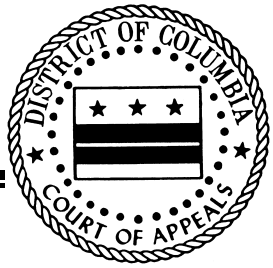
No. 24-CO-346



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 REPLY BRIEF

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REPLY ARGUMENT

I. Because the parties now agree that the Superior Court erred in finding that it lacked jurisdiction to rule on Swain's challenge to CSOSA's lifetime-registration determination, and because, on the merits, this is not a case where "only one disposition is possible," this Court should remand the case to the Superior Court to rule in the first instance.

In his Initial Brief ("Br."), Swain argued that "[t]he Superior Court erroneously ruled that it lacked jurisdiction [over] whether CSOSA incorrectly determined that Swain was subject to lifetime registration as a sex offender." Br. 4. Swain added that 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." Br. 9-10.

In its response brief ("Gov't Br."), the government "agrees [with Swain] that the trial court erred by dismissing Swain's motion based on lack of jurisdiction." Gov't Br. 9; Gov't Br. 14 (noting that the trial court "misread" Swain's pleading, and "should have reached the merits of Swain's motion"). The government then claims: "although the trial court did not substantively address Swain's claim, this Court should affirm the denial of Swain's motion on the alternative basis that Swain's challenge to CSOSA's lifetime-registration determination is meritless." Gov't Br. 15-16. Swain disagrees. Having now had the opportunity to read the merits arguments

of the government's response brief, Swain urges this Court not to decide the merits now, but to remand the case to the Superior Court, for the Superior Court to rule on the merits in the first instance.

Contrary to the government's view, ordinarily, the *merits* of a case are not an "alternative basis" for this Court to affirm a judgment below. This Court's precedents indicate that, when, as here (1) a trial court has erroneously dismissed a case on jurisdictional grounds and not reached its merits, and (2) the case is *not* one where "a remand would be futile as only one disposition is possible as a matter of law," the "better course" is to remand a case to the trial court for a determination on the merits in the first instance. In *District of Columbia v. American Fed. of State, County and Municipal Employees*, 81 A.3d 299, 301-02 (D.C. 2013), after the trial court erroneously found that it did not have jurisdiction to grant the relief requested, this Court remanded the case to the trial court, because there were "arguments on both sides" of the issue; the opinion explained that the "better course" was for the Superior Court to hear these arguments "in the first instance." *Accord District of Columbia v. Stokes*, 785 A.2d 666, 671 (D.C. 2001) (finding that it would be "premature for this court to address substantive questions," because there were arguments on both sides

of the issue)[1]; *Wilson v. Wilson*, 785 A.2d 647, 650 (D.C. 2001) (agreeing that dismissal for lack of jurisdiction was premature, declining to reach substantive issues, and remanding to the Superior Court); *In re Lewis*, 274 A.3d 310, 315 (D.C. 2018) (noting that the trial court did not address an issue that raised "a matter of first impression in this jurisdiction," and remanding to "defer to the trial court to consider this issue in the first instance"); *compare Ruffin v. United States*, 136 A.3d 799, 803-04 (D.C. 2016) (after trial court erroneously concluded that it lacked jurisdiction, declining to remand because the Court of Appeals could say "with fair assurance" that the trial court would have rejected the claim).[2]

The present case is not a case where "a remand would be futile as only one disposition is possible as a matter of law." Instead, a remand would be appropriate.

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[1] *Stokes*, like the present case, involved a Superior Court's incorrect ruling that it lacked jurisdiction to review a determination by a District of Columbia administrative agency (the Office of Employee Appeals). 785 A.2d at 670.

[2] The government also argues that because the argument Swain makes on appeal "was never presented during the Superior Court proceedings," this Court "may decline to consider it." Gov't Br. 18. In other words, the government's brief is simultaneously urging this Court to adjudicate in the first instance an issue that was not addressed by the trial court, and taking the view that this Court may "decline to consider it." Gov't Br. 18. But Swain, who now faces lifetime registration in D.C., should not be denied his day in court to challenge the lifetime registration determination.

II. Possession of child pornography involves ownership, dominion or control over illicit images, but it does not constitute an act.

Swain's Initial Brief acknowledged that *if* his prior federal conviction for possession of child pornography qualified as a "registration offense" under D.C. Code § 22-4001(8)(C), he would be subject to lifetime registration, because this conviction, added to his distribution conviction, would mean that he had "two or more" qualifying convictions. Br. 4, 20 (citing D.C. Code § 22-4002(b)(4)). Section § 22-4001(8)(C) defines a "registration offense," in pertinent part, as follows::

> (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, the statute *repeatedly* and *unambiguously* defines a "registration offense" by reference to "acts proscribed" by one of the listed statutes. Swain argued that his possession conviction did not qualify as a "registration offense" because "[i]t did not require proof of *acts* by Swain." Br. 4 (emphasis in original).

In response, the government acknowledges that § 22-4001(8)(C) governs the

determination whether Swain's prior federal conviction for possession of child pornography qualifies as a "registration offense" under D.C. law. Gov't Br. 18.[3] The government claims that Swain's federal conviction for possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B), qualifies as a "registration offense" simply because this federal statute is "substantially similar" to § 22-3102(b), the District of Columbia statute which criminalizes possession child pornography. Gov't Br. 19. But this argument is not faithful to the text of the statute, which defines "registration offense" by reference to "acts proscribed" by the listed D.C. statutes.

The government's "substantially similar offense" argument reads § 4001(8)(C) as though it defined a "registration offense" as a prior *conviction* for one of a list of specified offenses. Such recidivist statutes exist. *See*, *e.g.*, 18 U.S.C. § 922(e)(1) (providing harsher punishment for persons who have "three previous *convictions*" for certain offenses) (emphasis added).[4] But the § 4001(8)(C) definition of "registration offense" does not state that each of the D.C. offenses it lists qualifies as a

[3] In the trial court, the government argued that Swain was subject to lifetime registration based on the "multiple" victims of his offenses. DE7:8; DE13:3-4. In his Initial Brief, Swain argued that this argument was meritless. Br. 20. The government does not make a "multiple victims" argument in its response brief.

[4] The Supreme Court held § 922(e)(1) unconstitutionally vague on other grounds in *United States v. Davis*, 588 U.S. 445, 470 (2019).

"registration offense." Instead, Section 4001(8)(C) defines a registration offense by reference to "acts proscribed." This term directs persons applying the law to the acts proscribed by statute.

For example, D.C. Code § 22-4001(8)(C) defines one "registration offense" by cross-referencing "acts proscribed by § . . . 22-2705." This Section 22-2705, in turn, makes it unlawful for a parent or guardian to consent to a person "being taken . . . for . . . a sexual act." D.C. Code § 22-2705(b). The term "sexual act," in turn, is defined at 22-2701.01(5) (a provision which is also cross-referenced in § 22-4001(8)(C)), as follows: "(5) 'Sexual act' shall have the same meaning as provided in § 22-3001(8)." D.C. Code § 22-2701.01(5). Section 22-3001(8), in turn, lists the specific acts that constitute a "sexual act," including "penetration, however slight, of the anus or vulva of another by a penis," or "[c]ontact between the mouth and the penis." D.C. Code § 22-3001(8). Here, SORA's statutory scheme defines the D.C. offenses that qualify as a "registration offense" by reference to specific acts. And the same is true with regard to all the other registration offenses defined in the statute. Indeed, such act-based definition is necessary, because "[n]ot all sex offenses are covered by SORA. Generally speaking, sex offenses that are non-assaultive in nature

. . . are not registration offenses." *In re Doe*, 855 A.2d 1100, 1103. n. 3 (D.C. 2004).[5]

This Court's precedent also relies on acts when determining whether an offense qualifies as a "registration offense." As Swain pointed out in his Initial Brief (Br. 13-14) – a discussion the government's response brief tellingly ignores – *In re Doe* rejected the claim that a prior federal conviction for traveling in interstate commerce for the purpose of engaging in a sexual act with a minor did not qualify as a "registration offense," because 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 (emphasis added).

In his Initial Brief, Swain argued that his possession conviction "was based on the fact that police found child pornography on his computer [and] did not require proof of *acts* by Swain." Br. 4. The government responds that "it is sufficient that Swain's federal conviction for possession of child pornography generally involved 'sexual exploitation of children.'" Gov't Br. 20 (citing *Doe*, 855 A.2d at 1104). But this is incorrect. For purposes of imposing a lifetime registration requirement, the

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[5] In a footnote in its response brief, the government appears to fault Swain for omitting, in his discussion of *Doe*, the words "and do not involve minors" from the above-quoted sentence. Gov't Br. 11, n. 1. But all agree that Swain's offenses at issue here "involve minors." The issue is whether the lifetime registration requirement applies to an offense that is "non-assaultive in nature," namely, possession of child pornography.

inquiry is not whether a prior offense "generally involved sexual exploitation of children." The statute does not use these terms. Instead, the statute instructs to determine whether a prior federal offense qualifies as a "registration offense" based on whether the conduct proscribed by the federal offense corresponds to the "acts proscribed" by a D.C. statute. D.C. Code § 22-4001(8)(C). The inquiry is not whether a federal offense is "substantially similar" to a D.C. offense.

The government's next argument claims that "knowing possession is an 'act' that can give rise to criminal liability," and relies on the statement in *Lucas v. United States*, 305 A.3d 774, 776 (D.C. 2023), that "[t]he plain language of Section 22-3232 indicates that 'possesses' refers to the act of being in possession of stolen property rather than the momentary act of taking possession of the property." Gov't Br. 21. But this stretches *Lucas*'s statement well beyond the decision's scope.

Lucas presented, as the opinion noted, an issue of "territorial jurisdiction," namely whether the offense of receipt of stolen property ("RSP"), in violation of D.C. Code § 22-3232, occurs in the jurisdiction where a defendant "takes possession" of property, or, instead, wherever a person is "in possession of stolen property." *Id.* at 776-77. *Lucas* presented only one question: "can one 'possess' property . . . in a different jurisdiction from where one received it?" *Id.* *Lucas* emphasized that its opinion "answer[ed] only [this] question." *Id.* *Lucas* certainly did not address

whether, for purposes of interpreting all of D.C.'s criminal statutes, the word "possesses" refers to an "act."

After consulting dictionary definitions, and legislative history (and rejecting the appellant's compelling, albeit contrary, views), *Lucas* held that the word "'possesses,' in the context of the RSP statute, refers to the act of being in possession of stolen property rather than the singular act of taking possession of the property." *Id*. at 777-79. *Lucas* stated that, for purposes of determining territorial jurisdiction, the RSP offense covered "an entire range of conduct from the initial acquisition of the property through continued use or disposition of the property." *Id*. at 779 (quoting legislative history). Thus, *Lucas*' statement that "'possesses' refers to the act of being in possession," *id*. at 778, in effect stated that "possesses" refers to the *fact* of being in possession. *Lucas* held that, because the fact of being in possession continues during the "use or disposition of the property," the offense of receipt of stolen property did not end when a defendant took possession of stolen property in one jurisdiction, but continued into the jurisdiction into which he transported the property. *Id*. at 778.

Additional reasoning in *Lucas* undermines the government's view that "possesses" refers to an "act." The dictionary definitions quoted in *Lucas*, in support of its holding, do not suggest that "possesses" refers to an "act." *Id*. at 777. To the

contrary, *Lucas* noted that two dictionary definitions "suggest that the ordinary meaning of 'possesses' is to *have* possession, rather than to *take* possession." *Id*. at 777 (emphasis in original)(citations omitted). "Having possession" of something is not an act. "Having possession" refers to having an item on one's person, or in proximity – in one's constructive possession. *See Schools v. United States*, 84 A.3d 503, 510 & n. 7 (D.C. 2013) (collecting cases where constructive possession was found based on items found in a defendant's closet, and stating: "We have often found that evidence was sufficient to establish a defendant's constructive possession of contraband where the contraband was recovered in proximity to the defendant's personal items such as mail or personal papers, photographs, and identification cards.").

Lucas also relied on the legislative history of the statute, which indicated that "someone who received property, learned later that it had been stolen, and 'in the face of that knowledge continue[d] his control of it' would be guilty of receiving stolen property." *Id*. at 779 (citation omitted). *Lucas* added that the statute therefore "intended to criminalize mere possession of stolen property— independent of receipt." *Id*. Thus, the offense of being in possession of stolen property does not require an *act* such as "receipt" of property; it merely requires "knowledge" that

property had been stolen.[6]

The government faults Swain for relying on "the slight differences in terminology" used in the D.C. and federal child pornography statutes. Gov't Br. 19. But the distinction between a mental state like "knowledge," and an "act" is not a "slight" difference. Knowledge is clearly distinct from an act. Under the Federal Rule of Evidence governing the admissibility of prior crimes, for example, evidence of a defendant's prior crimes is inadmissible when offered "to show that on a particular occasion the person *acted* in accordance with the character," but admissible "as proof of . . . *knowledge*." Federal Rule of Evidence 404(b) (emphasis added).[7] Rule 404(b) is built upon the distinction between act and knowledge.

In his Initial Brief, Swain cited *Terrell v. United States*, 700 F.3d 755, 765 (5th Cir. 2012), for the proposition that a defendant can be convicted, under federal law,

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[6] The other cases cited in the government's brief (Gov't Br. 21-22) are similarly unavailing, because none addressed, much less resolved, whether possession constitutes an "act"; their holdings involved other issues. *Davis v. United States*, 590 A.2d 1036, 1037 n. 4 (D.C. 1991), addressed whether possession of two different rocks of cocaine supported a conviction for a single count of cocaine possession. *United States v. Freed,* 401 U.S. 601, 609 (1971), ruled that the district court erred in dismissing the indictment for absence of an allegation of scienter. *United States v. Woods*, 684 F.3d 1045, 1059 (11th Cir. 2012), rejected a claim that the federal child pornography possession statute was "unconstitutionally vague."

[7] Fed. R. Evid. 404(b) is "consistent with District of Columbia law." *Jackson v. United States*, 683 A.2d 1087, 1100 n. 17 (D.C. 1996).

of being in possession of child pornography based on "constructive possession" – in other words, not based on an act, but on merely based on having "dominion or control over the premises in which the item is found." Br. 17. The government responds by pointing out that *Terrell*, in rejecting an insufficiency-of-the-evidence challenge, stated that the evidence "support[ed] at least a plausible inference that the defendant *had knowledge of* or access to [the child pornography]." Gov't Br. 23 (emphasis added) (quoting *Terrell*, 700 F.3d at 765). The government adds: "In pleading guilty in his district-court case, *Swain admitted that he had such knowledge*." Gov't Br. 23 (emphasis added).

But, again, proof of *knowledge* is distinct from proof of an act. *See* Fed. R. Evid. 404(b). Moreover, the condition of having "access to" child pornography" is not an "act." Having access to child pornography can violate the federal child pornography possession statute, because, to commit this offense, it suffices that the defendant has the images in his "control" and "at his disposal." *Woods*, 684 F.3d at 1059. But having images under one's control, or at one's disposal, is not an *act*.

In a final argument, the government points out that in the statement of offense that accompanied Swain's federal guilty plea, he admitted that he "shared" images with an undercover detective. Gov't Br. 20-21 (citing Appx. A.5, Ex. 6, pp. 4-5, p. 7). The government claims that this admission proves, for purposes of his possession

conviction, that Swain "accessed" the images.

But, first, as the government elsewhere recognizes, § 2252A(a)(5)(B) creates *two* offenses, one which applies to a person who "knowingly possesses" child pornography, and a second, separate, offense, which applies to a person who "knowingly accesses with intent to view" child pornography. Gov't Br. 19. *See*, *e.g.*, *United States v. Noble*, 2022 WL 131135, * 1 (D. N.J. Jan. 14, 2022) (noting that the indictment separately charged, in Counts IV and V, possession of child pornography, and accessing child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B)). Here, Swain's federal indictment did not charge him with accessing child pornography, but only with knowing possession. Appx. 3, Ex. 1, p. 2. Thus, an "accessing" offense was not part of his federal offense – and it would be the equivalent of a constructive amendment of his indictment to now treat him as though he had pleaded guilty to "accessing." *See Johnson v. United States*, 613 A.2d 1381, 1384 (D.C. 1992) ("Generally described, a constructive amendment occurs when the trial court permits the jury to consider, under the indictment, an element of the charge that differs from the specific words of the indictment.") (citation omitted).

Second, Swain's admissions that he "shared" images established the factual basis for his guilty plea to *distribution* of child pornography, as charged in Count 1 of his federal indictment. Appx. A. 3, Ex. 1. Count 2, the possession count, simply

charged him with "unlawfully and knowingly possess[ing]" the images. Swain's admission that he shared images with an undercover detective was essential to support his distribution conviction but unnecessary to support his possession conviction. It would be inappropriate to double-count a *single* factual admission – Swain's admission that he shared images with an undercover detective – as the basis for finding that Swain qualified as an offender who had "two or more" qualifying convictions. Br. 4, 20 (citing D.C. Code § 22-4002(b)(4)). For federal sentencing purposes, double-counting prior misconduct erroneously measures an offender's prior criminal history. *Cf. Rosales-Mireles v. United States*, 585 U.S. 129, 135-36 (2018) (double-counting the same prior conviction twice when calculating a defendant's criminal history is plain error). Similarly, double-counting is inconsistent with the purpose of SORA, which seeks to identify, and impose longer registration terms on, *repeat* offenders – namely, offenders who have committed "two or more" registration offenses. D.C. Code § 22-4002(b)(4).

The statement of the offense established the factual basis for Swain's federal *possession* conviction on the basis of Swain's admission that child pornography was found on his computer, and that he knew the images were child pornography. *See* 18 U.S.C. § 2252A(a)(5)(B) (making it a crime for any person to "knowingly possess[]

. . . material that contains an image of child pornography.").[8]

The government (Gov't Br. 22) faults Swain's reliance on *Bailey v. United States*, 516 U.S. 137 (1995) (cited at Br. 16-17). Yet, the government acknowledges that *Bailey* "found that 'use' of a firearm requires its 'active employment,' rather than 'mere possession.'" Gov't Br. 22 (quoting *Bailey*, 516 U.S. at 144). This is the very basis for Swain's reliance on *Bailey*. *Bailey* held that a difference exists – a difference significant enough to support the reversal of a criminal conviction under 18 U.S.C. § 924(a) – between "mere possession." and "active employment." *Bailey*, 516 U.S. at 144. *Bailey* held that proof of the "use" of a firearm required proof of "*active* employment." *Id.* (emphasis added). *Bailey* reversed the defendant's conviction for this offense because the evidence only showed that the defendant had a firearm inside a bag in a locked car trunk, *i.e.*, merely *possessed* the firearm. *Id*. Similarly, here, an "act" cannot be read into an offense that merely requires knowing possession.

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[8] The government is correct that Swain's possession offense did not rest solely on the fact that child pornography was found on his computer. Gov't Br. 22. Because the statute criminalizes knowing possession, proof his conviction required showing that Swain *knew* he possessed child pornography. But knowledge is not an act.

CONCLUSION

Swain respectfully requests that this Court reverse the judgment of the Superior Court, and remand this case with instructions to exercise its jurisdiction over his motion for judicial review of CSOSA's determination that he was subject to lifetime registration as a sex offender. In the event this Court nonetheless decides to reach the merits, Swain urges this Court to rule that he does not qualify for lifetime registration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 14, 2024, the foregoing Reply Brief of Appellant was filed using the electronic filing system of the Court of Appeals and thereby electronically served on all counsel of record.

/s/*Timothy Cone*
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