DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 05-CT-1428

DISTRICT OF COLUMBIA,

APPELLANT,

v. CTF1129-05

MARK L. FITZGERALD,

APPELLEE.

BEFORE: *WASHINGTON, *Chief Judge*; RUIZ, *REID, GLICKMAN, KRAMER, FISHER, BLACKBURNE-RIGSBY, and *THOMPSON, *Associate Judges;* **FARRELL, *Associate Judge, Retired.*

O R D E R
(Filed 7/17/08)

On consideration of appellee's petition for rehearing, appellee's petition for rehearing en banc, and the opposition thereto, and further, on consideration of the supplemental briefs filed by appellee, appellant, and the Public Defender Service as *amicus curiae* (in support of appellee), in response to this court's order dated April 9, 2008, the court enters this order amending its decision of December 20, 2007, as it appears at 939 A.2d 65 (D.C. 2007), and reissuing the opinion in amended form. It is

ORDERED by the merits division* that the petition for rehearing is granted to the extent that this court's opinion filed December 20, 2007, (939 A.2d 65, D.C. 2007), is hereby vacated. That opinion issued on December 20, 2007, is hereby amended as follows; and the amended opinion, incorporating these changes, is issued on this date.

(1) The section including the names of attorneys, bottom of the second column, at 939 A.2d 65 is modified by adding:

James Klein and *Jaclyn S. Frankfurt*, Public Defender Service, *amicus curiae*, in support of appellee's petition for rehearing and rehearing en banc.

(2) New footnote 1 is added after the "Amended" date of the opinion, at 939 A.2d 65, to read:

This opinion was issued originally on December 20, 2007. *See District of Columbia v. Mark L. Fitzgerald*, 939 A.2d 65 (D.C. 2007). Upon consideration of Mr. Fitzgerald's post-decision petition for rehearing and the supplemental briefs relating to that petition, this opinion is being reissued in amended form. The amended opinion addresses an issue which was not raised during the original appellate proceeding, the jurisdiction of this court to hear

this matter.

(3) The **ANALYSIS** section is modified after the word **ANALYSIS**, second column, at 939 A.2d 67, to read:

Petition for Rehearing

Following the issuance of the original decision in this case, Mr. Fitzgerald filed petitions for rehearing and rehearing *en banc*, which the District opposed. The Public Defender Service for the District of Columbia ("PDS") requested leave to enter as *amicus curiae* and to file a brief, in support of Mr. Fitzgerald's petitions. Subsequently, on April 9, 2008, we granted the request of PDS. PDS raised an issue which was not raised during Mr. Fitzgerald's original appellate proceeding, "whether this court lacks jurisdiction to adjudicate this case."[1] In our April 9, 2008, order, we permitted the parties, and *amicus* to submit supplemental briefs on the following questions: "(1) Whether this court had jurisdiction over the District government's appeal, and if not, (2) Whether this court may regard the District's brief as a petition for writ of mandamus to review [Mr. Fitzgerald's] unauthorized sentence." On May 22 and 23, the parties and *amicus* lodged briefs in response to the order.

In its supplemental brief, the District argues that "this [c]ourt has jurisdiction over a government appeal of an unauthorized sentence order," and if it does not, this court may "treat the District of Columbia's brief as a Petition for Writ of Mandamus" to "review the [trial court's] unauthorized order refusing to apply the mandatory minimum sentence" in this case. Mr. Fitzgerald argues, in essence, that the District waived its statutory authority to appeal the trial court's decision not to take into consideration his Virginia conviction in sentencing him, and therefore, this court lacks jurisdiction over the District's appeal. He further claims that mandamus is inappropriate in this case. *Amicus* contends that not only does this court lack jurisdiction over the District's appeal, but also that "this [c]ourt may not use the extraordinary writ of mandamus under the circumstances presented here. . . ."[2]

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[1] In his original brief, responding to the District's brief on appeal, Mr. Fitzgerald did not question this court's jurisdiction to entertain the District's appeal. Rather, he asserted, in part, that the District waived its statutory right to appeal prior to sentencing. He also maintained that this court should affirm the trial court's decision to sentence him as a first time offender.

[2] Mr. Fitzgerald acknowledges that his argument in his petition for rehearing differs from that presented in his original appellate brief:

> Although similar arguments [to those made in this supplemental brief] have been previously presented by the appellee as a waiver argument, with the help of PDS, the appellee's ship which was off course has been steered in the proper direction.

However, we disagree with his statement that his contention in the original appellate proceeding "was . . . a jurisdictional argument."

In their analysis of the questions presented for consideration by this court's April 9, 2008, order, Mr. Fitzgerald and PDS insist that there is no statutory basis for a government appeal of appellee's sentence in this case, and hence, this court lacks jurisdiction to hear the District's appeal. They contend that this court's jurisdiction under D.C. Code § 11-721 is limited to orders issued under D.C. Code §§ 23-104 (which is not applicable here), or 23-111 (d)(2); and that the District failed to meet the express terms of § 23-111 (d)(2) with respect to its appeal.[3]

We are doubtful that this court's jurisdiction is as limited as Mr. Fitzgerald and PDS contend, as D.C. Code § 11-721 (a)(1) gives this court "jurisdiction of appeals from [] all final orders and judgments of the Superior Court of the District of Columbia." However, we need not delve into PDS' and Mr. Fitzgerald's statutory arguments, pertaining to the alleged lack of authority for the District's appeal of Mr. Fitzgerald's sentence and this court's jurisdiction, because our case law permits us to consider the government's appellate brief as a petition for writ of mandamus. As we said in *United States v. Stokes*, 365 A.2d 615 (D.C. 1976), "we proceed to the merits of this appeal by regarding the government's brief as a petition for a writ of mandamus, a recognized means of reviewing an allegedly unauthorized sentence." *Id*. at 617 (citations omitted). This practice is consistent with that followed in other jurisdictions. *See Minnesota v. Hoelzel*, 639 N.W.2d 605, 610 (Minn. 2002) (construing state's appeal as a petition for writ of mandamus where trial judge found defendant guilty of first-degree burglary but refused to enter judgment on that finding);[4] *People ex rel. Waller v. McKoski*, 748 N.E.2d 175, 179-80 (Ill. 2001) (issuing writ of mandamus where trial court refused to impose mandatory consecutive sentences, as required

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[3] Authority cited by PDS and Mr. Fitzgerald includes: *District of Columbia v. Whitley*, 640 A.2d 710, 712 (D.C. 1994) ("[T]he government has no right of appeal in a criminal case unless there is express legislative authorization") (referencing *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 568 (1977); D.C. Code §11-721 (a)(3) ("The District of Columbia has jurisdiction of appeals from – orders or rulings of the Superior Court of the District of Columbia appealed by the United States or the District of Columbia pursuant to §§ 23-104 or 23-111 (d)(2)."); D.C. Code § 23-104 (c) ("The United States or the District of Columbia may appeal an order dismissing an indictment or information or otherwise terminating a prosecution in favor of a defendant or defendants as to one or more counts thereof, except where there is an acquittal on the merits."); D.C. Code § 23-111 (d)(2) (*supra*, note 3). The District relies on *United States v. Shorter*, 343 A.2d 569, 571 (D.C. 1971) (agreeing that the government "may appeal an order of the trial court which was entered without authority") (citing *District of Columbia v. Bosley*, 173 A.2d 218, 220 (D.C. 1961)).

[4] In *Hoelzel*, the court declared that "a writ may be appropriate [and it was] because the relief the state seeks is in the form of an order to compel the district court to perform a function the state claims is required. Moreover, the absence of the right of appeal may leave the state with no adequate remedy in the ordinary course of law." *Id*. at 609-10. Here, as we shall see, the court had no discretion with respect to the mandatory sentence. Furthermore, as we conclude, *infra*, D.C. Code § 23-111 (d)(2) did not require the District to take an appeal prior to sentencing. *See infra* note 19.

by statute);[5] *People v. The District Court of the City and County of Denver*, 673 P.2d 991, 995 (Colo. 1983) ("The correction of an illegal sentence is an extraordinary cause for which mandamus is available"; "[a] court may not impose a sentence that is inconsistent with the terms specified by statutes.") (citations omitted); *see also United States v. Lane*, 284 F.2d 935, 938, 942 (9th Cir. 1960) (approving writ of mandamus as "an available remedy in an appropriate case," where the trial court imposed probation even though the applicable statute prohibited probation) (citing *Ex parte United States*, 242 U.S. 27 (1916)).

Despite these authorities, PDS and Mr. Fitzgerald contest the applicability here of the mandamus route used in *Stokes*, *supra*, primarily because they believe (a) mandamus would undermine important constitutional principles of separation of powers; (b) the government never filed a petition for writ of mandamus; and (c) the District cannot meet the stringent requirements for mandamus.[6] Treating the District's brief as a petition for a writ of mandamus would not undermine the constitutional doctrine of separation of powers. That doctrine "is concerned with the allocation of official power" among the three branches of government, and is designed to preclude "encroachment or aggrandizement of one branch [of government] at the expense of the other."[7] Encroachment or aggrandizement can be seen "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department," or where one branch of government "undermine[s] the authority and independence of one or another coordinate [b]ranch."[8] Rather than undermining legislative authority or aggrandizing the power of the judiciary, permitting mandamus in this case would result in the enforcement of the mandatory statutory penalty governing Mr. Fitzgerald's offense, and hence, it would be consistent with the legislature's goals regarding the safety of the streets and the penalties for those convicted of driving under the influence or drunk driving on more than one occasion. In short, we see no violation of the constitutional doctrine of separation of powers.

Nor do we agree that the District had to file a formal petition for writ of mandamus in this case. There was no reason to do so, since there was no hint in the trial court, or immediately after the District filed its appeal, that Mr. Fitzgerald would question the jurisdiction of this court to hear the District's appeal. Indeed, his strategy involved a request that this court affirm the trial court's decision to ignore his Virginia drunk driving offense and to sentence him in the District as a first offender. Moreover, even though Mr. Fitzgerald did not challenge this court's jurisdiction in his brief in the original proceeding, the District

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[5] "Mandamus is an extraordinary remedy used to enforce, as a matter of right, a public officer's performance of his or her public duties where no exercise of discretion on the officer's part is involved." *McKoski*, *supra*, 748 N.E.2d at 177-78 (citations omitted).

[6] PDS also emphasizes double jeopardy considerations. We leave those considerations to the trial court, in the first instance, upon remand.

[7] *Clinton v. Jones*, 520 U.S. 681, 699 (1997) (citation and internal quotation marks omitted).

[8] *Mistretta v. United States*, 488 U.S. 361, 381, 382 (1989) (emphasis in original) (citations and internal quotation marks omitted).

invoked *Stokes*, *supra*, and the mandamus doctrine, in its reply brief in the original proceeding.[9]

Furthermore, we do not agree that this is an inappropriate case for mandamus. "It is well established that the writ of mandamus is an extraordinary remedy, available only in those few cases where a trial court has refused to exercise or has exceeded its jurisdiction."[10] Thus, "[i]ts primary use is to confine [a] . . . court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."[11] But, "the party seeking the writ must show that [its] right is clear and indisputable and that [it] has no other adequate means to obtain relief."[12] And, "[a] court should grant the writ only when there is a usurpation of judicial power or the clear abuse of discretion."[13] Here, mandamus was most appropriate because the trial court refused to follow the statutory mandate in sentencing Mr. Fitzgerald, and sought to exercise discretion where the statute permitted no discretion. The District has an indisputable right to seek to enforce the statutory scheme governing the penalizing of driving under the influence on its streets.

In sum, under the circumstances of this case, we see no impediment, constitutional or statutory, to treating the District's original brief as a petition for writ of mandamus. Consequently, "we proceed to the merits of this appeal by regarding the government's brief [in the original appellate proceeding] as a petition for a writ of mandamus, a recognized means of reviewing an allegedly unauthorized sentence." *Stokes*, *supra*, 365 A.2d at 617 (citations omitted).[14]

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[9] In focusing on Mr. Fitzgerald's waiver argument under D.C. Code § 23-111 (d)(2), the District emphasized Super. Ct. Crim. R. 35 (a) ("The Court may correct an illegal sentence at any time"), and referenced *Stokes*, *supra*. The District stated that in *Stokes* "this court treated the government's appeal as a *writ of mandamus*, which it stated is a recognized means of reviewing an allegedly unauthorized sentence."

[10] *In re M.O.R.*, 851 A.2d 503, 509 (D.C. 2004) (citations and internal quotation marks omitted).

[11] *Id*. (citations and internal quotation marks omitted).

[12] *Id*. (citations and internal quotation marks omitted).

[13] *Banov v. Kennedy*, 694 A.2d 850, 858 (D.C. 1997) (citation and internal quotation marks omitted).

[14] On July 7, 2008, this court received a letter, filed pursuant to D.C. App. R. 28 (k), from *amicus*, PDS, calling our attention to the Supreme Court's recent ruling in *Greenlaw v. United States*, No. 07-330, 2008 U.S. LEXIS 5259, (June 23, 2008). The appeal there, unlike the one before us, was filed by the defendant, not the government, and that case is not controlling. The precise issue presented on appeal in *Greenlaw* was whether "a United States Court of Appeals, acting on its own initiative, [may] order an increase in a defendant's sentence[.]" 2008 U.S. LEXIS 5259, at *7. Unlike the Eighth Circuit, this court responded

(continued...)

The Merits

No other part of the **ANALYSIS** is amended.

It is FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

**Judge Farrell was an Associate Judge of the court at the time of argument. His status changed to Associate Judge, Retired, on July 1, 2008.

[14](...continued)
to an appeal filed by the District, and did not, *sua sponte*, increase Mr. Fitzgerald's sentence. Moreover, Mr. Fitzgerald's case does not involve the "cross-appeal rule," and its time limits, as did *Greenlaw*. The District filed a timely notice of appeal, thus putting Mr. Fitzgerald on immediate notice that the District would seek to enforce the mandatory statutory penalty applicable to his conviction. Furthermore, we see nothing in *Greenlaw* which calls into question the practice of treating the government's brief as a request for a writ of mandamus in appropriate cases.