, indecent, or obscene acts," "incest," "kidnaping" or "prostitution." Considered in the context of the full provision, the statute's reference to "acts proscribed by § 3102 (sexual performances involving minors)" refers to proof of a defendant's acts, not to the mere fact that police found child pornography on computers in a person's home – as here. DE13, Exhibit 6 p. 6. *See In re Doe*, 855 A.2d at 1103, n. 3 ("Not all sex offenses are covered by SORA. Generally speaking, sex offenses that are non-assaultive in nature . . . are not registration offenses.").

In addition, when the definition of a "registration offense" in § 22-4001(8)(C) is being interpreted to determine whether an offender is subject to lifetime registration, it is helpful to consider the list of offenses at subsections (6)(A) through (E) of this statute, which qualify as "lifetime registration offenses." Tellingly, all of these offenses require proof of *acts* – egregious acts, such as "sexual abuse," "murder," and "rape." D.C. Code § 22-4001(A)-(E). This confirms that the statute, when classifying offenders subject to lifetime registration, targeted those who had been proven acts, not persons, like Swain, with respect to whom the government just had to prove that police found images of child pornography on his computer, and that he admitted to possessing them.

It is also significant that (a) the federal district judge who sentenced Swain ran Swain's sentences for distribution and possession *concurrently*, *See* DE7, Exhibit 3, and (2) under the Federal Sentencing Guidelines calculation for Swain's two offenses, the possession conviction did not materially affect his advisory guideline range. DE7, Exhibit 2, pp. 2-3 (basing total offense level calculation on the distribution offense guidelines, because these distribution offense guidelines yielded the "highest offense level"). And the 96-month sentence imposed on Swain, DE7, Exhibit 3, was well below the 168-210 month advisory guideline range for a level 34 offender like Swain. DE7, Exhibit 2, p, 7. Thus, at his federal sentencing, the

federal judge's exercise of sentencing discretion on the length of the sentence, and whether to run the two sentences concurrent or consecutive, did not treat the possession offense as an offense that significantly aggravated the severity of punishment. Looking back on this sentence for sex offender registration purposes, it would now be arbitrary for the District of Columbia to treat the possession offense as triggering a *significantly harsher* registration requirement that the ordinary 10-year registration requirement – to require the harshest registration requirement under D.C. law: lifetime registration.

In the court below, the government repeatedly pointed to the "multiple" victims of Swain's two offenses as the basis for finding that he was subject to lifetime registration. DE7:8; DE13:3-4 (stating that the 23 videos and 88 still images "unequivocally establish[]" that the offense involved "*multiple* and different minor victims.") (emphasis in original). But as noted above, the registration statute does not base lifetime registration *on the number of victims*, but on whether the defendant was convicted of *two or more offenses* that qualify as "registration offenses." D.C. Code § 22-4002(b)(4).

With regard to the "multiple victims" argument it bears noting that the number of images for which Swain stood convicted was well below the number of images of the median child pornography possession, or distribution, offender. Swain

admitted to possession 23 videos and 88 images of child pornography. DE13, Exhibit 6, pp. 6-7. He admitted to transmitting a total of 13 videos or photographs to an undercover agent. DE13, Exhibit 6, pp. 4-5. By contrast, across the Nation, the median number of images for distribution and possession offenders is 6,300 images, and 2,350 images, respectively. *See* United States Sentencing Commission, *June 2021 Report to Congress: Federal Sentencing of Child Pornography Non-Production Offenses*, p. 30.[1]

It also bears noting that this same Sentencing Commission Report found that in light of "technological advancements," the number of images found on a person's computer is an outdated measure of an offender's culpability, and urged Congress to eliminate Guideline enhancements based on the number of images. *See id.* at 68. It would be odd if, while the Federal Sentencing Commission recognizes that the number of images as a measure of a non-production child pornography is an "outdated" measure of an offender's culpability, District of Columbia agencies and courts were to rely on the existence "multiple victims" as the basis for increasing the registration period mandated for non-production child pornography possession

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[1] *https://www.ussc.gov/research/research-reports/federal-sentencing-child-pornography-non-production-offenses.*

offenders, from 10 years, to life.

In the court below, the government relied on regulations promulgated for the implementation of SORA, pointing out that 28 C.F.R. 811, Appendix A provides:

> Class A also includes offenders who:
>
> (b) In a single trial or plea proceeding, have been convicted or found not guilty by reason of insanity of registration offenses against two or more victims where each offense is a felony or committed against a minor (Multiple victims).

DE13:7. But this regulation does not change the analysis. It simply restates the statutory requirement that a person has been convicted of, *in the plural*, "registration offenses." For the reasons argued above, Swain's possession offense does not count as a "registration offense" under D.C. law. Only one conviction for distribution counts as a prior offense. Standing alone, a single prior conviction does not subject Swain to lifetime registration.

Finally, it seems important to recognize that a government's justifications for imposing severe criminal penalties on its citizens are at their weakest when the punishment is being applied to a person, like Swain, who has served his time in jail, and now is trying to re-integrate himself into society. *See* Daryl Atkinson and Jeremy Travis, *The Power of Parsimony*, The Square One Project, May 2021 (discussing the "weak justifications" for "collateral sanctions" to incarceration, and

noting their corrosive, stigmatizing, and unjustly punitive effect on an offender who is re-entering civil society).[2]

CONCLUSION

Swain respectfully requests that this Court reverse the judgment of the Superior Court.

Respectfully submitted,
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[2]https://craftmediabucket.s3.amazonaws.com/uploads/CJLJ8747-Square-One-Parsimony-One-Pager-WEB-210524.pdf

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 30, 2024, the foregoing Initial Brief of Appellant was filed using the electronic filing system of the Court of Appeals and thereby electronically served on all counsel of record.

/s/*Timothy Cone*
Timothy Cone
Counsel for Appellant Swain

District of Columbia
Court of Appeals

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If you are incarcerated, are not represented by an attorney (also called being "pro se"), and not able to redact your brief or motion, please initial the box below at "G" to certify you are unable to file a redacted brief or motion. 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 April 17, 2024, and Super. Ct. Crim. R. 49.1, and I will remove the following information from any subsequent briefs and motions filed in this case:

A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
(2) Taxpayer-identification number
(3) Driver's license or non-driver's' license identification card number
(4) Birth date

(5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)
(6) Financial account numbers
(7) The party or nonparty making the filing shall include the following:

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

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

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

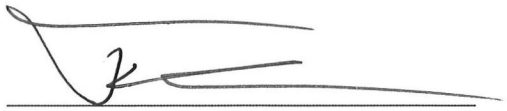
D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

Initial here

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



Signature

24-CO-346

Case Number(s)

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4/30/2024

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