APPENDIX A

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

UNITED STATES OF AMERICA	:	
	:	2011 CF3 9753
v	:	
	:	
JOHN KING,	:	
	:	
Defendant	:	
	:	February 24, 2012
	X	Washington, D.C.

The above-entitled action came on for a hearing before the Honorable FLORENCE Y. PAN, Associate Judge, in Courtroom Number 212.

APPEARANCES:

On behalf of the Government:

APRIL E. FEARNLEY, Esquire
Assistant United States Attorney

On behalf of the Defendant:

HOWARD X. X. MCEACHERN, Esquire
Washington, D.C.

P R O C E E D I N G S

THE DEPUTY CLERK: Your Honor, calling from your sentencing calendar, United States versus John King, Case 2011 CF3 9753.

MR. MCEACHERN: Good morning, again, Your Honor, Howard McEachern for John King who is coming from the dock.

MS. FEARNLEY: Good morning, Your Honor, April Fearnley for the United States.

THE COURT: Good morning. Good morning, Mr. King.

THE DEFENDANT: Good morning.

THE COURT: All right, this case is here for sentencing. The Government has filed a memorandum in aid of sentencing which I've read. Did you have a chance to see that, Mr. McEachern?

MR. MCEACHERN: Court's brief indulgence, Your Honor? Yes, Your Honor, I have -- I have had a chance to review it.

THE COURT: All right.

MR. MCEACHERN: And there wasn't any submission from the Defense.

THE COURT: Yes and there was a Victim Impact Statement from Mr. Shink. (phonetic)

MR. MCEACHERN: And I did read that as part of the PSI.

THE COURT: All right, is there anything else that

I should have received but did not?

MS. FEARNLEY: No, Your Honor.

THE COURT: All right. Are there any objections or corrections to the guideline ranges? I have 14 to 32 months for the Threats; 180 days is the max for the Destruction of Property; 30 to 72 months for each of the Robbery counts. Is that correct?

MR. MCEACHERN: Yes, Your Honor.

MS. FEARNLEY: That's correct and --

THE COURT: All right, I'll hear from you.

MS. FEARNLEY: -- and as I noted, that's just different than the PSI for the Destruction of Property. They had the incorrect range listed.

THE COURT: Okay, I'll hear first from the Government.

MS. FEARNLEY: Yes, Your Honor. I think what's significant in terms of this victim's experience is that it wasn't just one night. It was a continuing course of conduct for him.

It started with assaults. It began in February of 2011 grabbing him in the neck when he was asking the defendant to get out of his apartment; backhanding him in March down the stairs; punching him in the face in May when he was late paying for drugs. And then of course it escalates when he shows up in the morning on May 26th at

about six o'clock in the morning and is demanding to be let in.

I would note that the charges are essentially that they convicted on. They really equate to be one even though they hung on the B1 count; threatening to beat him at the door, destroying the door as he breaks it down and then going into his bedroom right afterwards and stealing his phone and then coming back and stealing his key.

They really equate to, you know, invading someone's home as they're lying in their bed and assaulting and taking their property.

What's really significant about this defendant is that he has a long history in this particular housing complex called LeDroit Park. And I specifically remember thinking when I went out there preparing for trial that this is not really an easy place to live.

Most of the residents pay $10 for their apartments. They've very poor and you don't really choose where you're going to live when you get a Public Housing slot.

And the defendant has been terrorizing that area and that location for residents for a number of years. He's part of what is a violent gang that sells drugs in that area.

As I noted in my memorandum, a number of his associates have been convicted and charged with Obstruction of Justice, with killing witnesses and as a result in this

case, these witnesses had extreme fear in testifying against the defendant.

The defendant is basically the -- kind of the bodyguard for the leader of that gang. And not only did they have to relocate but you can see in the Victim Impact Statement that he just even now has trouble leaving where he's now living and just walking down to the store.

He told me very early on I won't be able to come to sentencing. I'm just so scared still. And I think a couple of the sentences that he said in his statement, they just really resound with me. I'm so tired of being afraid. I don't know how to get past that feeling. The effects of this experience feel like they will never leave me. It will never be over. Anyone who isn't a victim can't really understand what it's like to be afraid all the time. I carry it with me no matter where I am; at home, at work, on the streets. I know I can be hurt at anytime.

That victim's fear is very real given the defendant, his role in that community and who he associates with and what he's done.

His history in terms of compliance with Court orders is abominable. His four contempt convictions all from being ordered to stay away from that same area always violated those orders. He has two contempt convictions from 2004, one from 2001, one from 2002. Probation expired

unsatisfactorily.

He was convicted of Distribution of Cocaine in 2007. His supervised release was revoked from that in 2008. Although the Presentence Report writer didn't count up the arrest and it's certainly possible that a few were warrants, I counted out the number of offense dates. There were 25 so I estimate he was arrested approximately 25 times.

In short, this victim still can't sleep, has headaches, really can't function based on the defendant's conduct in this case. And I would ask that the two robbery counts be sentenced consecutively.

As the Court will recall, there was a break. There was a fork in the road. After he stole the phone, he left. He went into the living room. Then he came back, demanded money and stole the key.

In addition, I would ask for a consecutive sentence of the top end of the guidelines 32 months for the Felony Threats and 180 days for Destruction of Property. It would be approximately a 15 year two month sentence.

THE COURT: All right, thank you.

MS. FEARNLEY: Thank you.

THE COURT: Mr. McEachern?

MR. MCEACHERN: Yes, Your Honor. As Mr. King presents at sentencing, he is 31 years of age. His last conviction was seven years ago in 2005. He has no criminal

history for any crime of violence. As the Government had noted, there are contempt convictions and the one drug conviction and that's the entirety of his criminal history.

As of today's sentencing, he's been incarcerated approximately nine months.

THE COURT: Yes, there were -- there -- there's some things that DWEPT or were no billed; an ADW in 1999 and a Murder II While Armed in 2002.

MR. MCEACHERN: Well, Your Honor --

THE COURT: And there are some juvenile things that were not petitioned.

MR. MCEACHERN: Well there's no criminal history. I mean --

THE COURT: I'm saying there's criminal history, there's no convictions.

MR. MCEACHERN: Well, I won't quibble with the semantics of it but what I was speaking to were the convictions, Your Honor.

THE COURT: All right.

MR. MCEACHERN: Page 14 of the report, caption of the employment history did indicate he did go through Project Empowerment and was employed at the time that -- had been for four months at the time of the arrest in this case.

When you look at what the jury said in this case, they categorically rejected the -- with while armed defenses.

And what that really says is that they really rejected Mr. Shink because --

THE COURT: Mr. McEachern?

MR. MCEACHERN: -- and -- and -- and I will -- I -- I --

THE COURT: Mr. McEachern?

MR. MCEACHERN: -- if I'm allowed to -- if I'm allowed to just expound upon that --

THE COURT: If I can stop you for a moment --

MR. MCEACHERN: Yes.

THE COURT: -- since this might affect what you want to say.

MR. MCEACHERN: Yes.

THE COURT: We're at sentencing. I heard all the testimony and I credit Mr. Shink.

MR. MCEACHERN: Very -- very well.

THE COURT: Okay. So I just thought that might affect your allocution. You can go ahead if you want but I thought I'd let you know that.

MR. MCEACHERN: Very well, Your Honor. But while we're here, we're not here for the fact that he was convicted on any while armed defenses. What we're here for and what the Government seems to want to do in this case is punish Mr. King for everything they think that he may have done without presenting any evidence that he did any of these things.

The fact that he knows somebody who's convicted is a case of one on one that -- that cannot be imputed to Mr. King because he knows somebody who was convicted.

There's nothing presented in the Government's memorandum and there's nothing that we currently present -- as we come to sentencing today, which supports any of those contentions. They are just allegations.

I understand Your Honor saying that you credit what Mr. Shink said so I'm not going to argue with the person who's making the sentencing determination. But I do think that it should factor into whatever decision you make about the sentencing, that the two counts of which he really was found -- obviously there were four counts. But -- and two of those relate to coming into the door and was said outside the door.

What happened actually in the apartment, the only -- to -- I think a strong argument could be made is that the officers are who they believe with regard to -- to that particular -- those particular crimes, and that they had a great deal of problems with what Mr. Shink said. And I think that should be factored in because we're here because of those two convictions.

And when you look at those two convictions, the robberies don't -- the actual robberies, there is no injury with regard to either of those robberies. With regard to

those robberies, a phone was taken off of a -- off of the night stand and a key was taken out of the drawer. And I think in punishing him, we should try to make the punishment proportional to what it is that he actually was found guilty of.

In regard to Your Honor making these sentences consecutive, I would strongly argue against that. I think there was an issue at one point in the trial about the present tense impressions and the allowance of the -- of the -- the call to be let in as a present tense impression. And one of the things the Government argued was this is one continuous event and that's what happened afterwards. And today they want to say well it's broken up and it seemed to depart somewhat from that argument that they made at trial to get the tape in of what Mr. Shink said.

I think at -- at the -- the testimony was that these are minutes apart that these robberies that they found him guilty of occurred; and therefore I would think that the appropriate way to put it so that that would be concurrent.

And I'd ask Your Honor to factor those -- to use those factors -- use those factors in mitigation to the shooting appropriately.

THE COURT: All right, thank you. Mr. King, is there anything that you would like to say before I sentence you in this matter?

THE DEFENDANT: Your Honor, I would just like to say that I'm not the animal that they describe me to be, the Government described me to be. And basically I'm innocent, you know, of the charges that was brought against me but I understand that I was found guilty of lesser charges.

But I'd just like to say that before this happened, I was working and, you know, trying to change my life around. And it's just like when you're working and when people have negative ways of thinking about you, they tend to sometimes alter their thinking of you so they just make that -- who that person that they're saying you is when that wasn't the case. And I've lost things since I've been in, you know, and I have to start all over again when I go back out into the community, and I'm eager to do that because I want to change.

As I said in the PSI Report, I always kept a job and I just ask that you have mercy on me because I'm not the animal that they're trying to say I am.

THE COURT: All right. Thank you, Mr. King. Mr. King, in sentencing you, I am taking into account the seriousness of your conduct in this case. I agree with Ms. Fearnley that this was not just an isolated incident but a series of events of prolonged course of conduct in which you victimized Mr. Shink and you terrorized him.

The jury hung on -- on some counts in this indictment but I -- I heard the testimony at trial and the

law allows me to find by preponderance of the evidence that you committed all these other offenses and I do so find.

I thought Mr. Shink's testimony was very credible and so you got a hung jury on charges including four counts of Simple Assault, First Degree Burglary, Assault with a Dangerous Weapon and Threats. But I find by a preponderance of the evidence that those things did happen.

I credit him entirely. I found him a very compelling and credible witness and I -- I felt that -- that he testified in a very straight forward manner to the best of his ability and bravely, given how scared he is of you.

And so I'm going to accept the Government's sentencing recommendation in this case, particularly in light of the long history of -- of torturing and victimizing Mr. Shink, that he -- he told us about at trial.

I am going to run those robbery counts consecutive for a different reason and that is that I think that without running them consecutive, the total sentence would understate and not be appropriate to the conduct that is at issue before me. And so I think a maximum sentence is appropriate under the circumstances. So I think we need to escort somebody from the Courtroom.

(PAUSE)

THE COURT: Ma'am, you're going to have leave the Courtroom now. You're going to have to leave the Courtroom

now.

(PAUSE)

THE COURT: As to the charge of Threats to Kidnap or Injure a person I will sentence you to 30 months -- 32 months of incarceration. With respect to Destruction of Property I will sentence you to 180 days of incarceration. I'm sorry, I should say 32 months followed by three years of supervised release on the Threats; 180 days on the Destruction of Property.

With respect to the robbery involving the cell phone, that will be 72 months followed by three years of supervised release and on the robbery regarding the key, 72 months followed by three years of supervised release. All these sentences will run consecutive to each other.

I do have to access Court costs and that will be $350, $100 to each felony and $50 for the misdemeanor. With respect to supervised release, I am going to recommend a stay away from Jeffrey Shink during the three years of supervised release. The supervised release will run concurrent but the sentences of incarceration will be consecutive.

All right, Mr. King, you do have a right to appeal your conviction. If you wish to file a notice of appeal that would be due within 30 days and you can talk to Mr. McEachern about that. Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you have any child support obligations in the District of Columbia?

THE DEFENDANT: No.

THE COURT: All right, good luck to you, Mr. King. That is your sentence.

(Thereupon, the proceeding concluded.)

CERTIFICATE OF TRANSCRIBER

I, LAWRENCE R. MARSHALL, an Official Court Transcriber for the Superior Court of the District of Columbia, do hereby certify that in my official capacity I prepared from electronic recordings the proceedings had and testimony adduced in the matter of the United States of America versus John King, Docket Number 2011 CF3 9753, in said Court, on the 24th day of February, 2012.

I further certify that the foregoing 14 pages were transcribed to the best of my ability from said recordings.

In witness whereof, I have subscribed my name this the 25th day of April, 2012.

_____

OFFICIAL COURT TRANSCRIBER

APPENDIX-B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5185 **September Term, 2019**

1:19-mc-00031-UNA

Filed On: October 22, 2019

John King,

Appellant

v.

United States of America,

Appellee

BEFORE: Millett and Pillard, Circuit Judges, and Sentelle, Senior Circuit Judge

ORDER

Upon consideration of the notice of appeal, which contains a request for a certificate of appealability, and appellant's brief and appendix, it is

ORDERED that the request for a certificate of appealability be denied. See 28 U.S.C. § 2253(c). Because appellant has not shown "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling," Slack v. McDaniel, 529 U.S. 473, 484 (2000), no certificate of appealability is warranted. Appellant may not challenge his District of Columbia conviction or sentence in federal court unless his remedy under D.C. Code § 23-110(a) is inadequate or ineffective to test the legality of his detention. See, e.g., Blair-Bey v. Quick, 151 F.3d 1036, 1042-43 (D.C. Cir. 1998); see also D.C. Code § 23-110(g).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Lynda M. Flippin
Deputy Clerk

APPENDIX-C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5185

September Term, 2019

1:19-mc-00031-UNA

Filed On: January 16, 2020

John King,

Appellant

v.

United States of America,

Appellee

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Griffith, Srinivasan, Millett, Pillard, Wilkins, Katsas, and Rao, Circuit Judges; and Sentelle, Senior Circuit Judge

ORDER

Upon consideration of the petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN KING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Civil Action No.: 1:19-mc-00031 (UNA)

MEMORANDUM OPINION

This matter is before the Court on its initial review of petitioner's *pro se* motion for certificate of appealability relating to denials issued by the District of Columbia Court of Appeals, and his application to proceed *in forma pauperis* ("IFP"). However, this Court lacks subject matter jurisdiction. Therefore, petitioner's IFP application will be granted and his motion and this matter will be dismissed.

Petitioner is a prisoner incarcerated at the U.S. Penitentiary located in Florence, Colorado. He was convicted and sentenced in the Superior Court of the District of Columbia. Petitioner seeks a certificate of appealability from this Court, in order to revisit arguments in support of vacating or setting aside his sentence, or voiding the judgment of the trial court. As a general rule, a federal district court lacks jurisdiction to review or interfere with the decisions of a state court. *See Richardson v. District of Columbia Court of Appeals*, 83 F.3d 1513, 1514 (D.C. Cir. 1996) (citing *District of Columbia v. Feldman*, 460 U.S. 462, 476 (1983) and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), *aff'd*, No. 94-5079, 1994 WL 474995 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1150 (1995)).

Furthermore, unlike prisoners convicted in state courts or in a United States district court, "District of Columbia prisoner[s] ha[ve] no recourse to a federal judicial forum unless [it is shown that] the local remedy is inadequate or ineffective to test the legality of his detention." *Garris v. Lindsay*, 794 F.2d 722, 726 (D.C. Cir. 1986) (internal footnote and quotation marks omitted); *see Byrd v. Henderson*, 119 F.3d 34, 36–37 (D.C. Cir. 1997) ("In order to collaterally attack his sentence in an Article III court a District of Columbia prisoner faces a hurdle that a federal prisoner does not."). Petitioner's recourse lies, if at all, in the Superior Court under D.C. Code § 23-110. *See Blair-Bey v. Quick*, 151 F.3d 1036, 1042–43 (D.C. Cir. 1998); *Byrd*, 119 F.3d at 36–7 ("Since passage of the Court Reform Act [in 1970][] . . . a District of Columbia prisoner seeking to collaterally attack his sentence must do so by motion in the sentencing court – the Superior Court – pursuant to D.C. Code § 23-110."). Section 23-110 states:

> [an] application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained by ... any Federal... court if it appears ... that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

D.C. Code § 23-110(g). The local statute "divests federal courts of jurisdiction to hear habeas petitions by prisoners who could have raised viable claims pursuant to § 23-110(a)." *Williams v. Martinez*, 586 F.3d 995, 998 (D.C. Cir. 2009).

Petitioner has not claimed, let alone shown, that his local remedy is inadequate to address his grounds for relief. Thus, this action will be dismissed without prejudice for want of jurisdiction. Petitioner has also filed a motion to appoint counsel, which will be denied as moot. A separate Order accompanies this Memorandum Opinion.

Date: April 16, 2019

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN KING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Civil Action No.: 1:19-mc-00031 (UNA)

ORDER

For the reasons stated in the accompanying Memorandum Opinion, is hereby

ORDERED that petitioner's application to proceed *in forma pauperis* [2] is **GRANTED**; and it is

FURTHER ORDERED that the motion for certificate of appealability [1] and this civil action are **DISMISSED** without prejudice, and it is

FURTHER ORDERED that plaintiff's motion to appoint counsel [3] is **DENIED** as moot.

This is a final appealable Order. *See* Fed. R. App. P. 4(a).

SO ORDERED.

United States District Judge

Date: April 16, 2019

District of Columbia
Court of Appeals

12/04/2013

No. 12-CF-295 & 12-CO-1598

JOHN R. KING,

Appellant,

CF3-9753-11

v.

UNITED STATES,

Appellee.

Duane B. Delaney, Clerk
Superior Court of the District of Columbia

Dear Mr. Delaney:

The attached certified copy of the Decision in this case, pursuant to Rule 41(a) of the Rules of this Court, constitutes the mandate issued this date.

JULIO A. CASTILLO
Clerk of the Court

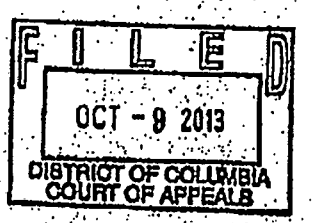
DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 12-CF-295 and 12-CO-1598

JOHN R. KING, APPELLANT,

v.

UNITED STATES, APPELLEE.



Appeals from the Superior Court
of the District of Columbia
(CF3-9753-11)

(Hon. Florence Y. Pan, Trial Judge)

(Submitted September 27, 2013 Decided October 9, 2013)

Before GLICKMAN, *Associate Judge*, and NEBEKER and STEADMAN, *Senior Judges*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Appellant, John R. King, was found guilty of two counts of robbery, one count of destruction of property, and one count of making threats following a series of events that took place between him and Jeffrey Shank, the complainant witness, in the early morning hours of May 26, 2011. Appellant raises three arguments for reversal on appeal. For the reasons set forth below, we affirm.

1. Double Jeopardy Clause: First, appellant argues that the two convictions for robbery must merge into one under the Fifth Amendment's Double Jeopardy Clause. "There is, however, no double jeopardy bar to 'separate and cumulative punishment for separate criminal acts,' even if those separate acts do happen to violate the same criminal statute." *Ellison v. United States*, 919 A.2d 612, 614-15 (D.C. 2007) (quoting *Brown v. United States*, 795 A.2d 56, 63 (D.C. 2002)). In such circumstances, we employ a "fact-based" analysis to determine whether "separate criminal acts" have occurred. *Id.* at 615. "[C]riminal acts are considered separate when there is an appreciable length of time 'between the acts that constitute the two offenses *or* when a subsequent criminal act was not the result of

the original impulse, but of a fresh one.'" *Id.* (footnote omitted) (quoting *Sanchez-Rengifo v. United States*, 815 A.2d 351, 354 (D.C. 2002)) (emphasis added in *Ellison*). Thus, among the factors to consider is "any evidence that the defendant may have reformulated his intent." *Gardner v. United States*, 698 A.2d 990, 1003 (D.C. 1997). An appreciable length of time between two criminal acts may result in their being considered distinct, even if that period is "quite brief." *Id.*

Appellant claims that the two robbery charges are "identical," save for the word "key" and "cell phone."[1] This assertion ignores the fact that the underlying motivations for the taking of each item were distinct and that the second robbery occurred only after the appellant had left the site of the first robbery for a period of time and subsequently returned to commit the second robbery.

Both parties agree that appellant entered Shank's bedroom at one time and took Shank's cellphone as a form of payment for the debt Shank owed. After returning to the living room for an undisclosed but distinct period, appellant re-entered Shank's bedroom, took an apartment key, tested the key in the front door lock to make sure that it worked, and told Shank not to close doors. Thus, appellant's desire to have access to the apartment whenever he wanted was distinct from his desire to keep the cellphone as security for Shank's debt; each instance of robbery was committed for a different purpose. *See Ewing v. United States*, 36 A.3d 839, 850-51 (D.C. 2012) (upholding two counts of arson against the defendant when he set two fires at two different times in the victim's apartment and noting that each fire was set for a different purpose). Further, it was appellant who provided the breaks between taking Shank's cellphone, returning to the living room, and then returning to the bedroom and taking Shank's apartment key. Although the amount of time spent in the living room is unknown, it was enough time for appellant to have a fresh impulse to return, take the key, and test it in the lock. *See Gardner*, *supra*, 698 A.2d 1002-03 (conviction of two separate counts to rape committed in alley where appellant, after first rape, left alley, and shortly returned to commit second rape was no Double Jeopardy violation). The two

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[1] Appellant also argues that the unit of prosecution for robbery is the number of victims because this court has held that robbery, as defined in D.C. Code § 22-2801 (2012 Repl.), is a "crime against the person." Appellant has failed, however, to point to any case law in this jurisdiction that holds multiple counts for "a crime against the person" automatically violate the Double Jeopardy Clause, even where separate criminal acts are involved.

robberies here were not a single offense and the two separate convictions did not violate the Double Jeopardy Clause.

2. Deadlocked jury instructions: Appellant's second argument is that the trial court committed error in denying his motions for a mistrial when the jury was instructed to continue deliberating several times after they indicated they were unable to reach a verdict. Responses to indications of a jury deadlock are reviewed for an abuse of discretion. *Barbett v. United States*, 54 A.3d 1241, 1245 (D.C. 2012). "It usually is not coercive for a judge to respond initially to a deadlock note simply by asking the jury in neutral careful terms to continue deliberating . . . ." *Fortune v. United States*, 65 A.3d 75, 86 (D.C. 2013).

In response to the first inquiry, where the jury asked how long they were required to deliberate, the trial court gave a proper response, free of coercion, which indicated there was no set timeframe. As the government correctly states, this initial note did not indicate the jury was deadlocked. After the jury provided a second note indicating that they were at a deadlock, the trial court gave an initial instruction, mirroring Criminal Jury Instructions 2.601.I.[2] Such an instruction is not coercive. *See Nixon v. United States*, 730 A.2d 145, 154-55 (D.C. 1999). The jury sent only one additional note in regards to a deadlock—thereby making it the second indication that they were at an impasse. In response, the jurors were brought into the courtroom and, in response to an inquiry by the trial court, reported that they had reached unanimous verdicts on three of the counts. At this point, the jury was given a *Winters* instruction on the remaining counts as provided in Criminal Jury Instructions 2.601,III.B. Whatever coercion such a charge created was ineffective; further deliberation yielded no verdicts on the remaining nine counts besides one that the jury had forgotten to report the day before. The trial court committed no abuse of discretion in its careful responses to the jury's several notes. *See Williams v. United States*, 52 A.3d 25, 42-50 (D.C. 2012); *Van Dyke v.*

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[2] "Ladies and gentlemen, I calculate that you've been deliberating for approximately 6.75 hours in this case before sending us this note. This is a case with a lot of counts, a lot of things for you to consider, and so I don't think that that's an unusual amount of time for a jury to be deliberating in a case like this. So, I'm going to instruct you to continue deliberations at this point and not—and just keep deliberating, because I don't think this is an undue amount of time, given the complexity of the charges and the number of counts in this case. Alright. Thank you very much. And I thank you for your diligence and your deliberations. I'll ask you to keep deliberating."

United States, 27 A.3d 1114, 1122-30 (D.C. 2011).

3. Sentencing and Sixth Amendment: Appellant's third and final argument is that the trial court violated his Sixth Amendment rights by imposing a maximum sentence for each charge and denying his motion for reconsideration of sentencing when it found, by a preponderance of the evidence, that appellant had committed the remaining charges on which the jury could not agree. This court has recognized that the trial court has broad discretion when determining a defendant's sentence and will not reduce a sentence within statutory limits unless there is a "fundamental defect." *Yemson v. United States*, 764 A.2d 816, 819 (D.C. 2001) (quoting *Johnson v. United States*, 628 A.2d 1009, 1015 (D.C. 1993)). Appellant cites *United States v. Watts*, 519 U.S. 148, 157 (1997) (per curiam), which stated that "[a] judge violates a defendant's Sixth Amendment rights by making findings of fact that either ignore or countermand those made by the jury and then relies on these factual findings to enhance the defendant's sentence." *Watts* is of no help to appellant, because the trial court did not *ignore* or *countermand* the jury's findings—the jury was simply unable to find that appellant committed the remaining crimes beyond a reasonable doubt. Instead, the trial court found by a preponderance of the evidence that appellant had committed those crimes and merely used that determination to sentence him within the guidelines' allowable limits. Binding authority establishes that such use does not violate the Sixth Amendment or Due Process. As *Watts* itself squarely held, "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, . . . so long as that conduct has been proved by a preponderance of the evidence." 519 U.S. at 156-57; *see also Greene v. United States*, 571 A.2d 218, 220 (D.C. 1990).

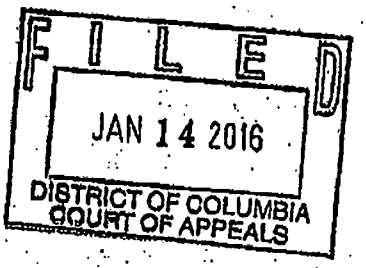
Accordingly, Appellant's conviction is hereby AFFIRMED.

ENTERED BY DIRECTION OF THE COURT:

Julio A. Castillo

JULIO A. CASTILLO
Clerk of the Court

District of Columbia
Court of Appeals



Nos. 12-CF-295 & 12-CO-1598

JOHN R. KING,

Appellant,

v.

CF3-9753-11

UNITED STATES,

Appellee.

BEFORE: Washington, Chief Judge; Glickman*, Fisher, Blackburne-Rigsby, Thompson, Beckwith, and Easterly, Associate Judges; Nebeker* and Steadman*, Senior Judge.

ORDER

On consideration of appellant's motion to appoint counsel, and appellant's petition for rehearing or rehearing *en banc*, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing *en banc*, it is

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

FURTHER ORDERED that appellant's motion to appoint counsel is denied as moot. *See* Qualls v. United States, 718 A.2d 1039 (D.C. 1998). Appellant may file a *pro se* petition for writ of certiorari in the Supreme Court within 90 days from the date of this order.

PER CURIAM

Associate Judge McLeese did not participate in these appeals.

APPENDIX-D

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

United States of America
Vs.

JOHN R KING
DOB:05/17/1980

JUDGMENT IN A CRIMINAL CASE
(Incarceration)

Case No. 2011 CF3 009753
PDID No. 479205
DCDC No.

THE DEFENDANT HAVING BEEN FOUND GUILTY ON THE FOLLOWING COUNT(S) AS INDICATED BELOW:

Count	Court Finding	Charge
4	Jury Trial Guilty	Threat to Kidnap or Injure a Person
5	Jury Trial Guilty	Destruction of Property less than $1000
8	Jury Trial Guilty	Robbery
9	Jury Trial Guilty	Robbery

SENTENCE OF THE COURT (Amended)

Count 4 Threat to Kidnap or Injure a Person Sentenced to 32 month(s) incarceration, 3 year(s) supervised release., $100.00 VVCA, VVCA Due Date 10/24/2027

Count 5 Destruction of Property less than $1000 Sentenced to 180 day(s) incarceration, $50.00 VVCA, VVCA Due Date 10/24/2027

Count 8 Robbery Sentenced to 72 month(s) incarceration, 3 year(s) supervised release, $100.00 VVCA, VVCA Due Date 10/24/2027

Count 9 Robbery Sentenced to 72 month(s) incarceration, 3 year(s) supervised release, $100.00 VVCA, VVCA Due Date 10/24/2027

The defendant is hereby committed to the custody of the Attorney General to be incarcerated for a total term of 176 Months Plus 180 Days. MANDATORY MINIMUM term of _____ applies.
Upon release from incarceration, the Defendant shall be on supervised release for a term of: 3 Years
The Court makes the following recommendations to the Bureau of Prisons/Department of Corrections:
VVCA is to be deducted from prison funds.

Total costs in the aggregate amount of $ 350.00 have been assessed under the Victims of Violent Crime Compensation Act of 1996, and ☐ have ☑ have not been paid. ☑ Appeal rights given ☐ Gun Offender Registry Order Issued
☑ Advised of right to file a Motion to Suspend Child Support Order ☐ Sex Offender Registration Notice Given
☐ Domestic violence notice given prohibiting possession/purchase of firearm or ammunition
☑ Restitution is part of the sentence and judgment pursuant to D.C. Code § 16-711. ☐ Voluntary Surrender

2/27/2012 Nunc Pro Tunc 02/24/2012
Date

FLORENCE Y PAN
Judge

Certification by Clerk pursuant to Criminal Rule 32(d)

2/27/2012 Nunc Pro Tunc 02/24/2012
Date

Aaron Morris
Deputy Clerk

Received by DUSM: FA/G Badge#: 4500 Signature:
Printed Name

Date: 2/27/12 Time: 1115

Case: 2011 CF3 009753
DC044418051

fail.doc

APPENDIX-E

CLERK OFFICE OF CHAMBERS OF CHIEF JUDGE OF THE D.C. SUPERIOR COURT

COMES NOW JOHN KING PLEADING WITH THIS HONORABLE JUDGE TO APPOINT ME COUNSEL FOR A 23-110 AND ASSIST ME IN CHALLEGE MY CONSTITUTIONAL VIOLATION OF MY FIFTH AND SIXTH AMENDMENT RIGHT AS MY SENTENCE HAS BEEN DEEMEND UNCONSTITUTIONAL BY THE SUPREME COURT IN LIGHT OF U.S. VS. HAYMOND 139 S.CT 2369 204 L.ED 2D 897 (201 ARGUED FEB 26, 2019 - DECIDED JUNE 24, 2019. A LITTLE ABOUT MY CASE I WA TRIED IN FRONT OF D.C. JUDGE PAN AND WAS FOUND GUILTY OF TWO COUNTS OF ROBBERY AND ONE COUNT OF FELONY THREATS AND DESTRUCTION OF PROPERTY LESS TH $100. MY SENTENCE WAS ENHANCED BASED ON JUDGE PAN FINDINGS BY A PREPONDE OF THE EVIDENCE THAT I COMMITED THE CHARGES FROM WHICH THE JURY WAS UNABLE TO FIND BEYOND A REASONABE DOUBT AND WAS ACQUITTED OF. I HAVE ASK JUDGE PAN IN MANY MOTIONS TO APPOINT ME COUNSEL AS I DO NOT UNDERSTAN THE LAW TO FILE A PRO SE MOTION SUCESSFULLY AND I AM INDIGENT AND CANN AFFORD COUNSEL AS MY PRISON ACCOUNT STANDS AT $0.00 DOLLARS. AS IT STANDS HONORABLE CHIEF JUDGE I AM INDIGENT AND BEING DEPRIVED OF MY CONSTITUTIONAL RIGHT TO AN ATTORNEY WHICH IS A VIOLATION OF MY DUE PROCESS. I AM BEGGING FOR YOUR HELP AS I AM DOING A ILLEGAL SENTE THAT THE SUPREME COURT DEEMED UNCONSTITUTIONAL. I ASK THAT THIS HONORABLE CHIEF JUDGE APPOINT ME COUNSEL TO ASSIST ME WITH MY 23-110 AND WRIT OF CERTIORARI PLEASE. THANK YOU AND HAVE A BLESS DAY.

Superior Court of the District of Columbia
Washington, D.C. 20001

Chambers of
Florence Y. Pan
Judge

(202) 879-1880
(202) 879-1837 Fax

January 22, 2020

John King
Register Number 35043-007
Administrative United States Penitentiary
P.O. Box 1002
Thomson, IL 61285

Dear Mr. King,

Judge Pan is in receipt of your letter, received in chambers, on January 22, 2020. Judge Pan denied your motion for appointment of counsel on January 6, 2020. It appears that the order, however, was mailed to a facility in which you were previously held. The Court now attaches to this letter a copy of the January 6, 2020, order. You may reach out directly to the Criminal Division Clerks' Office if you need assistance with the procedure to file any future *pro se* motion.

Yours truly,

Matthew Bryden
Career Clerk for Judge Florence Pan

Copies to:

Howard McEachern, Esq.
Counsel for Defendant

United States Attorney's Office

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION – FELONY BRANCH

UNITED STATES OF AMERICA	:	Criminal Number: 2011 CF3 9753
v.	:	Judge Florence Y. Pan
JOHN KING	:	Closed Case

ORDER

This matter comes before the Court on consideration of defendant's letter requesting the appointment of counsel, received December 10, 2019 ("Def. Letter"). The Court construes defendant's letter as a motion for appointment of counsel. The Court has considered defendant's motion, the relevant law, and the entire record. For the following reasons, defendant's request for appointment of counsel is denied.

PROCEDURAL HISTORY

On December 15, 2011, a jury found defendant guilty of one count of threats, one count of malicious destruction of property, and two counts of robbery. *See* Jury Verdict Form.[1] On February 24, 2012, defendant was sentenced to 182 months' incarceration, followed by three years of supervised release, and payment of $350.00 to the Victims of Violent Crime Compensation Act fund. *See* Judgment and Commitment Order.

On March 6, 2012, defendant filed a timely Notice of Appeal. *See* First Notice of Appeal. On June 24, 2012, defendant filed a Motion for Reconsideration of Sentencing, which asked the Court to reduce defendant's sentence. The Court denied defendant's motion for reconsideration on August 10, 2012.

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[1] The jury found defendant not guilty of one count of kidnapping while armed, but hung on the remaining counts: four counts of assault; one count of assault with a dangerous weapon; one count of first degree burglary; and one count of threats. *See* Jury Verdict Form. The government represented that it would not proceed with the remaining counts at a status hearing on January 10, 2012. *See* Docket Entry, dated January 10, 2012.

On September 6, 2012, defendant filed a second Notice of Appeal, appealing the Court's Order denying defendant's motion for reconsideration of sentence. *See* Notice of Appeal, dated September 6, 2012. On October 9, 2013, the District of Columbia Court of Appeals affirmed defendant's conviction, finding that all of defendant's arguments were without merit. *See* Memorandum Opinion and Judgment, Nos. 12-CF-295 and 12-CO-1598 (D.C. October 9, 2013). Relevant to the instant motion is the Court of Appeals' holding that the trial court did not violate defendant's Sixth Amendment right by finding, by a preponderance of the evidence, that defendant had committed the charges on which the jury hung, and using that finding to sentence defendant within the applicable guideline ranges. *See id.* at 3.[2]

On December 10, 2019, the Court received a handwritten letter from defendant, requesting that the Court appoint him counsel to assist him with filing a motion under D.C. Code Section 23-110. *See* Def. Letter. Specifically, defendant asserts that the Supreme Court's recent holding in *United States v. Haymond*, 139 S. Ct. 2369 (2019), demonstrates that his sentence violates the Fifth and Sixth Amendments of the United States Constitution. *See* Def. Letter.

APPLICABLE LEGAL STANDARDS

Courts must appoint counsel to represent indigent criminal defendants in cases where "a person faces a loss of liberty and the Constitution or any other law requires the appointment of counsel." *See* D.C. Code § 11-2602. The Constitution does not require the appointment of counsel to defendants pursuing post-conviction relief. *See, e.g., Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) ("We have never held that prisoners have a constitutional right to counsel when

[2] The Court of Appeals also determined that (1) defendant's two robbery convictions do not violate the double jeopardy clause because they had different motivations and were separated by the passing of time; and (2) the trial court did not abuse its discretion in providing the "deadlocked" jury instructions because the instructions were not coercive. Defendant filed a Petition for Rehearing En Banc, and a Motion for Appointment of Counsel, which were both denied by the Court of Appeals on January 14, 2016.

mounting collateral attacks upon their convictions, . . . [and] the right to appointed counsel extends to the first appeal of right, and no further."); *Jenkins v. United States*, 548 A.2d 102, 104 (D.C. 1988) ("generally speaking there is no constitutional right to appointment of counsel to develop and pursue post-conviction relief . . . . Nor is there commonly a statutory basis entitling a criminal defendant whose conviction has been affirmed on direct appeal to have counsel appointed to pursue collateral relief."). In addition, because "a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, [it follows that] he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process." *See Pennsylvania v. Finley*, 481 U.S. at 555. Although appointment of counsel is not mandatory, the law requires that the Joint Committee on Judicial Administration maintain a "plan for furnishing representation to any person in the District of Columbia who is financially unable to obtain adequate representation . . . who is . . . seeking collateral relief as provided in . . . Section 23-110 of the District of Columbia Official Code (remedies on motion attacking sentence)." *See* D.C. Code § 11-2601(3)(A).

The decision to appoint counsel to defendants interested in pursuing post-conviction relief through D.C. Code § 23-110 is left to the trial court's sound discretion. *See Jenkins*, 548 A.2d at 105 ("Since neither the Constitution nor any other law requires appointment of counsel for purposes of pursuing § 23-110 relief, D.C. Code § 11-2602 makes clear that any appointment of counsel for that purpose is entrusted to the sound discretion of the trial court."); D.C. Code § 23-110(a) ("A prisoner in custody under sentence of the Superior Court claiming the right to be released upon the ground that (1) the sentence was imposed in violation of the Constitution of the United States or the laws of the District of Columbia, (2) the court was without jurisdiction to

impose the sentence, (3) the sentence was in excess of the maximum authorized by law, (4) the sentence is otherwise subject to collateral attack, may move the court to vacate, set aside, or correct the sentence."). Trial courts should use an "interests of justice" standard to determine whether it is appropriate to exercise their discretion and appoint counsel to assist defendants with Section 23-110 motions. *See Jenkins*, 548 A.2d at 105 ("for want of any more enlightened formulation, and in recognition of the appropriate and workable standard specified under federal law, we construe § 11-2601(3)(A) to incorporate, implicitly, an "interests of justice" standard for trial court scrutiny of a prisoner's request for legal assistance.").

In general, trial courts should appoint counsel in cases where they determine that the defendant is entitled to a hearing on the Section 23-110 motion. *See Jenkins*, 548 A.2d 105-06 ("[U]sually the 'interests of justice' will be served when appointments of counsel under § 11-2601 (3) (A) are limited to . . . assistance of prisoners entitled to hearings pursuant to § 23-110 (c) based on grounds they have proffered by *pro se* motion."). In evaluating whether a Section 23-110 motion warrants a hearing, trial courts are guided by the principle that they should only deny a motion without a hearing if they can say "that under no circumstances could the petitioner establish facts warranting relief." *See Fontaine v. United States*, 411 U.S. 213, 215 (1973). Further, trial courts may decline to hold a hearing on a Section 23-110 motion in the following categories of cases: (1) "palpably incredible (though not merely 'improbable') claims can be summarily handled;" (2) "a motion which fails to state a claim can be denied without a hearing;" and (3) "vague and conclusory allegations do not trigger § 23-110's hearing requirement." *See Pettaway v. United States*, 390 A.2d 981, 984 (D.C. 1978) (internal quotations omitted). In light of these criteria that inform a trial court's analysis, a defendant

must "proffer the grounds for collateral relief at the time counsel is requested." *See Jenkins*, 548 A.2d at 106.

ANALYSIS

The Court declines to appoint counsel to assist defendant in preparing a Section 23-110 motion, based on his claim that his sentence violates the Fifth and Sixth Amendments under *United States v. Haymond*, 139 S. Ct. 2369 (2019). Defendant's claim lacks merit because *Haymond* does not change the law applicable to this case, and the facts of *Haymond* are distinguishable.

Haymond held that a federal law governing the revocation of supervised release violated the Fifth and Sixth Amendments because it required judges, using facts found without the aid of a jury, to impose a mandatory minimum sentence above the minimum sentence prescribed by a defendant's original conviction. *See id.* at 2378. The defendant in *Haymond* was convicted of possessing child pornography, which authorized the trial judge to impose a prison term between zero and 10 years, and a period of supervised release between 5 years and life. *See id.* at 2373. The judge sentenced the defendant to 38 months in prison, followed by 10 years of supervised release. *See id.* After the defendant completed his prison sentence and was on supervised release, the government discovered additional images of child pornography on the defendant's cell phone and computer. *See id.* at 2374. The government sought to revoke the defendant's supervised release and to secure a new and additional prison sentence. *See id.* Using the preponderance of the evidence standard, the judge found that the defendant knowingly downloaded and possessed 13 of the newly discovered images of child pornography. *See id.* Under 18 U.S.C. § 3583(k), the judge's finding required him to impose an additional sentence of at least 5 years, and up to life, without regard to the length of the prison term authorized by the

initial crime of conviction. This provision removed the judge's customary discretion in imposing a sentence after revocation of supervised release by mandating a new term of at least five years. And it did so without requiring a finding by a jury, beyond a reasonable doubt. *See id.*

Relying on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013), the Supreme Court held that Section 3583(k) was unconstitutional. *See Haymond*, 139 S. Ct. at 2378. The Supreme Court applied the holdings in *Apprendi* and *Alleyne* that neither the minimum sentence nor maximum sentence authorized by a conviction may be increased based on facts that were not found by a jury. *See id.* at 2378.

The facts of *Haymond* do not apply to defendant here, who has not been resentenced for post-conviction conduct, based on facts not found by a jury. Moreover, "nothing in *Haymond* suggests any consideration of the propriety of a sentencing court's consideration of acquitted conduct." *See Roman-Oliver v. Joyner*, No. 7:19-CV-50, 2019 U.S. Dist. LEXIS 211704, at *7 (E.D. Ky. Dec. 9, 2019). "Rather, the *Haymond* Court explicitly clarified that 'at the initial sentencing hearing, . . . a jury need not find every fact . . . that may affect the judge's exercise of discretion within the range of punishments authorized by the jury's verdict.'" *See id.* (citing *Haymond*, 139 S. Ct. at 2380).

Defendant may be asserting that his sentence violates the spirit of *Apprendi* and *Alleyne* because the Court sentenced him at the high end of the applicable sentencing ranges, based on the Court's finding that he also was guilty of the counts on which the jury hung. But "long-standing precedents of the Supreme Court . . . establish that a sentencing judge may consider uncharged or even acquitted conduct in calculating an appropriate sentence, so long as that conduct has been proved by a preponderance of the evidence and the sentence does not exceed the statutory maximum for the crime of conviction." *See United States v. Settles*, 530 F.3d 920,

923 (D.C. Cir. 2008) (emphasis added); *United States v. Booker*, 543 U.S. 220, 233 (2005) (same). Indeed, the Court of Appeals rejected the same argument defendant appears to make here when it affirmed the trial court's denial of defendant's motion to reconsider sentencing. *See* Memorandum Opinion and Judgment, Nos. 12-CF-295 and 12-CO-1598, at 3 (citing *United States v. Watts*, 519 U.S. 148, 156-57 (1997)).

The Court therefore declines to appoint defendant counsel to file a Section 23-110 motion because he seeks to file "a motion which fails to state a claim" that would "be denied without a hearing." *See Pettaway v. United States*, 390 A.2d 981, 984 (D.C. 1978).

Accordingly, it is this 6th day of January, 2020, hereby

ORDERED that defendant's motion for appointment of counsel is **DENIED.**

SO ORDERED.

Florence Pan
Judge Florence Y. Pan
Superior Court of the District of Columbia

Copies to:

John King
Reg. No. 35043-007
U.S.P. Hazelton
P.O. Box 2000
Bruceton Mills, W.V. 26525

Special Proceedings Division
United States Attorney's Office
555 4th Street, N.W.
Washington, D.C. 20530

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION – FELONY BRANCH

UNITED STATES OF AMERICA	:	Criminal Number: 2011 CF3 9753
v.	:	Judge Florence Y. Pan
JOHN KING	:	Closed Case

ORDER

This matter comes before the Court upon consideration of defendant's letter requesting the appointment of counsel, dated May 5, 2017 ("5/5/2017 Letter"); the Court's response requesting additional information from defendant, dated May 24, 2017; and defendant's second letter clarifying the legal and factual basis for his request, dated June 16, 2017 ("6/16/2017 Letter"). The Court construes defendant's letters as a motion for appointment of counsel. The Court has considered defendant's motion, the relevant law, and the entire record. For the following reasons, defendant's request for appointment of counsel is denied.

PROCEDURAL HISTORY

On December 15, 2011, a jury found defendant guilty of one count of threats, one count of malicious destruction of property, and two counts of robbery. *See* Jury Verdict Form.[1] On February 24, 2012, defendant was sentenced to 182 months' incarceration, followed by three years of supervised release, and payment of $350.00 to the Victims of Violent Crime Compensation Act fund. *See* Judgment and Commitment Order.

Throughout the course of these proceedings, defendant has had the assistance of four different court-appointed attorneys. On May 26, 2011, at defendant's presentment, Patricia Cresta-Savage, Esq., was appointed to represent defendant King. *See* CJA Entry of Appearance

[1] The jury found defendant not guilty of one count of kidnapping while armed, but hung on all other counts; the government represented that it would not proceed with the remaining counts at a status hearing on January 10, 2012. *See* Docket Entry, dated January 10, 2012.

Form, May 26, 2011. On September 12, 2011, Ms. Cresta-Savage filed a Motion to Withdraw as Counsel for defendant, in which she asserted that "communication between Counsel and Mr. King has completely broken down," and that defendant "is unhappy and unwilling to have Counsel continue to represent him." *See* First Mot. to Withdraw ¶¶ 14-17. The Court granted Ms. Cresta-Savage's motion to withdraw, and continued the case for ascertainment of counsel.

On September 14, 2011, Dorsey Jones, Esq., was appointed as counsel for defendant. Less than two weeks later, on September 27, 2011, Mr. Jones filed an Emergency Motion to Withdraw as Counsel, asserting that at his first meeting with defendant, "the meeting disintegrated," and defendant told counsel to file a motion to withdraw from the case, because defendant "does not trust counsel and does not believe that counsel will effectively represent him." *See* Emergency Mot. to Withdraw ¶¶ 2-5. On October 18, 2011, the Court granted Mr. Jones's motion to withdraw as counsel, and appointed Howard McEachern, Esq., to represent defendant *nunc pro tunc* to October 7, 2011.

Mr. McEachern represented defendant through defendant's trial and at his sentencing on February 24, 2012. He also filed a timely Notice of Appeal on defendant's behalf. *See* Notice of Appeal, dated March 6, 2012. In addition, Mr. McEachern assisted defendant in filing a Motion for Reconsideration of Sentencing, which asked the Court to reduce defendant's sentence. *See* Def. Mot. for Reconsideration, dated June 24, 2012. On August 10, 2012, the Court denied defendant's motion.

On September 6, 2012, defendant's fourth appointed counsel, Marc Resnick, Esq., filed a second Notice of Appeal on defendant's behalf. *See* Notice of Appeal, dated September 6, 2012 (appealing the Court's August 10, 2012, order denying defendant's motion for reconsideration of sentence). On October 9, 2013, the District of Columbia Court of Appeals affirmed defendant's

conviction, upon finding that all of defendant's arguments were without merit. *See* Memorandum Opinion and Judgment, Nos. 12-CF-295 and 12-CO-1598 (D.C. October 9, 2013) *(per curiam)*.[2] Defendant filed a Petition for Rehearing En Banc, and a Motion for Appointment of Counsel, which were both denied by the Court of Appeals on January 14, 2016.

On May 5, 2017, defendant mailed a handwritten letter to the Court, requesting that the Court appoint him counsel to assist him with filing two motions: (1) "a section 23-110 Motion against [Trial] Counsel;" and (2) "a 2241: Motion for Ineffective Assistance [of Appellate Counsel]." *See* 5/5/2017 Letter. On May 24, 2017, the Court, through a staff member, wrote back to defendant, asking him to provide more information about the nature of his claims against his two counsels, and the factual basis for the motions that he wishes to file, so that the Court could determine whether it would be appropriate to appoint counsel to assist defendant with filing those motions.

On June 16, 2017, defendant sent the Court a second letter, which explains the legal and factual basis for his request for the appointment of counsel. In the letter, defendant asserts that during his trial, Officer Paul Marshall presented testimony that contradicted other evidence in the record, concerning the location of the complaining witness's cell phone and keys at the time that Officer Marshall responded to the scene of the incident. *See* 6/16/17 Letter ¶¶ 3-4. Defendant asserts that Officer Marshall testified that he searched defendant, and found the complaining witness's cell phone and house key on defendant's person; but other evidence established that the cell phone and keys were in the complaining witness's home. *Id.* Defendant represents that he

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[2] The Court of Appeals determined that (1) defendant's two robbery convictions do not violate the double jeopardy clause because they had different motivations and were separated by the passing of time; (2) the trial court did not abuse its discretion in providing the "deadlocked" jury instructions because the instructions were not coercive; and (3) the trial court did not violate defendant's Sixth Amendment right by considering at sentencing its finding, by a preponderance of the evidence, that defendant had committed the charges on which the jury hung, and using that finding to sentence defendant within the applicable guideline ranges.

informed his trial attorney, Mr. McEachern, of the inconsistent testimony and requested that Mr. McEachern recall Officer Marshall to "rebut his testimony." *See* 6/16/17 Letter ¶ 5. Mr. McEachern failed to recall Officer Marshall, allegedly claiming that he "forgot" to do so. *See* 6/16/17 Letter ¶ 6. Defendant asserts that his counsel's failure to recall Officer Marshall "to properly address the mentioned discrepancy" is the reason that defendant was convicted at trial. Defendant requests that the Court appoint counsel to assist him in preparing a motion claiming ineffective assistance of counsel, based on the foregoing allegations. *See* 6/16/17 Letter ¶ 8.[3]

APPLICABLE LEGAL STANDARDS

Courts must appoint counsel to represent indigent criminal defendants in cases where "a person faces a loss of liberty and the Constitution or any other law requires the appointment of counsel." *See* D.C. Code § 11-2602. The Constitution does not require the appointment of counsel to defendants pursuing post-conviction relief. *See, e.g., Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions,...[and] the right to appointed counsel extends to the first appeal of right, and no further."); *Jenkins v. United States*, 548 A.2d 102, 104 (D.C. 1988) ("generally speaking there is no constitutional right to appointment of counsel to develop and pursue post-conviction relief... Nor is there commonly a statutory basis entitling a criminal defendant whose conviction has been affirmed on direct appeal to have counsel appointed to pursue collateral relief."). In addition, because "a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion

[3] Defendant's letter fails to provide any support for his previously expressed intention to file a motion alleging the ineffectiveness of his appellate counsel. The Court therefore presumes that defendant no longer requests the appointment of counsel to file such a motion.

of the appellate process." *See Pennsylvania v. Finley*, 481 U.S. at 555. Although appointment of counsel is not mandatory, the law requires that the Joint Committee on Judicial Administration maintain a "plan for furnishing representation to any person in the District of Columbia who is financially unable to obtain adequate representation...who is... seeking collateral relief as provided in...Section 23-110 of the District of Columbia Official Code (remedies on motion attacking sentence)." *See* D.C. Code § 11-2601(3)(A).

The decision to appoint counsel to defendants interested in pursuing post-conviction relief through D.C. Code § 23-110 is left to the trial court's sound discretion. *See Jenkins*, 548 A.2d at 105 ("Since neither the Constitution nor any other law requires appointment of counsel for purposes of pursuing § 23-110 relief, D.C. Code § 11-2602 makes clear that any appointment of counsel for that purpose is entrusted to the sound discretion of the trial court."); D.C. Code § 23-110(a) ("A prisoner in custody under sentence of the Superior Court claiming the right to be released upon the ground that (1) the sentence was imposed in violation of the Constitution of the United States or the laws of the District of Columbia, (2) the court was without jurisdiction to impose the sentence, (3) the sentence was in excess of the maximum authorized by law, (4) the sentence is otherwise subject to collateral attack, may move the court to vacate, set aside, or correct the sentence."). Trial courts should use an "interests of justice" standard to determine whether it is appropriate to exercise their discretion and appoint counsel to assist defendants with § 23-110 motions. *See Jenkins*, 548 A.2d at 105 ("for want of any more enlightened formulation, and in recognition of the appropriate and workable standard specified under federal law, we construe § 11-2601(3)(A) to incorporate, implicitly, an "interests of justice" standard for trial court scrutiny of a prisoner's request for legal assistance.").

In general, trial courts should appoint counsel in cases where they determine that the defendant is entitled to a hearing on the § 23-110 motion. *See Jenkins*, 548 A.2d 105-06 ("In sum, we do not say that the criteria for entitlement to a hearing and to appointment of counsel will always, as a matter of law, produce the same positive or negative result, but, we do believe that usually the "interests of justice" will be served when appointments of counsel under § 11-2601 (3) (A) are limited to, but assured for, assistance of prisoners entitled to hearings pursuant to § 23-110 (c) based on grounds they have proffered by *pro se* motion."). In evaluating whether a § 23-110 motion warrants a hearing, trial courts are guided by the principle that they should only deny a motion without a hearing if they can say "that under no circumstances could the petitioner establish facts warranting relief." *See Fontaine v. United States*, 411 U.S. 213, 215 (1973). Further, trial courts may decline to hold a hearing on a § 23-110 in the following categories of cases: (1) "palpably incredible (though not merely 'improbable') claims can be summarily handled;" (2) "a motion which fails to state a claim can be denied without a hearing;" and (3) "vague and conclusory allegations do not trigger § 23-110's hearing requirement." *See Pettaway v. United States*, 390 A.2d 981, 984 (D.C. 1978) (internal quotations omitted). In light of these criteria that inform a trial court's analysis, a defendant must "proffer the grounds for collateral relief at the time counsel is requested." *See Jenkins*, 548 A.2d at 106.

ANALYSIS

The Court declines to appoint counsel to assist defendant in preparing his § 23-110 motion, claiming ineffective assistance of trial counsel. Defendant asserts that his trial counsel was ineffective in failing to recall Officer Marshall, in order to highlight and rebut a discrepancy in that officer's testimony concerning the location of the complaining witness's cell phone and house key; and that this alleged error resulted in defendant's conviction and sentence. This

Court presided over defendant's trial, and does not believe that defendant's claim is substantial enough to warrant the appointment of counsel at this time.

Although the Court does not question defendant's good faith assertion that the alleged error of his trial counsel caused defendant to be convicted at trial, the Court disagrees with defendant's assessment of the evidence, and therefore finds that it is not in the interests of justice to appoint counsel. The government's case at defendant's trial relied primarily on the testimony of two civilian witnesses, Jeffrey Shank and Jacqueline Hopkins. Both of these witnesses testified that defendant broke in Mr. Shank's apartment, threatened Mr. Shank, struck Mr. Shank with his fist and with a pole, and took Mr. Shank's phone and house key. Although it is true that Mr. Shank testified that the cell phone was later found under the couch in his living room (contrary to Officer Marshall's testimony), the witnesses were consistent in their testimony that the house key was found on defendant's person by the police. The minor discrepancy regarding the location of the cell phone was not a significant issue in the case. The linchpin of the government's case was the credibility of Mr. Shank and Ms. Hopkins, who presented compelling, mutually corroborating testimony about defendant's actions in breaking down the door, threatening Mr. Shank, beating him, and taking his belongings. Moreover, the Court notes that defendant has a history of apparently unjustified dissatisfaction with his lawyers, as demonstrated by his multiple changes of counsel while his case was pending trial. The Court therefore declines to exercise its discretion to appoint counsel to represent defendant at this time.

The Court notes, however, that it is open to considering and being persuaded by any motion that defendant chooses to file *pro se*. And if the Court determines that it would be appropriate to hold a hearing on such a *pro se* motion, it will reconsider appointing counsel to represent defendant at such a hearing.