BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 24-CO-346

JOHN SWAIN, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

MATTHEW M. GRAVES
United States Attorney

CHRISELLEN R. KOLB
JOHN P. MANNARINO
RACHEL A. BRUCE
* TIMOTHY R. CAHILL
D.C. Bar #1032630
Assistant United States Attorneys

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

No. 2023-CNCSLD-17

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II. Whether this Court should nevertheless affirm the trial court's denial of Swain's motion on the alternative ground that Swain's challenge to CSOSA's lifetime-registration determination is meritless, since Swain's federal conviction for possession of child pornography involved conduct "substantially similar" to a D.C. Code registration offense under SORA.

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COUNTERSTATEMENT OF THE CASE

On September 6, 2012, appellant John Swain pleaded guilty in the United States District Court for the District of Columbia (Case No. 12-cr-186-JEB) to distribution of child pornography, in violation of 18 U.S.C. § 2252A(a)(2), and possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) (Appendix (A.) 3, Ex. 2). On January 29, 2013, the district court sentenced Swain to 96 months of incarceration and 120 months of supervised release (A.3, Ex. 3 at 3-4). As a special condition of

supervision, Swain was required to "comply with the Sex Offender Registration requirements for convicted sex offenders in any state or jurisdiction where [he] reside[s], [is] employed, carr[ies] on a vocation, or [is] a student" (*id*. at 5).

On November 14, 2022, after Swain's release, the District of Columbia Court Services and Offender Supervision Agency (CSOSA) notified Swain that, as a result of his federal convictions, he was required to register for his lifetime under the D.C. Sex Offender Registration Act (SORA) (A.3, Ex. 4). On December 14, 2022, Swain filed a motion in the Superior Court of the District of Columbia opposing CSOSA's registration determination pursuant to D.C. Code § 22-4004 (A.2). The government opposed Swain's motion (A.3), and the parties submitted additional briefing (A.4, A.5, A.6). On March 7, 2024, the Honorable Marisa Demeo issued an order denying Swain's motion for lack of jurisdiction (A.1). Swain timely appealed (Record on Appeal (R.) 122-23 (PDF)).

Swain's Child-Pornography Offenses

In June 2012, Swain engaged in online communications with an undercover Metropolitan Police Department detective (the UC) on a social network site that focused on incest (A.5, Ex. 6). Swain identified

himself as the father of two prepubescent girls and told the UC that he was sexually active with his daughters (*id.* at 1-2). The UC similarly claimed to be a father who engaged in incest with his children (*id.* at 2). At the UC's request, Swain sent him three non-explicit photographs via Yahoo Instant Messenger of girls that he claimed were his daughters (*id.* at 2-3). Swain and the UC discussed the photographs in sexually explicit terms, and each expressed interest in engaging in sexual acts with the other's children (*id.* at 3).

During their conversation, Swain sent the UC a 59-second video of an adult man performing a sexual act with a prepubescent girl (A.5, Ex. 6 at 3). When the UC asked if Swain had other similar videos, Swain replied that he had "a lot," and he sent the UC a photograph of a prepubescent girl's exposed genitalia (*id.*). In subsequent conversations, Swain continued to send the UC additional images and videos of child pornography, describing their content to the UC with sexually explicit language (*id.* at 4-6). The videos and photographs depicted numerous prepubescent girls with their genitalia exposed, often engaging in sexual acts with adults (*id.*).

On July 11, 2012, law enforcement officers executed a search warrant at Swain's home, where they recovered a computer, external data-storage

devices, CDs, and DVDs (A.5, Ex. 6 at 6-7). A forensic examiner's preliminary review of these devices found 23 unique videos and 88 unique images of child pornography, most of which depicted adults engaging in sexual acts with numerous male and female children (*id.*). Many of the child victims who appeared in the pornography were two-to-four years old (*id.*).

Swain's Convictions in Federal District Court

On August 24, 2012, Swain was charged in federal district court with one count of distribution of child pornography, in violation of 18 U.S.C. § 2252A(a)(2), and one count of possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) (A.3, Ex. 1). On September 6, 2012, Swain pleaded guilty to both charges pursuant to a written plea agreement (A.3, Ex. 2). Swain affirmed that the government's description of his offense conduct, summarized above, was true and accurate (A.5, Ex. 6 at 8). Swain stipulated that the child pornography that he distributed and knowingly possessed included portrayals of sadistic or masochistic conduct or other depictions of violence (A.3, Ex. 2 at 3). Swain further acknowledged and agreed that, as a result of his convictions, he would be required to register as a sex offender for a minimum of 25 years under the federal Sex Offender Registration and Notification Act (SORNA) (*id.* at 6-

7). Swain acknowledged that his compliance with the federal SORNA registry requirements would be "a specific condition of [his] supervised release pursuant to 18 U.S.C. § 3583" (*id*. at 7).

On January 29, 2013, the district court sentenced Swain to concurrent terms of 96 months of incarceration for each of his convictions (A.3, Ex. 3 at 3). The court also imposed a term of 120 months of supervised release (*id*. at 4). As a special condition of supervision, the court required Swain to "comply with the Sex Offender Registration requirements for convicted sex offenders in any state or jurisdiction where [he] reside[s], [is] employed, carr[ies] on a vocation, or [is] a student" (*id*. at 5).

Swain's Motion Opposing Sex-Offender Registration

After Swain was released from incarceration, he resided in the District of Columbia (A.3, Ex. 4 at 2). On November 14, 2022, CSOSA notified Swain that he was required to register for his lifetime under SORA (*id.* at 1-3). CSOSA explained that this obligation was based on Swain's federal convictions for distribution of child pornography and possession of child pornography, and the fact that Swain's sex offenses "involv[ed] 2 or more minor victims" (*id*. at 2; A.3, Ex. 5). CSOSA identified D.C. Code § 22-3102 as a statute that is "substantially similar" to Swain's

federal convictions (A.3, Ex. 5). CSOSA informed Swain that if he wanted to seek judicial review of the agency's determination, he needed to file a motion in the Superior Court within 30 days (A.3, Ex. 4 at 1).

On December 14, 2022, Swain filed a motion in the Superior Court pursuant to D.C. Code § 22-4004 (A.2). The motion broadly asserted that Swain "is not required to register as a sex offender in the District of Columbia," but it did not identify specific bases on which Swain challenged his sex-offender-registration status (*id*. at 3).

On July 11, 2023, the government filed an opposition, noting that Swain had provided "little or no discussion" as to the nature of his claim (A.3 at 1). The government contended that to the extent Swain sought to challenge aspects of his district-court sentence, the Superior Court lacked jurisdiction to "modify [Swain's] conditions of federal supervised release" (*id*. at 3). The government acknowledged that the Superior Court did have jurisdiction under D.C. Code § 22-4004 to review CSOSA's determination that Swain is "required to register as a sex offender" "subject to lifetime registration" under SORA (*id*. at 5). The government argued, however, that Swain's challenge to CSOSA's determination should be rejected as vague, conclusory, and meritless (*id*. at 5-8).

On August 1, 2023, Swain filed a reply, in which he first set forth the specific bases for his motion (A.4). Swain clarified that his motion challenged only CSOSA's determination that he was "a Class A sex offender who has to register for life" under SORA, which he distinguished from his "requirement to register in the federal case" (*id*. at 3-4). Swain affirmed that he did not seek "to challenge or modify any condition of federal supervised release" (*id*. at 3).

Swain advanced four arguments as to why CSOSA's determination was incorrect, all of which he has abandoned on appeal (A.4 at 5-8). First, Swain argued that his federal convictions did not constitute two "dispositions" under D.C. Code § 22-4002(b)(4) because both offenses were charged "in one case with one case number" (*id*. at 5-6). Second, Swain argued his convictions were not "substantially similar" to D.C. Code § 22-3102 because he was not convicted of "produc[ing]" or "promot[ing]" child pornography, which is criminalized under § 3102(a) (*id*. at 6-7). Third, Swain argued that the government had not proved the victims in his case were minors at the time Swain distributed and possessed the pornographic videos and images (*id*. at 7-8). Fourth, Swain argued there was no evidence that his federal case "involved multiple minor victims" (*id*. at 8-9).

On August 21, 2023, the government responded in a supplemental brief (A.5). The government explained that the term "dispositions" in D.C. Code § 22-4002(b)(4) refers to convictions for different offenses and does not require separate trials or plea proceedings (*id*. at 6-8). *See also United States v. Hawkins*, 261 A.3d 914, 919 (D.C. 2021) (concluding there is "no doubt" that SORA "interchangeably" uses the phrases "was convicted" and "has been subject to [a] disposition[ ]"). The government noted that Swain's focus on "production" and "promotion" under D.C. Code § 22-3102(a) was misplaced because § 3102(b) applies to anyone who "transmit[s]" or "possess[es]" child pornography (A.5 at 3-5). The government further explained that Swain's federal offenses and D.C. Code § 22-3102 apply to any pornographic material that "depicts" minors, regardless of the victims' ages at the time of distribution and possession (*id*. at 5-6). Finally, the government submitted the statement of offense from Swain's guilty plea, which conclusively disproved Swain's suggestion that his crimes had involved only a single minor victim (*id*. at 2-3).

On March 7, 2024, the Honorable Marisa Demeo issued an order denying Swain's motion for lack of jurisdiction (A.1). The trial court characterized Swain's motion as "seek[ing] judicial review of the terms of

his supervised release," and found that the court lacked "jurisdiction over an offender serving a term of supervised release imposed by a federal district court" (*id*. at 3). The court further noted that Swain's district-court sentence required him to register under the federal SORNA (*id*.).

SUMMARY OF ARGUMENT

The government agrees that the trial court erred by dismissing Swain's motion based on lack of jurisdiction. As the government explained in the proceedings below, the Superior Court lacked jurisdiction to the extent Swain sought to modify his federal sentence and conditions of supervised release, but it did have jurisdiction under D.C. Code § 22-4004 to review CSOSA's determination that Swain is subject to lifetime-registration under SORA. This Court should nevertheless affirm the trial court's denial of Swain's motion on the alternative ground that Swain's challenge to CSOSA's lifetime-registration determination is meritless.

CSOSA correctly determined that Swain is subject to lifetime registration under SORA. Contrary to Swain's claim, his federal conviction for possession of child pornography involved conduct "substantially similar" to a D.C. Code registration offense. Both D.C. Code § 22-3102(b) and 18 U.S.C. § 2252A(a)(5)(B) make it unlawful for a person to knowingly

possess child pornography. Swain's reliance on slight differences in the terminology used in these statutes is unavailing. This Court has held that the term "substantially similar" must be "given a broad construction" to "overcome difficulties caused by the variations among different jurisdictions in the terminology and categorizations used in defining sex offenses." *In re Doe,* 855 A.2d 1100, 1104-05 (D.C. 2004). Swain's claim that his conviction under 18 U.S.C. § 2252A(a)(5)(B) is not a "registration offense" under SORA because it did not require proof of any "act" is also meritless, since it is well established that knowing possession is an "act" that can give rise to criminal liability. *See, e.g., Lucas v. United States*, 305 A.3d 774, 776 (D.C. 2023).

THE D.C. SEX OFFENDER REGISTRATION ACT

By 1994, Congress required all states and the District of Columbia, as a condition of receiving certain federal funds, to establish sex-offender registries meeting minimum requirements. *See Smith v. Doe*, 538 U.S. 84, 89-90 (2003). Every state and D.C. ultimately enacted their own versions of these registries. *See id.* In 2006, Congress updated the federal requirements for state sex-offender registries through the Sex Offender Registration and Notification Act (SORNA). *See Gundy v. United States*,

588 U.S. 128, 132-33 (2019). SORNA also created a nationwide registry to supplement the state-level registries. *See* 34 U.S.C. §§ 20901, 20921.

The D.C. Sex Offender Registration Act (SORA), which went into effect in July 2000, "establishes a registration and public notification regime for persons who have committed sex offenses against minors or other crimes of sexual abuse." *Cannon v. Igborzurkie*, 779 A.2d 887, 890 (D.C. 2001). SORA requires any "person who lives, resides, works, or attends school in [D.C.]," and who "[c]ommitted a registration offense at any time and is in custody or under supervision [at the time of or after SORA's enactment]" to register as a sex offender and comply with periodic verification and reporting requirements established by CSOSA. *Sullivan v. United States*, 990 A.2d 477, 478 (D.C. 2010) (citing D.C. Code §§ 22-4001(9), 22-4007, 22-4014).

"Most sex offenses are within the coverage of SORA, but the Act does not apply, generally speaking, to offenses that are non-assaultive and that do not involve minors." *In re W.M.*, 851 A.2d 431, 436 n.2 (D.C. 2004).[1] SORA identifies many specific D.C. Code sex offenses as

[1] In arguing that his conviction for possession of child pornography is not a "registration offense" under SORA, Swain (at 18) quotes similar (continued . . .)

"registration offenses," including "all sex offenses involving minors." *In re Doe,* 855 A.2d 1100, 1103 (D.C. 2004) (citing D.C. Code § 22-4001(8)). SORA further provides that an offense under the law of another jurisdiction, including federal law, is a SORA "registration offense" if it "involved conduct that would constitute" a D.C. Code registration offense or "conduct which is substantially similar to" a D.C. Code registration offense. D.C. Code § 22-4001(8)(G).

SORA divides sex offenders into three classes based on the nature of the offense or offenses committed. "Class A" offenders must register on a lifetime basis. *See* D.C. Code § 22-4001(6). "Class B" and "Class C" offenders must comply with SORA's requirements for a 10-year registration period. *See* 28 C.F.R. § 811, Appendix A. Class A lifetime registration is required for offenders who commit certain serious sex offenses, such as first or second-degree sexual abuse, as well as offenders who have been determined to be sexual psychopaths. *See* D.C. Code §§ 22-4002(b)(1)-(2); 4001(6). Lifetime registration is also required for sex offenders convicted on separate occasions as recidivists against a single

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language from *In re Doe,* 855 A.2d 1100, 1103 n.3 (D.C. 2004), but he notably uses an ellipsis to omit the phrase "and do not involve minors."

minor victim, and those, like Swain, convicted of multiple registration offenses involving multiple minor victims. *See* D.C. Code §§ 22-4002(b)(3)-(4); 4001(3)(A), (8); 28 C.F.R. § 811, Appendix A.

"The determination that a particular person is required by SORA to register is made in the first instance by either the Superior Court or CSOSA." *In re W.M.*, 851 A.2d at 436. When COSA determines that a person "is required to register or register for life" under SORA, the registrant may seek judicial review of that determination in the Superior Court. D.C. Code § 22-4004(a). This includes challenges to registration determinations based on whether the standards "for coverage offenses under the laws of other jurisdictions are satisfied." D.C. Code § 22-4004(a)(1)(A)(iv) (citing D.C. Code § 22-4001(8)(G)).

ARGUMENT

I. The Trial Court Had Jurisdiction to Consider Swain's Challenge to CSOSA's Lifetime-Registration Determination Under SORA.

The government agrees with Swain (at 5-9) that the trial court erred by denying Swain's motion based on lack of jurisdiction.

Swain's initial motion broadly claimed, with minimal elaboration, that he was not required to register as a sex offender (A.2). In response,

the government contended that the Superior Court lacked jurisdiction to the extent that Swain sought to modify his federal sentence and conditions of supervised release (A.3 at 3-5). In the same filing, the government acknowledged that the Superior Court did have jurisdiction under D.C. Code § 22-4004 to review CSOSA's determination that Swain is "required to register as a sex offender" "subject to lifetime registration" under SORA (*id.* at 5). The government urged the trial court to deny Swain's challenge to CSOSA's determination as vague and conclusory, or, alternatively, as meritless (*id.* at 5-8).

Swain's reply clarified that his motion sought relief based only on his challenge to CSOSA's lifetime-registration determination, and that he did not seek "to challenge or modify any condition of federal supervised release" (A.4 at 3-4). The trial court appeared to misread Swain's reply, since it cited his clarification to support the contrary assertion that Swain "s[ought] judicial review of the terms of his supervised release" (A.1 at 3). The trial court also appeared to conflate the federal SORNA and D.C.'s SORA, which are separate registries established under the U.S. Code and D.C. Code, respectively, when it relied in part on Swain's obligation to register under SORNA in denying his motion (*id.*).

As CSOSA's initial notification to Swain explained (A.3, Ex. 4 at 1), D.C. Code § 22-4004 provides a means to seek judicial review in the Superior Court of CSOSA's determination that a person "is required to register or to register for life" under SORA. D.C. Code § 22-4004(a)(1). The trial court accordingly should have reached the merits of Swain's motion. As discussed infra, this Court should nevertheless affirm the trial court's denial of Swain's motion on the alternative ground that Swain's challenge to CSOSA's lifetime-registration determination is meritless.

II. CSOSA Correctly Determined That Swain Is Subject to Lifetime Registration Under SORA.

"It is well settled that an appellate court may affirm a decision for reasons other than those given by the trial court." *Purce v. United States,* 482 A.2d 772, 775 n.6 (D.C. 1984). In order for affirmance on alternative grounds to be appropriate, "the appellant must have had a reasonable opportunity to be heard with respect to the reasoning on which the proposed affirmance is to be based," so that there is "no procedural unfairness." *Randolph v. United States*, 882 A.2d 210, 218 (D.C. 2005). As Swain acknowledges (at 9), both parties addressed the merits of Swain's challenge to CSOSA's lifetime-registration determination below. Thus, although the

trial court did not substantively address Swain's claim, this Court may affirm the denial of Swain's motion on the alternative basis that Swain's challenge to CSOSA's lifetime-registration determination is meritless.

A. Standard of Review and Legal Principles

Whether a conviction qualifies as a "registration offense" under SORA is a question of law that is reviewed de novo. *In re Doe,* 855 A.2d at 1102.

As noted supra, an offense under federal law is a "registration offense" under SORA if it "involved conduct" that is "substantially similar" to a D.C. Code registration offense. D.C. Code § 22-4001(8)(G). The term "substantially similar" must be "given a broad construction to effectuate the goals of [SORA]." *In re Doe,* 855 A.2d at 1104-05. "SORA was adopted to protect the public, and especially minors, from the threat of recidivism posed by sex offenders who have been released into the community." *Id.* at 1102. Since SORA "is a remedial regulatory enactment and not a penal law, . . . it should be liberally construed for the benefit of the class it is intended to protect." *Id*. (cleaned up).

Subparagraph (G) of D.C. Code § 22-4001(8) "is designed to overcome difficulties caused by the variations among different jurisdictions in the terminology and categorizations used in defining sex offenses." *In re Doe,*

855 A.2d at 1104 (cleaned up) (citing the D.C. Council Judiciary Committee Report for SORA). Thus, substantial similarity is not determined through "element-by-element comparisons between offenses in D.C. and similar offenses elsewhere." *Id.* (cleaned up). "CSOSA properly may (and often must) look beyond the face of the judgment of conviction in another jurisdiction to the underlying offense conduct to determine whether the requirements of subparagraph (G) are met." *Id.* In general, a person is deemed to have committed a D.C. SORA "registration offense" "so long as they have been convicted under the laws of other jurisdictions of crimes involving sexual assault or crimes involving sexual abuse or sexual exploitation of children." *Id.* (cleaned up).

B. Discussion

Swain does not dispute that his federal child-pornography offenses both involved multiple minor victims, and thus he would be subject to lifetime-sex-offender registration pursuant to D.C. Code § 22-4002(b)(4) if both convictions qualify as "registration offenses" under SORA. Swain also concedes (at 12) that his conviction for distribution of child pornography, in violation of 18 U.S.C. § 2252A(a)(2), is a SORA "registration offense." Swain's only claim on appeal (at 1) is that his conviction for possession of

child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B), is not a "registration offense" under SORA because "it did not require proof of an act proscribed by [D.C. Code § 22-3102]." This Court should reject Swain's claim for multiple reasons.

As a threshold matter, the argument that Swain asserts on appeal with respect to "acts proscribed by § 22-3102" was never presented during the Superior Court proceedings, and this Court may decline to consider it on this basis alone. "[A]rguments not raised in the trial court are ordinarily waived on appeal." *Blackson v. United States*, 979 A.2d 1, 10 n.9 (D.C. 2009). Even if this Court opts to consider Swain's claim, moreover, it should reject it as meritless.

All "acts proscribed by" D.C. Code § 22-3102 are "registration offenses" under SORA. *See* D.C. Code § 22-4001(8)(C). Section 3102(b) makes it unlawful "for a person, knowing the character and content thereof, to attend, transmit, *or possess* a sexual performance by a minor." D.C. Code § 22-3102(b) (emphasis added). A "sexual performance" includes any "motion picture" or "photograph" that depicts "sexual conduct by a person under 18 years of age." D.C. Code §§ 22-3101(3), (6). "Sexual conduct"

includes, among other things, "[a]ctual or simulated sexual intercourse" and "[l]ewd exhibition of the genitals." D.C. Code § 22-3101(5).

Swain's federal conviction for possession of child pornography, at a minimum, "involved conduct" "substantially similar" to acts proscribed by D.C. Code § 22-3102(b). Section 2252(A)(5)(B) applies to any person who "knowingly *possesses*, or knowingly accesses with intent to view" videos or images containing child pornography. 18 U.S.C. § 2252A(a)(5)(B) (emphasis added). In pleading guilty to that offense, Swain admitted that he knowingly possessed, on a computer and data-storage devices in his home, at least 23 videos and 88 images of child pornography, many of which depicted adults engaging in sexual acts with male and female children as young as two-to-four years old (A.5, Ex. 6 at 6-7). Swain's "conduct" was thus plainly "substantially similar" to D.C. Code § 22-3102(b)'s proscription on "possessing" "motion pictures" or "photographs" that depict "sexual conduct by a person under 18 years of age."

Swain's reliance (at 18) on slight differences in the terminology used by D.C. Code § 22-3102(b) and 18 U.S.C. § 2252A(a)(5)(B) is unavailing. Swain notes that under § 22-3102, the term "possess" is defined to require "accessing" the child pornography if it is electronically received or

available. D.C. Code § 22-3102(d)(1). Under § 2252A(a)(5)(B), by contrast, "knowingly possess[ing]" and "knowingly access[ing]" child pornography are listed as alternative ways to commit the offense. 18 U.S.C. § 2252A(a)(5)(B). Swain argues (at 16, 18) that because his federal conviction did not "require proof" of "accessing" the child pornography that he possessed, it is not "substantially similar" to § 3102(b). This Court has expressly rejected such "element-by-element" comparisons when assessing substantial similarity under D.C. Code § 22-4001(8)(G). *In re Doe,* 855 A.2d at 1104. The term "substantially similar" must be "given a broad construction" to "overcome difficulties caused by the variations among different jurisdictions in the terminology and categorizations used in defining sex offenses." *Id*. at 1104-05. "In this area we are not to exalt form over substance." *Id*. at 1107. Indeed, it is sufficient that Swain's federal conviction for possession of child pornography generally involved "sexual exploitation of children." *Id*. at 1104.

In any event, Swain's contention (at 18) that he did not ever admit "accessing" the child pornography found in his home is incorrect. Swain's statement of offense makes clear that at least two of the videos recovered from his personal devices were among the videos he shared via Yahoo

Instant Messenger with the undercover detective. Compare A.5, Ex. 6 at 4-5 (describing 27-second video (#1) and 4-minute 25-second video (#13)) with *id.* at 7 (describing these same two videos (#21 and #23)). Although, as discussed above, Swain's offense satisfies the standard for substantial similarity under D.C. Code § 22-4001(8)(G) regardless, his admissions thus do confirm that he "accessed" the video files. *See In re Doe,* 855 A.2d at 1104 (in assessing substantial similarity under D.C. Code § 22-4001(8)(G), it is permissible to "look beyond the face of the judgment of conviction in another jurisdiction to the underlying offense conduct").

Swain's claim (at 15-18) that his conviction under 18 U.S.C. § 2252A(a)(5)(B) is not a "registration offense" under SORA because it did not require proof of any "act" is also meritless. It is well established that knowing possession is an "act" that can give rise to criminal liability. *See, e.g., Lucas v. United States*, 305 A.3d 774, 776 (D.C. 2023) ("The 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.") (emphasis added); *Davis v. United States*, 590 A.2d 1036, 1037 n.4 (D.C. 1991) ("Appellant's alleged possession of two rocks of cocaine, one in his pocket and one on the ground

in close proximity to him, constituted *a single legally cognizable act of possession*.") (emphasis added); *United States v. Freed*, 401 U.S. 601, 609 (1971) ("possession of hand grenades is not *an innocent act*") (emphasis added); *United States v. Woods*, 684 F.3d 1045, 1057 (11th Cir. 2012) ("'Possession' is '*the act* or condition of having in or taking into one's control or holding at one's disposal.'") (emphasis added; citations omitted). Swain erroneously relies (at 16-17) on *Bailey v. United States*, 516 U.S. 137 (1995), to support his assertion that "possession of an object does not connote an act." In *Bailey*, the Supreme Court interpreted the statutory term "use" and found that "use" of a firearm requires its "active employment," rather than "mere possession." *Id.* at 144. Contrary to Swain's claim, *Bailey* did not address the meaning of the term "act."

Swain's further suggestion (at 17-18) that his possession conviction was based on "the mere fact that police found child pornography on computers in [his] home" ignores the plain text of § 2252A(a)(5)(B), which requires that a defendant "knowingly possesses" child pornography. 18 U.S.C. § 2252A(a)(5)(B). In *Woods*, the Eleventh Circuit explained that § 2252A(a)(5)(B) "criminalize[s] only 'knowing' possession . . . of child pornography, which eliminates the possibility that an unwitting

downloader of child pornography will trigger liability[.]" 684 F.3d at 1060. Swain's reliance (at 17) on *United States v. Terrell*, 700 F.3d 755 (5th Cir. 2012), is misplaced. *Terrell* observed that a conviction under § 2252A(a)(5)(B) could be upheld against a sufficiency challenge based on constructive possession "where the prosecution has proven that there is something else . . . that supports at least a plausible inference that the defendant had knowledge of and access to" the child pornography. *Id*. at 765 (internal quotation marks and citation omitted). In pleading guilty in his district-court case, Swain admitted that he had such knowledge.

Finally, Swain's discussion (at 19-20) of the district court judge's sentencing decisions in his child-pornography case has no bearing on Swain's classification under SORA. Unlike sentencing, a defendant's obligation to register as a sex offender under SORA is not based on any discretionary decisions by a Superior Court judge. Rather, the statute's registration provisions are imperatives triggered by a defendant's conviction for a registration offense. *See, e.g.,* D.C. Code § 22-4002(b) ("The registration period *shall start* . . .") (emphasis added); § 22-4014 ("During the registration period, a sex offender *shall*, in the time and

manner specified by [CSOSA] [r]egister with [CSOSA] as a sex offender") (emphasis added).

For all these reasons, this Court, rather than remanding this matter to the Superior Court, should affirm the denial of Swain's motion pursuant to D.C. Code § 22-4004 on the basis that Swain's challenge to CSOSA's lifetime-registration determination is meritless.

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
JOHN P. MANNARINO
RACHEL A. BRUCE
Assistant United States Attorneys

/s/
TIMOTHY R. CAHILL
D.C. Bar #1032630
Assistant United States Attorney
601 D Street, NW, Room 6.232
Washington, D.C. 20530
Timothy.Cahill@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, Timothy Cone, Esq., at timcone@comcast.net, on this 7th day of August, 2024.

/s/
TIMOTHY R. CAHILL
Assistant United States Attorney