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Michael K. Ciacci
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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Criminal Case No. 2011-cf2-012334

UNITED STATES,
555 Fourth Street, NW
Washington, D.C. 20530,

V.

MICHAEL K. CIACCI,
Defendant,
Pro se Movant,

SECOND MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE AND JUDGMENT PURSUANT D.C. CODE SECTION 23-110

Pursuant D.C. Superior Court Rule 47 and D.C. Code Section 23-110, I, Michael K. Ciacci, by and through myself, moves this Honorable Court to amend my second motion to vacate, set aside or correct my sentence, to state the following.

I begin by explaining the underlying incident and summarizing judicial proceedings. I then raise procedural default. Finally, I raise new discoverable evidence ground establishing actual innocence under ineffective assistance of counsel claim, and structural error ground establishing actual innocence under separate ineffective assistance of counsel claim.

Statement of the Case

The underlying incident leading to my sentence occurred while I was in the District of Columbia, on a short term visit, before heading to Paris, France for graduate studies program.

I had known the complainant for less than two weeks, when he appeared to be getting ready to attack me on a Saturday night, July 2, 2011.

I reasonably defended myself and I immediately reported the incident to the local police; I walked couple blocks to the nearest station.

I then reported the self defense incident at D.C. Metropolitan police station. I was then taken on Sunday morning July 3, 2011 to D.C. Superior Courthouse under criminal information warrant.

Within a few hours, I had an initial appearance hearing Sunday morning, July 3, 2011. Only D.C. Superior Court judge and public defender was present at initial appearance hearing; I was released on my own recognizance.

The public defender reasoned and advised me the criminal information - assault with a dangerous weapon - would be dropped. Thereafter, I left the District of Columbia to attend graduate studies.

Ten months later, the United States Attorneys Office for the District of Columbia, issued four indictments and an arraignment hearing was scheduled; I was extradited to the District of Columbia by U.S. Marshals.

I pled not guilty to four indictments - assault with intent to kill, aggravated

assault while armed, assault with deadly weapon, assault with significant bodily injury - and pre-trial date was scheduled in D.C. Superior Court.

Motion for discovery and bill of particulars were filed by the public defender from my initial appearance hearing. The government filed their discovery and did not include an alleged dangerous weapon.

I moved D.C. Superior Court successfully for a second public defender.

Suppression hearing was scheduled for November 5, 2012.

The trial ran for roughly twenty four total hours spread out over four days; September 9, 2013 through September 12, 2013.

I testified to reasonable self defense, a lack of intent to harm the complainant, and the complainant was conscious during the entire underlying incident.

The jury verdict was not-guilty on assault with the intent to kill, and guilty on the remaining three charges; the remaining three guilty verdicts merge.

After trial and verdict, the Court granted me self-representation, co-counsel, and dismissed trial public defender on October 23, 2013.

Trial judge at November 15, 2013 sentencing hearing made a statement, and I paraphrase: if my case was a bench trial, the bean count as to the weight of evidence may have led to a different verdict, but since I had a jury trial, the government's successful arguments was the basis of his sentence.

The judge offered me an opportunity to speak on my behalf and I made an objection at the sentencing hearing, stating facts found in complainant's medical

records and the government's discovery filing referring to several corresponding D.C. Court of Appeals cases.

I was sentenced to an upper range, eight year prison term, no probation or parole, to be followed by a five year term of supervised release, for a total thirteen year sentence. The judge referred to the D.C. Superior Court sentencing guidelines for aggravated assault while armed conviction; four to twelve years range for no criminal history points; a sentence outside the four to twelve year range guidelines.

I appealed the sentence, filed November 27, 2013, to D.C. Court of Appeals, criminal case no. 13-1359. I was appointed a public defender for my direct appeal.

On January 24, 2014, I filed a letter requesting new counsel.

I would then file February 24, 2014 D.C. Superior Court pro se D.C. Code Section 23-110 motion to vacate, set aside or correct sentence (hereinafter 23-110 motion), crim. case no. 2011-cf2-12334, raising an ineffective assistance of counsel claim, concurrent to my direct appeal; after my public defender refused to raise an ineffective assistance of counsel claim. Trial transcripts had not been available.

I wrote another letter to D.C. Court of Appeals dated September 24, 2014, filed October 3, 2014, requesting new counsel.

The public defender on direct appeal agreed to my request for leave to withdraw as my appointed representation and filed motion for leave to withdraw on October 15, 2014; but not before he filed my appellant brief on September 24, 2014. The motion for leave to withdraw cited irreconcilable differences.

The government moved the Court on October 21, 2013, requesting an extension of time to file appellee brief and responded to my motion for leave to withdraw counsel on appeal. Extension of time to file appellee brief was granted on October 28, 2014 and again on January 2, 2015.

The D.C. Court of Appeals, in an order filed November 19, 2014, denied my motion for leave to withdraw counsel, and ordered me to cooperate with the public defender whom I had irreconcilable differences.

On February 6, 2015, my legal documents were forced from my property by D.C. Jail officials, citing jail procedure. I arrive at the prison institution in North Carolina on March 2, 2015, after spending couple weeks at a Virginia county jail.

Appellee brief on direct appeal was filed on March 3, 2015.

On March 9, 2015, my trial, sentencing, and postconviction judge issued an order denying my 23-110 motion, stating I failed both Strickland prongs.

I filed an appeal from the order denying my 23-110 motion to D.C. Court of Appeals on March 25, 2015. Public defender was appointed. The appellant brief did not raise an issue citing rules of evidence procedure errors at trial.

I then filed April 6, 2015, pro se writ of habeas corpus 28 U.S.C. Section 2254 petition in U.S. District Court, Eastern District of North Carolina, case no. 5:15-hc-02062-F, Michael Kekoa Ciacci v. Brick Tripp, raising an ineffective assistance of counsel claim.

D.C. Court of Appeals filed an order on July 10, 2015, affirming my D.C.

Superior Court sentence; dismissing two of three guilty merged verdicts.

I was advised by my public defender on direct appeal, only issues raised in my direct appeal brief in D.C. Court of Appeals, could be raised in an appeal to the Supreme Court. An appeal of D.C. Court of Appeals affirmance to my D.C. Superior Court conviction was not filed to the Supreme Court.

However, I did file an appeal, pro se to the Supreme Court, case no. 15-6247, from the D.C. Court of Appeals, November 19, 2014 filed order, denying my motion for leave to withdraw counsel; certiorari denied on November 2, 2015.

On October 13, 2015, I filed an amended pro se writ of habeas corpus in U.S. District Court, Eastern District of North Carolina, citing an ineffective assistance of counsel claim, raising counsel's rules of evidence procedure errors at trial. I received through postage mail, a copy of my trial transcripts, filed July 3, 2015 for the record on appeal.

I then filed a pro se D.C. Court of Appeals motion to recall the mandate, case no. 2011-cf2-12334, on October 15, 2015; raising an ineffective assistance of counsel claim that cited rules of evidence procedure errors at trial; D.C. Court of Appeals filed November 5, 2015, order denying motion to recall the mandate.

U.S. District Court, Eastern District of North Carolina, filed an order on December 15, 2015, denying my pro se writ of habeas corpus. The order stated reason was 23-110 motion was still pending, I had not exhausted state remedies, and 23-110 motion to not be an inadequate or ineffective remedy. Certificate of ap-

pealability was not issued; I did not appeal to the Fourth Circuit Court of Appeals.

On September 21, 2016, D.C. Court of Appeals affirmed my trial, sentencing and postconviction judge's order denying my 23-110 motion.

At the prison, my legal documents, including my copy of the trial transcripts, were also seized by prison institution officials whom cited prison procedure.

On July 27, 2019, I completed my eight year prison term at the North Carolina institution, and was released to my home residence in the State of Hawaii.

On September 4, 2019, I filed a 28 U.S.C. Section 2254 pro se writ of habeas corpus in U.S. District Court, District of Hawaii, case no 1:19-cv-00476-DKW-KJM, Michael K. Ciacci v. United States Probation Office, raising an ineffective assistance of counsel claim, U.S. Attorney trial error claim, and inadequate or ineffective remedy claim; September 16, 2019 order dismissing my writ of habeas corpus, citing procedural defaults, and denied certificate of appealability.

I filed an appeal to the Ninth Circuit Court of Appeals on September 20, 2019, case no 19-16896, and the Ninth Circuit on September 26, 2019, stated the Court would consider whether to issue certificate of appealability.

I filed a second 23-110 motion on October 9, 2019, pending in D.C. Superior Court. I raised an ineffective assistance of counsel claim, citing rules of evidence procedure trial error issue, and inadequate or ineffective remedy claim.

I then filed a D.C. Superior Court Rule 33 new evidence motion on February 19, 2020, raising an actual innocence claim citing trial counsel's error omitting ex-

culpatory evidence.

On February 28, 2020, the Ninth Circuit denied certificate of appealability, stating I had not shown 23-110 remedy to be inadequate or ineffective.

Reasons to Grant Motion to vacate, set aside or correct sentence and judgment

At my home residence in the State of Hawaii, under the immediate custody of the United States Probation Office, District of Hawaii, I am currently serving the supervised release portion of my November 15, 2013 filed District of Columbia Superior Court sentence; criminal case no. 2011-cf2-12334, United States v. Michael K. Ciacci.

A prisoner held under conviction of the District of Columbia Superior Court is considered a State prisoner. *Madley v. U.S. Parole Comm'n, 278 F.3d 1306, 1308-1310 (D.C. Cir. 2002) (concluding that "a court of the District of Columbia is a state court" for purposes of federal habeas cases).*

I must raise collateral attack on my sentence in D.C. Superior Court, unless the remedy is inadequate or ineffective to test the legality of my detention. *Swain v. Pressley, 430 U.S. 372, 381, 384 (1977) (D.C. Code Section 23-110(g) is the provision requiring collateral attack jurisdiction to D.C. Superior Court unless the local remedy is inadequate or ineffective to test the legality of the detention).*

A remedy is inadequate or ineffective if it deprives a defendant of "any opportunity for judicial rectification of so fundamental a defect in his conviction as having been imprisoned for a non-existent offense." *In re Smith, 285 F.3d 6, 8*

(D.C. Cir. 2002); In re Davenport, 147 F.3d 605, 611 (7th Cir. 1998).

D.C. Superior Court assigned postconviction review of my 23-110 motion to my trial and sentencing judge. He did not recuse himself, and that is ground for second motion to vacate, set aside or correct sentence and judgment.

My postconviction judge had previous knowledge of the contested facts at issue and had previously made decisions on the questions I raised in my 23-110 motion. Recusal was required to avoid the appearance of impropriety, even if no actual bias exists. Failure to recuse amounts to a miscarriage of justice.

My postconviction judge, during pre-trial proceedings, did not question my public defender's expressed confusion, from lack of preparation, regarding alleged statements in discovery (MtnSuppTranscript pg.92, lines 12-17); ruled to allow confusing inclusion, of both a deadly force jury instruction and nondeadly force jury instruction (Tr.Tn.pg. 387-388); my postconviction judge did not question public defender's request, the government had not object to, to limit the complainant's treating physician's expert testimony, testimony considered exculpatory evidence; and at trial, my postconviction judge did not question my public defender's strategy to withhold submission of defense trial exhibits until after defense case had rest. My postconviction judge did not question plausible public defender structural errors as the proceedings occurred, and then ruled on suppression and judgment of acquittal motions, based on outcomes burdened by those plausible structural errors. He is also wedded to his ruling on confusing jury instructions.

The order denying my 23-110 motion implicates the effects and continuing force of my judge's original decisions at my trial and sentencing hearing. There exist serious risk that my judge was influenced by an inadvertent and improper motive to validate and preserve the result obtained through the adversary process.

In *Williams v. Pennsylvania, 195 L. Ed. 2d 132 (2016)*, the Court ruled an objective standard to review such cases that avoids determining whether actual bias is present.

"The Due Process Clause is violated when a judge adjudicates the same question - based on the same facts - that he had already considered...had previous knowledge of the contested facts at issue in the habeas petition, and had previously made any decision on the questions raised by that petition." *Williams, supra, (Roberts, J., dissent).*

My postconviction judge was likely "psychologically wedded" to his pre-trial and trial decisions and that risk of impartiality is "too high to be constitutionally tolerable." *Id., quoting Withrow v. Larkin, 421 U.S, 35, 47 (1975); American Bar Association Annotated Model Code of Judicial Conduct (2004) (judge shall avoid impropriety and the appearance of impropriety).*

Failure to recuse is structural error in violation of Due Process Clause of the Fourteenth Amendment, requiring unburdened review of my 23-110 motion. Williams, supra (unconstitutional failure to recuse constitutes structural error).

There is no federal statutory or D.C. Code requirement for this type of judicial recusal. There exists a possibility, that a postconviction judge is assigned a case he presided as trial and sentencing judge, and did not recuse. It is a rare case and will continue to be possible.

Courts have not foreclosed the standard to apply possible rare cases. *Brown v. Caraway, 719 F.3d 583, 597 (7th cir. 2013) (text of Savings Clause does not limit its scope to test legality of underlying criminal conviction).*

My 23-110 motion, burdened by failure to recuse, denied me a full and fair hearing and adjudication. This denial of full and fair hearing and adjudication is a limitation, that Courts think define a remedy to be inadequate or ineffective to test the legality of my detention.

I can proceed on second motion to vacate, set aside or correct sentence and judgment.

Separately, my 23-110 motion is inadequate or ineffective to test the legality of my detention, under a developed standard of review test, that defines the scope of the Savings Clause, an actual innocence and unobstructed procedural shot test.

Circuit courts have applied the actual innocence and unobstructed procedural shot test to petitions claiming the remedy is inadequate and ineffective to test the legality of the detention.

The standard's actual innocence prong is whether the prisoner is making a claim that he is actually innocent of the crime of conviction.

Actual innocence is defined as factual innocence, and not simply legal insufficiency, whereby a prisoner must show that in light of all the evidence, it is more likely than not, that no reasonable juror would have convicted him, in order to establish actual innocence. *Bousley v. United States, 523 U.S. 614, 623 (1998).*

The standard's unobstructed procedural opportunity prong is whether I have had an unobstructed procedural opportunity to have my claim heard. Opportunity, under the standard, is not an actual hearing, but refers to the accessibility of the claim being made.

My direct appeal public defender and my postconviction appellate public defender, both omitted in the appellate briefs, an ineffective assistance of counsel claim based on trial counsel's rules of evidence procedural errors and an inadequate or ineffective remedy claim. My petitions in Eastern District of North Carolina and District of Hawaii, were both denied under procedural defaults.

Legal documents were taken from my property, at both D.C. Jail and prison institution under their procedures. I recently requested copies of my case file from the public defender's offices, and received an incomplete copy. The portions of the case file I did receive, provides the basis and grounds for this foregoing motion.

This foregoing motion also overcomes procedural default, successive petition bar, requiring I establish actual innocence by a clear and convincing evidence standard of review pursuant *McQuiggin v. Perkins, 569 U.S. 383 (2013).* A prison-

er who can show proof of innocence may file a successive petition and a court may consider the merits of the claims. *Id.*

New discoverable evidence grounds proving actual innocence under an ineffective assistance of counsel claim, which must also overcome procedural defaults, requires establishing proof under clear and convincing standard of review, "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.*

The prosecution is required, under rules of discovery, to hand over possible exculpatory evidence to the defense.

In an electronic mail correspondence dated November 3, 2012, shortly before my suppression hearing, the prosecutor, a U.S. Attorney for the District of Columbia, informed my public defender that the complainant in my case, had sustained a prior incident involving serious injuries, located in a medical record that the U.S. Attorney did not have a copy to provide the defense. The government provided my public defender possible exculpatory evidence (see Addendum A).

An investigation by my public defender into complainant's prior incident involving serious injuries, would have been appropriate at this stage in my case, given the following factors.

The government's discovery filing (see Addendum B) provided my public defender with a copy of the complainant's medical records of the underlying incident in my case. Complainant's medical records, executed under established med-

ical procedure, clearly states in the record's section providing complainant's medical history, that he had sustained a prior hospitalization, describing surgical inclusion of metal plates the same hospital had provided. Complainant's medical records in discovery also states, actual injuries the treating physician's examination had found.

Complainant sustained a small, 6cm laceration and an overlapping 3cm abrasion to the back of his head, and no other injuries anywhere else on his body. The medical records also state, the complainant had not been unconscious at any point during the underlying incident. The medical records state the complainant's hospitalization was classified as trauma level white, the lowest trauma level under the hospital's medical procedure. The medical records state the complainant did not require surgery, did not require aftercare items, like a wheelchair, cane, or prescription of pain medication, and the medical records state the duration of complainant's hospitalization was under twenty-four hours (see Addendum C).

The government's discovery filing, also provided my public defender with the arresting officer's police report and two sets of color photographs, one set provided by D.C. Metropolitan police crime scene officer, and another set, produced by a cellphone and provided to the government by the complainant.

The arresting officer's police report shows a depiction of one injury to the back of complainant's head, a laceration, and no other injuries depicted or worded

provided by the complainant established an incident representing seriously severe injuries. Unanimity issue had exist before trial.

Reasonable investigation by my public defender, should have raised the question that my indictments were not supported by the crime scene officer's report and demonstrative evidence, but supported only by color photographs provided by the complainant. The crime scene officer, under police procedure, produced a set of color photographs that were not the same, completely different images from those depicted in the set of color photographs provided by the complainant.

Moreover, if my public defender was unaware that there were two sets of color photographs in the government's discovery filing, a reasonable examination of the documentary evidence in discovery, under complainant's medical records, states the one stitching of the laceration on complainant's head occurred roughly six hours after the crime scene officer produced color photographs and completed her two-page report.

The one inconsistent evidence in the government's discovery filing, examined and evaluated side by side to the remaining evidence, should have triggered an investigation by my public defender, after notice by the U.S. Attorney, of possible exculpatory evidence; evidence which could have resolved questions regarding the inconsistent evidence. The failure to do so was constitutional error.

My public defender should have moved the court to order a subpoena of complainant's medical records of a prior incident involving serious and severe in-

juries. There were several factors present at the time of the electronic mail correspondence, between the U.S. Attorney and my public defender, supporting a subpoena, and a corresponding motion to delay the suppression hearing. Failure to subpoena exculpatory evidence was error.

Medical records of a prior injury complainant sustained, stating severe and serious injuries, would have probably placed reasonable doubt in the jury, that the color photographs presented by the government at trial, were of injuries unrelated to the underlying incident.

Evidence the complainant sustained serious injuries two years prior, that depict injuries not inconsistent to the injuries shown in the set of color photographs provided by the complainant in discovery, is evidence proving actual innnocence of charges under my indictment.

Moreover, my public defender erred, by not attempting to move the court to challenge the sufficiency of the charging papers to state an offense. Motion for bill of particulars was filed. The government, the judge, nor my public defender, addressed the motion for bill of particulars; which my first court appointed public defender had filed on my behalf.

My public defender's error to not investigate possible exculpatory evidence, which could prove actual innocence, is the type of performance before trial, held to be ineffective assistance under Sixth Amendment Constitutional right of counsel standards. *Kimmelman v. Morrison, 477 U.S. 365 (1986) (failure to conduct pre-*

trial discovery constitutes ineffective assistance of counsel, and that failure was not based on strategy, but a mistaken belief the State was obliged to take the initiative).

I am factually innocent pursuant new discoverable evidence ground under my ineffective assistance of counsel claim, and thus, I can proceed on second motion to vacate, set aside or correct sentence and judgment.

The standard of review for an ineffective assistance of counsel claim, requires constitutional deficiency and sufficient prejudice. Constitutional deficiency is whether attorney performance is reasonable under prevailing norms. Sufficient prejudice is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Strickland v. Washington, 466 U.S. 668 (1984).* Under the attorney performance prong, the inquiry is whether counsel's assistance was reasonable considering all the circumstances. *Strickland, supra, at 688.* A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland, supra, at 694.* Whether "the fact finder would have had a reasonable doubt respecting guilt." *Strickland, supra, at 695.*

Examination and evaluation by my public defender, of the evidence from the government's discovery filing, should have triggered a motion to suppress both sets of color photographs. Burden of proving the color photographs were authentic was on the government.

Set of color photographs provided by the complainant (TrialTranscipt pg.21, lines 10-22) were completely inconsistent with the crime scene officer's set of col-

or photographs. This inconsistency, coupled by inconsistency to the remaining evidence from discovery, should have at least raised the question of whether the color photographs needed to be authenticated, claim of custody and preservation of all discoverable evidence, by my public defender before trial. She should have raised the issue at the suppression hearing, but did not. At sentencing, postconviction judge termed complainant's injuries, "very significant" and "life-threatening" (SentenceTranscript pg. 26, lines 19-20); inferring these color photographs established severity. It was error to not require the government prove the color photographs were authentic representations of the underlying incident. *Kimmelman, supra (Sixth Amendment duty to bring to bear skill and knowledge, including identifying, investigating and litigating motions to suppress).*

Arguing the inconsistency to the remaining documentary evidence, as the government attempts to prove authenticity, was an available strategy under rules of evidence procedures, and failure to raise the issue is inexcusable. Not attempting to suppress color photographs, which show images of lacerations, metal plates, and bruising, injuries that cannot be found in complainant's medical records or the arresting officer's police report, is inexcusable.

The government presenting few demonstrative evidence and no clearly identifiable injuries, would have probably placed reasonable doubt in the jury.

My public defender put together eight defense exhibits for trial; four defense exhibits were impeachments of three government witnesses (see Addendum E).

The arresting officer at the suppression hearing, testified he observed the complainant had lacerations and bruises along his body. This testimonial evidence contravened his police report. Two years after authoring the police report, the arresting officer, from memory alone, testified he had incorrectly stated the complainant sustained only one small laceration to the back of the head. My public defender presented, as trial exhibits, his testimony at the suppression hearing and his police report, in an attempt to impeach his testimony at trial.

The complainant testified at grand jury proceeding. The testimony at the grand jury proceeding, alleging he loss consciousness and sustained serious injuries, was consistent to his trial testimony. My public defender presented the grand jury testimonial evidence, as a trial exhibit, in an attempt to lay foundation attacking his credibility, to impeach his trial testimony.

After presenting each exhibit under examination, my public defender decided not to request submission into the trial record, of any of the defense trial exhibits, until after the defense had rest its case and the jury was dismissed for recess (Tr.Tn.pgs. 389- 397). Only then did my public defender attempt to submit all eight defense trial exhibits into the trial record. The government had object to the defense exhibits. My public defender was then not able, under rules of evidence procedures to execute submission of all eight defense trial exhibits; plausible procedures no longer available. Four exhibits, three impeachments and a medical record stating hospital release instructions, were denied submission. A fifth exhibit, the

arresting officer's police report, had also been denied; but during jury deliberation, a redacted police report was submitted into trial record and sent to jury room (Tr.Tn.pg. 462, lines 1-7). The strategy employed by my public defender was inexcusable. The inability under rules of evidence procedure to submit exculpatory evidence, is structural error. *Hinton v. Alabama, 571 U.S. 263 (2014) (inexcusable mistake of law and unreasonable failure to understand caused counsel to perform an erroneous strategy).*

The immediate consequence at trial of these rules of evidence procedure errors, was postconviction judge's rejection of my motion for judgment of acquittal; based on "light most favorable to the government" standard of review, weighed in favor of the government's evidence submitted into the trial record, against my defense evidence submitted at that point, into the trial record (Tr.Tn.pgs. 370-383). Apparently, complainant's treating physician and my trial testimonies, both testifying complainant did not lose consciousness, under light most favorable to the government standard, is ruled loss of consciousness, if the complainant makes the claim under his grand jury and trial testimonies.

Moreover, postconviction judge stated at sentencing hearing, "I thought the bean count could go either way. I'm not sure whether I could have found evidence beyond a reasonable doubt on that, but I didn't have to make that decision because it was a jury trial and not a bench trial" (Sn.Tn.pg. 27, lines 16-20).

in the report. Nothing in the arresting officer's report, depicted or worded, indicates serious injuries (see Addendum D).

The first set of color photographs provided by crime scene police officer, depicts only the complainant's extremities, his face while lying in a hospital bed, and no apparent injuries; none of the color photographs depict a clear image of the one laceration and abrasion.

The second set of color photographs provided by the complainant, produced from a cellphone, shows serious injuries; color photographs showing several large, stapled and stitched lacerations, implying insertion of metal plates, covering the top and back of complainant's head, and other color photographs depicting deep bruises along his arm, side of his body, and his leg.

My four indictments included, assault with the intent to kill, aggravated assault while armed, assault with a dangerous weapon, and assault with significant bodily injury. Aggravated assault requires the government establish serious bodily injury.

Under *Jackson v. United States, 970 A.2d 277 (2009)*, D.C. Court of Appeals defined serious bodily injury is construed to mean injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or loss of impairment of a bodily member or function.

Serious bodily injury are injuries not unlike gunshot wounds and knife stab wounds, protracted as meaning beyond a very brief recovery period, and requires

strict construction of serious bodily injury in which the government must prove all four elements under the statute. The strict construction ruling is supported by D.C. Code passages of an intermediate severity injury statute to fill the gap between aggravated and simple assault, termed assault with significant bodily injury; which means injuries that require hospitalization and immediate medical attention, and not simply admission to a hospital. *Jackson, supra.*

Reasonable investigation by my public defender should have at least raised the question of whether all four elements of serious bodily injury, and the two elements of significant bodily injury, could be proven by the government's documentary evidence given the evidence in discovery. The facts stated in complainant's medical record supports a claim, that the government would not be able to prove serious bodily injury nor significant bodily injury beyond a reasonable doubt, if the documentary evidence, medical record, and the treating physician's corresponding testimonial evidence were part of the trial record. Complainant's medical record states actual injuries, duration and circumstance of his hospitalization, that clearly do not rise to the level of serious and significant bodily injury required to convict on an aggravated and intermediate assault charges.

A reasonable investigation and evaluation of the documentary and demonstrative evidence in discovery, should have raised questions of whether the evidence established two separate incidents, one incident representing a small injury, and another incident representing seriously severe injuries; only color photographs

His statement infers: part of treating physician's trial testimony, confirming complainant reported not losing consciousness, did not sustain injuries on his arms and legs, was stable under lowest trauma white classification, and spent minimal duration at the hospital (Tr.Tn.pgs. 248-253), along with my self defense testimony, establishing several self defense jury instructions (Tr.Tn.pgs. 384-388), had not met the stated MJOA standard; but that my public defender's submission of four defense trial exhibits, out of eight attempted, and the closing arguments, both after MJOA denial, were in total, sufficient to place reasonable doubt in his mind before sentencing.

Postconviction judge's reasoning infers, light most favorable to the government standard is higher evidentiary threshold to meet, than reasonable doubt standard, and the required elements essential to prove my indictments, relied upon my public defender's rules of evidence procedure trial errors. Actual innocence can be inferred from the judge's denial of my MJOA and his sentencing statement.

Before the jury was seated and opening statements given, the Court addressed preliminary questions. My public defender had request the Court to limit the treating physician's expert testimony, to fact witness testimony (Tr.Tn.pg.10, lines 21-25l; pg.11, lines 1-5).

Under direct examination of my defense witness, complainant's treating physician, he could not answer several lines of questioning that rely on his expertise; the government's objections were sustained (Tr.Tn.pg.252, lines 24-25;

pg.253, lines1-12). Complainant had testified he was struck with an alleged dangerous weapon repeatedly for twenty minutes (Tr.Tn.pg.176, lines 21-24), and my public defender did not present medical expert testimony proving that testimony to be unreliable. Limiting the treating physician's expert testimony, an opportunity to complete impeachments and present exculpatory evidence, was error.

However, under cross-examination of treating physician, without objection, the government had elicit expert testimony; the difference between a laceration and abrasion, the layers of skin on one's scalp, and force of trauma, evulsion, and bruising defined (Tr.Tn.pgs. 258-267).

Moreover, under my public defender's limitation, the treating physician could answer lines of questioning related to facts based on his first hand knowledge. However, my public defender omitted several key points under the complainant's medical records. Complainant's treating physician should have confirmed, under direct examination, that the actual injuries sustained by the complainant, were one laceration, 6cm in size, and one overlapping abrasion 3cm in size, and no surgery was required. Under the limitation, she still could have completed her impeachments of key government witnesses. These omissions were inexcusable error.

If my public defender presented the actual injuries and all relevant medical records, it would have cast reasonable doubt in the jury, as to whether the government established elements required to convict on all four indictments. *Rompilla v.*

Beard, 545 U.S. 374, 381 (2005) (prejudice met when counsel's unintroduced evidence bore no relation to the evidence actually put before the jury).

The reliability and truthfulness of a witness, is determinative of whether the factfinder discerns guilt or innocence. *Silva v. Brown, 416 F.3d 980, 987 (9th cir. 2005).*

If my public defender presented expert witness testimony, completed impeachments, and submitted into trial record, all eight defense exhibits, it would have instilled reasonable doubt in the jury, regarding whether the complainant and the arresting officer's testimonies were credible. *Porter v. McCollum, 558 U.S. 30, 40 (2009)(per curiam) (prejudicial to omit the effect that the expert witness might have had on the jury).*

At trial, the U.S. Attorney prosecuting my case, utilized several color photographs from each set of color photographs in their discovery. He would alter the form of each color photograph and reproduced a depiction not consistent with the original image of each color photograph in the government's discovery.

The exhibits depict images of injuries that did not exist due to the alteration. The alteration gave the visual impression that the complainant sustained deep, bludgeoning, bruise-like injuries, completely covering his body and face.

A side by side examination of the government's trial exhibits and the two sets of color photographs from the government's discovery filing, clearly show the

alteration. The difference between the two is not negligible. The alteration was a manipulation directed toward the jury and extremely prejudicial.

My public defender did not notice the alteration, and she did not attempt to object to the government's trial exhibits. Her lack of preparation was an inexcusable error. An objection by my public defender, would have raised reasonable doubt as to whether the government's trial exhibits were reliable.

I had a due process right to a complete defense, to confront the prosecution case at every stage of the proceedings and through all available legal avenues. *Chambers v. Mississippi, 410 U.S. 284, 294 (1973).*

My public defender's pre-trial and trial errors establish a constitutional deficient performance, and but for her insufficient performance, the jury would have found a more favorable outcome. *Williams v. Taylor, 529 U.S. 420 (2000) (District Court ruled counsel's assistance to be ineffective for failure to discover and present significant evidence).* I am factually innocent under my second ineffective assistance of counsel claim.

An evidentiary hearing in this Court, to resolve pre-trial and trial structural errors by my public defender, and to resolve exculpatory evidence my public defender did not investigate, is appropriate.

Wherefore, I pray this Honorable Court grants my second motion to vacate, set aside or correct sentence and judgment.

I declare under penalty of perjury the foregoing is true and correct.

Michael K. Ciacci
Defendant
Pro se Movant
67-328 Kaliuna Street
Waialua, Hawaii 96791
michaelciacci@yahoo.com
DOB: 03/13/1980
Fed.Reg.no. 95242-280

Service of Process

I certify this amended second motion to vacate, set aside or correct sentence and judgment was served on the United States, by postage mail, on this day 10, of June, 2020~~, and CaseFileXpress.~~

Michael K. Ciacci

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL KEKOA CIACCI,

Petitioner-Appellant,

v.

UNITED STATES PROBATION OFFICE, District of Hawaii,

Respondent-Appellee.

No. 20-16338

D.C. No. 1:20-cv-00271-LEK-RT
District of Hawaii, Honolulu

ORDER

Before: SCHROEDER and GRABER, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and 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); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MICHAEL K. CIACCI,	CIV. NO. 20-00271 LEK-RT
Petitioner,	ORDER GRANTING IN FORMA PAUPERIS APPLICATION; DISMISSING PETITION; AND DENYING CERTIFICATE OF APPEALABILITY
vs.	
UNITED STATES PROBATION OFFICE,	
Respondent.	

Before the Court is Petitioner Michael K. Ciacci's second petition for a writ of habeas corpus brought in this federal district court pursuant to 28 U.S.C. § 2254 ("Petition"), and an Application to Proceed in District Court Without Prepaying Fees or Costs ("IFP Application"). *See* ECF Nos. 1 and 2.[1] Ciacci is serving a term of supervised release in Hawaii under the authority of the United States Parole Commission, pursuant to his 2013 conviction in the District of Columbia Superior Court ("Superior Court"). *See* D.C. Code § 24-133(c)(2).

For the following reasons, the IFP Application is GRANTED, the Petition is DISMISSED, and any request for certificate of appealability is DENIED.

[1]Referring to the court's docket and page numbering system for all filed documents.

C

I. STANDARD OF REVIEW

The Court must screen all petitions for writ of habeas corpus before service to determine if "it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court." Rule 4, Rules Governing Section 2254 Cases in the U.S. District Courts (2012). A pro se litigant's pleadings are liberally construed and held to a less stringent standard than those drafted by attorneys. *See Erickson v. Pardus*, 551 U.S. 89, 93–94 (2007).

II. BACKGROUND[2]

On September 12, 2013, Ciacci was found guilty by jury trial in the Superior Court of Aggravated Assault Knowingly While Armed ("Count 2 "); (2) Assault With A Dangerous Weapon ("Count 3 "); and (3) Assault with Significant Bodily Injury ("Count 4"). *See* Pet., ECF No. 1 at #3; *see also United States v. Ciacci*, 2011-CF2-012334 (D.C. Super. Ct.), https://eaccess.dccourts.gov/eaccess/search.[3]

Ciacci directly appealed and the District of Columbia Court of Appeals ("DCCA") affirmed Ciacci's conviction. *See Ciacci v. United States*, No. 13-CF-1359 (D.C. Ct. App. 2013). The DCCA remanded to the Superior Court, however,

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[2]The procedural history of Ciacci's criminal and post-conviction proceedings is taken from the Petition, the federal court database, and Superior Court and DCCA records. *See* http://pacer.psc.uscourts.gov.; https://eaccess.dccourts.gov/eaccess/search.

[3]Ciacci received a 96-month term with five years supervised release (Count 2); a 48-month term with three years supervised release (Count 3); and a 24-month term with three years supervised release (Count 4), all terms concurrent. *Ciacci*, 2011-CF2-012334.

with instructions to vacate the lesser-included offense convictions in Counts 3 and 4, which had merged with his conviction in Count 2, stating, "[n]o re-sentencing is required, as appellant was sentenced concurrently and the affected convictions carried lesser sentences." *Id.* On July 16, 2015, the Superior Court issued an Amended Judgment merging Counts 2-4. *Id.*

While Ciacci's direct appeal was pending, he filed a Motion to Vacate, Set Aside or Correct Sentence and Judgment pursuant to D.C. Code § 23-110 ("§ 23-110 Motion"). The Superior Court denied the § 23-110 Motion and the DCCA affirmed on September 21, 2016. *See Ciacci v. United States*, No. 15-CO-0334 (D.C. Ct. App. 2016). The mandate issued on October 13, 2016.

Ciacci also filed a habeas petition pursuant to 28 U.S.C. § 2254, in the U.S. District Court for the Eastern District of North Carolina, where he was then confined, while his § 23-110 Motion was pending. *See Ciacci v. Tripp*, Civ. No 5:15-HC-2062-F (E.D. N. Car. Dec. 15, 2015). That district court dismissed the § 2254 petition for lack of jurisdiction, and because Ciacci's § 23-110 Motion was still before the Superior Court. *Id.*

On September 4, 2019, Ciacci filed a § 2254 habeas petition in the District of Hawaii, where he is serving his term of supervised release. *See Ciacci v. United States Probation Office*, No. 1:19-cv-00476 DKW (D. Haw. 2019). Ciacci argued that allowing his trial judge to adjudicate his § 23-110 Motion created a conflict of

interest that rendered his sentences invalid; his public defender was ineffective before and during trial; and sentencing him to terms of incarceration *and* supervised release constituted two separate sentences (or punishments) for one crime, in violation of the Fifth Amendment.

On September 16, 2019, the district court dismissed Ciacci's petition for lack of jurisdiction and denied a certificate of appealability. *See id.*, ECF No. 3 at #18 (finding jurisdiction lies exclusively with the Superior Court under D.C. Code § 23-110, absent a showing that § 23-110 is inadequate or ineffective to test the legality of Ciacci's challenged detention). Ciacci appealed, and on February 28, 2020, the U.S. Court of Appeals for the Ninth Circuit denied the request for a certificate of appealability. *See* App. No. 19-16896 (9th Cir. 2020).

While awaiting disposition of his appeal in No. 1:19-cv-00476, Ciacci filed another § 23-110 Motion in the Superior Court on October 9, 2019, raising the same issues as he raised in No. 1:19-cv-00476. *See* Pet., ECF No. 1 at #7. On February 19, 2020, Ciacci filed a Superior Court Rule of Criminal Procedure ("DC R RCRP") 33 motion, seeking a new trial, raising an actual innocence claim based on his trial counsel's alleged failure to introduce exculpatory evidence.[4] *See id.* at #7-8. These motions are both apparently still pending before the Superior Court.

[4] Rule 33, governing motions for a new trial, allows a defendant to move for a new trial in the interests of justice. A claim grounded on newly discovered evidence "must be filed within 3 years after the verdict or finding of guilty." DC R RCRP Rule 33(b)(1).

On June 12, 2020, Ciacci filed the present Petition. He raises the same or similar issues that he raised in No. 1:19-cv-00476, i.e., that an alleged conflict of interest violated his right to due process when his trial judge failed to recuse and presided over his § 23-110 Motion, and the ineffective assistance of trial counsel. *See* Pet., ECF No. 1 at #8-12. He now alleges, however, that he has new evidence of his trial counsel's ineffectiveness showing that he is actually innocent, which he asserts overcomes any procedural impediments to bringing this Petition under 28 U.S.C. §§ 2244(a) (regarding second or successive petitions) and 2244(d) (regarding the one-year statute of limitation). *Id.* at #12 (citing *McQuiggin v. Perkins*, 569 U.S. 383 (2013)).

III. DISCUSSION

This Court lacks jurisdiction over Ciacci's claims, and even if jurisdiction was proper, Ciacci's claims are clearly unexhausted and time-barred.

A. The Court Lacks Jurisdiction Under D.C. Code § 23-110

Ciacci was convicted in the Superior Court and is therefore subject to the provisions of the District of Columbia Reform and Criminal Procedure Act of 1970 ("Court Reform Act"). *See Byrd v. Henderson*, 119 F.3d 34, 36 (D.C. Cir. 1997). Under the Court Reform Act, Congress enacted D.C. Code § 23-110 "to vest the Superior Court with exclusive jurisdiction over most collateral challenges by prisoners sentenced in that court." *Williams v. Martinez*, 586 F.3d 995, 1000 (D.C.

Cir. 2009); *Blair-Bey v. Quick*, 151 F.3d 1036, 1042 (D.C. Cir. 1998). "[A] District of Columbia prisoner has no recourse to a federal judicial forum unless [he shows 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) (citations and internal quotation marks omitted). Therefore,"to collaterally attack his sentence [or conviction] in an Article III court[,] a District of Columbia prisoner faces a hurdle that a federal prisoner does not." *Byrd*, 119 F.3d at 37. He must first proceed in the Superior Court and the DCCA, and then show that relief in those courts is inadequate or ineffective.[5] *Id.*

Section 23-110 (a) (1), authorizes a D.C. prisoner "claiming the right to be released upon the ground that . . . the sentence was imposed in violation of the Constitution of the United States or the laws of the District of Columbia" to "move the court to vacate, set aside, or correct the sentence." Section 23-110(g) 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.

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[5]This conforms with normal rules of habeas jurisprudence, where venue for a habeas corpus petition challenging a conviction or sentence is in the district court for the district where the judgment was entered, to ensure the accessibility of evidence, records, and witnesses. *See Hernandez v. Campbell*, 204 F.3d 861, 864 (9th Cir. 2000) (discussing venue for § 2254 petitions) (citing *Brown v. United States*, 610 F. 2d 672, 677 (9th Cir. 1980) (discussing venue under § 2255)); *Blair-Bey*, 151 F.3d at 1042 (stating § 23-110 motion as analogous to § 2255).

The U.S. Court of Appeals for the District of Columbia ("D.C. Circuit") holds that this "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); *see Ibrahim v. United States*, 661 F.3d 1141, 1142 (D.C. Cir. 2011) (stating, "the availability of relief by motion under § 23-110 typically precludes the challenger from seeking habeas relief in federal court"); *see Swain v. Pressley*, 430 U.S. 372, 377-78 (1977) (finding that § 23-110 divests federal courts of jurisdiction over such claims absent a showing that § 23-110 is inadequate or ineffective to test the legality of the detention).

Importantly, the D.C. Circuit has concluded "that the § 23-110 remedy is neither inadequate nor ineffective to test the legality" of a D.C. prisoner's conviction where, as here, he raises a claim of actual innocence. *Ibrahim*, 661 F.3d at 1146; *see Earle v. United States*, 987 F. Supp. 2d 7, 11 (D.D.C. 2013) (district court "lacks jurisdiction to consider actual innocence claim–whether asserted as a 'gateway' claim to federal court review or as a 'stand-alone' claim–because 'either claim' is available under D.C. Code § 23-110 . . . and, therefore, is foreclosed by Section 23-110(g)") (quoting *Ibrahim*, 661 F.3d at 1143). Additionally, an actual innocence claim predicated on trial counsel's ineffectiveness, as Ciacci asserts, "falls squarely within the scope of section 23-110(a)." *Whoie v. Warden, Butner Fed. Medical Ctr.*, 891 F.Supp.2d 2, 3 (D.D.C. 2012); *see Reyes v. Rios*, 432

F.Supp.2d 1, 3 (D.D.C. 2006) ("Section 23-110 provided the petitioner with a vehicle for challenging his conviction based on the alleged ineffectiveness of his trial counsel."); *Garmon v. United States*, 684 A.2d 327, 329 n. 3 (D.C. 1996) ("A motion to vacate sentence under [§] 23-110 is the standard means of raising a claim of ineffective assistance of trial counsel.").

Ciacci has filed two motions under § 23-110 with the Superior Court. The first was denied on its merits and affirmed on appeal, and the second is pending before the Superior Court. He also has a motion for a new trial pending before the Superior Court, based on his allegations of actual innocence. Ciacci again fails to demonstrate that the remedies available to him in the District of Columbia under § 23-110 are or were ineffective or inadequate. As the Ninth Circuit Court of Appeals also held, this Court lacks jurisdiction to entertain Ciacci's claims regarding alleged trial error and actual innocence based on the alleged ineffective assistance of trial counsel.

B. The Petition is Unexhausted

Even if the Court could consider the Petition under § 2254, it is subject to dismissal on its face. Section 2254(b)(1)(A) requires that a petitioner must exhaust all adequate and available state judicial remedies by presenting his claims to the highest court a fair opportunity to rule on the merits of each and every issue sought to be raised in the federal court. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 839-40

(1999); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). If available remedies have not been exhausted as to all claims, the district court must dismiss the petition. *See Rose v. Lundy*, 455 U.S. 509, 510 (1982); *Guizar v. Estelle*, 843 F.2d 371, 372 (9th Cir. 1988). Ciacci has two post-conviction motions pending before the Superior Court raising the same issues as raised here, therefore, his claims are unexhausted.

C. 28 U.S.C. § 2244(d)

A one-year statute of limitation applies to applications for writs of habeas corpus, subject to certain tolling conditions. 28 U.S.C. § 2244(d). The statute reads in pertinent part:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of–
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing such by State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of

due diligence.

> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

Superior Court and DCCA records affirmatively show that Ciacci's conviction in No. 2011-CF2-012334 was final on direct appeal on November 5, 2015 when the DCCA denied his motion to recall the mandate. *See* 13-CF-1359 (D.C. Ct. App. Nov. 5, 2015). He had ninety days to seek certiorari with the United States Supreme Court, or on or before February 3, 2016.

The statute of limitation was tolled, however, while Ciacci's first § 23-110 Motion was pending, *see* § 2244(d)(2). The DCCA denied the § 23-110 Motion on September 21, 2016, and the statute of limitation expired no later than September 21, 2017. Thus, even if Ciacci was able to show that § 23-110 was "inadequate or ineffective to test the legality of his detention" under § 23-110(g), the statute of limitation had already expired on his claims unless he is entitled to equitable tolling.

Ciacci argues that his newly discovered evidence of actual innocence "serves as a gateway through which a petitioner may pass" regardless of the untimeliness of the petition. *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). "[A] petitioner does not meet the threshold requirement unless he persuades the district

court that, in light of the *new* evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 329 (1995). And "in making an assessment of the kind *Schlup* envisioned, "the timing of the [petition]" is a factor bearing on the "reliability of th[e] evidence" purporting to show actual innocence. *McQuiggen*, 569 U.S. at 387; Schlup, 513 U.S. at 332.

The evidence that Ciacci submits is not new; it was available to him and his attorney before trial. *See* Exs. A-E, ECF Nos. 1-1 to 1-5. On June 15, 2012, the Government notified Ciacci's attorney about this evidence, which consists of photographs, the complainant's medical records, police reports, and other documents. *See* Ex. B, ECF No. 1-1 (discovery letter dated 06/15/12). Further, Ciacci argued on direct appeal that the trial court's refusal to allow his attorney to introduce this evidence was reversible error, clearly undercutting any argument that he recently became aware of such evidence. *See Ciacci*, No. 13-CF-1359, ECF No. 12-1 (DCCA Memorandum Opinion and Judgment at 4-6). Ciacci is not entitled to use this evidence as a gateway to toll the statute of limitation and raise these claims in a federal district court.

IV. CERTIFICATE OF APPEALABILITY

Jurists of reason would not disagree with this Court's ruling, nor would such jurists disagree that Ciacci has failed to make a substantial showing to the contrary.

Slack v. McDaniel, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012). Any request for a certificate of appealability is DENIED. *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); 28 U.S.C. § 2253(c)(1(A).

V. CONCLUSION

For the foregoing reasons:

(1) Ciacci's Application to Proceed in District Court Without Prepaying Fees or Costs is GRANTED.

(2) The Petition is DISMISSED for lack of jurisdiction.

(3) Any request for a certificate of appealability is DENIED.

(4) The Clerk is DIRECTED to terminate this action and close the file.

IT IS SO ORDERED.

DATED: HONOLULU, HAWAII, June 26, 2020.

/s/ Leslie E. Kobayashi
Leslie E. Kobayashi
United States District Judge

Ciacci v. U.S. Probation Office, No. 1:20-cv-00271 LEK; DMP hab '20 (DC pris. lack J, SOL)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 28 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MICHAEL KEKOA CIACCI, Petitioner-Appellant, v. UNITED STATES PROBATION OFFICE, Respondent-Appellee.	No. 19-16896 D.C. No. 1:19-cv-00476-DKW-KJM District of Hawaii, Honolulu ORDER

Before: SILVERMAN and WATFORD, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and 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); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MICHAEL K. CIACCI, Petitioner, vs. UNITED STATES PROBATION OFFICE, Respondent.	CIV. NO. 19-00476 DKW-KJM ORDER GRANTING IN FORMA PAUPERIS APPLICATION; DISMISSING PETITION; AND DENYING CERTIFICATE OF APPEALABILITY

Before the Court is Petitioner Michael K. Ciacci's petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254 ("Petition"),[1] and Application to Proceed in District Court Without Prepaying Fees or Costs ("IFP Application"). Ciacci is currently serving his term of supervised release, pursuant to his 2013 conviction in the District of Columbia Superior Court ("Superior Court"), in Hawaii under the authority of the United States Parole Commission. *See* D.C. Code § 24-133(c)(2).

For the following reasons, the IFP Application is GRANTED,[2] the Petition

[1]"A 'conviction in the Superior Court of the District of Columbia is considered a state court conviction under federal habeas law,' and a challenge to a Superior Court conviction is 'properly brought under 28 U.S.C. § 2254.'" *Wright v. Wilson*, 930 F. Supp. 2d 7, 10 (D.D.C. 2013) (quoting *Smith v. United States*, 2000 WL 1279276, at *1 (D.C. Cir. Aug. 23, 2000)).

[2]Review of the IFP Application reflects that Ciacci's only income (of any sort) is an amount less than $800 a month in welfare benefits. As a result, Ciacci's income falls below the

(continued...)

E

is DISMISSED, and any request for certificate of appealability is DENIED.

I. BACKGROUND[3]

On September 12, 2013, Ciacci was found guilty in the Superior Court for the District of Columbia ("Superior Court") of: (1) Aggravated Assault Knowingly While Armed ("Count 2 "); (2) Assault With A Dangerous Weapon ("Count 3 "); and (3) Assault with Significant Bodily Injury ("Count 4"). *See* Pet., ECF No. 1, at PageID #2; *see also United States v. Ciacci*, 2011 CF2 012334 (D.C. Super. Ct.), https://eaccess.dccourts.gov/eaccess/search.

On November 15, 2013, the Superior Court sentenced Ciacci to 96 months imprisonment with five years supervised release on Count 2; 48 months imprisonment with three years supervised release on Count 3; and 24 months imprisonment with three years supervised release on Count 4, all terms to run concurrently. *Ciacci*, 2011 CF2 012334; *see also* Pet., ECF No. 1, at PageID #2. On November 27, 2013, Ciacci directly appealed his conviction and sentence. *See Ciacci v. United States*, 13-CF-1359 (D.C. Ct. App. 2013).

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[2](...continued)
poverty threshold identified by the Department of Health and Human Services' 2019 Poverty Guidelines. *See* HHS Poverty Guidelines, available at: https://aspe.hhs.gov/poverty-guidelines. The Court, thus, GRANTS the IFP Application.

[3]The procedural history of Ciacci's criminal and post-conviction proceedings is taken from the Petition, from publicly available federal court records, and from records of the D.C. Superior and Appellate Courts. https://eaccess.dccourts.gov/eaccess/search; https://pcl.uscourts.gov/pcl/pages/search/results.

On July 10, 2015, the Court of Appeals for the District of Columbia ("D.C. Court of Appeals") affirmed Ciacci's conviction in part, remanding to the Superior Court "to vacate the lesser-included convictions affected by the merger" of Count 2 with Counts 3 and 4. *See Ciacci*, 13-CF-1359; 2011 CF2 012334.

On July 16, 2015, the Superior Court issued an Amended Judgment that merged Count 2 with Counts 3 and 4. It imposed a 48-month term on Count 3 and a 24-month term on Count 4, terms to run concurrently, with three-year terms of supervised release on both Counts. *Id.*

On December 3, 2013, while his direct appeal was pending, Ciacci also filed a Motion to Vacate, Set Aside or Correct Sentence and Judgment ("Motion"), pursuant to D.C. Code § 23-110. The Superior Court denied the Motion on March 9, 2015. *Id.* Ciacci appealed, and the D.C. Court of Appeals affirmed on September 21, 2016. *See Ciacci v. United States*, App. No. 15-CO-0334 (D.C. App. 2016). The mandate issued on October 13, 2016.

Ciacci also filed a previous federal habeas petition, pursuant to 28 U.S.C. § 2254, in the U.S. District Court for the Eastern District of North Carolina, where he was then confined. *See Ciacci v. Tripp*, Civ. No 5:15-HC-2062-F (E.D. N. Car. Dec. 15, 2015). That petition was summarily dismissed for lack of venue, jurisdiction, and because Ciacci's § 23-110 was still pending in the D.C. Superior Court. *Id.*

Ciacci filed the present Petition on September 4, 2019, after he was placed on supervised release in Hawaii. He "seeks relief from his [Superior Court] sentence on the grounds that the sentence violates the United States Constitution." Pet., ECF No. 1, at PageID #1. Ciacci alleges that his sentence violates the Fifth and Sixth Amendments because: (1) the judge who presided at his criminal trial was assigned to review and adjudicate his D.C. Code § 23-110 Motion; (2) his court-appointed public defender provided ineffective assistance of counsel before and during trial; and (3) his sentence, which included terms of incarceration and terms of supervised release, allegedly constitutes two separate sentences for one crime in violation of the Fifth Amendment.[4]

II. STANDARD OF REVIEW

The Court must screen all petitions for writ of habeas corpus before service to determine if "it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court." Rule 4, Rules Governing Section 2254 Cases in the U.S. District Courts (2012). As a pro se litigant, the petitioner's pleadings are accorded liberal construction and held to a less stringent standard than formal pleadings drafted by attorneys. *See Erickson v.*

[4]Ciacci claims his "eight year prison term . . . to include five years supervised release," constitutes two separate sentences and a thirteen year term. Pet., ECF No. 1, at PageID #8. Ciacci's amended sentences only imposed four years imprisonment, however, as Counts 3 and 4 were served concurrently, and his terms of supervised release run for three years, not five, and are also concurrent.

Pardus, 551 U.S. 89, 93–94 (2007).

III. DISCUSSION

Even under the less stringent standard for reviewing pro se pleadings, Ciacci's Petition is subject to summary dismissal. A liberal construction does not mean that a court can ignore a clear failure in the pleading to allege facts that set forth a claim cognizable in federal district court. *See Weller v. Dep't of Soc. Servs.*, 901 F.2d 387 (4th Cir. 1990).

A. The Court Lacks Jurisdiction Under D.C. Code § 23-110

Because Ciacci was convicted and sentenced in the D.C. Superior Court in 2013, he is subject to the provisions of the District of Columbia Reform and Criminal Procedure Act of 1970 ("Court Reform Act"). *See Byrd v. Henderson*, 119 F.3d 34, 36 (D.C. Cir. 1997). Congress enacted D.C. Code § 23-110 "to vest the Superior Court with exclusive jurisdiction over most collateral challenges by prisoners sentenced in that court." *Williams v. Martinez*, 586 F.3d 995, 1000 (D.C. Cir. 2009); *Blair Bey v. Quick*, 151 F.3d 1036, 1042 (D.C. Cir. 1998).

Thus, collateral challenges to sentences imposed by the District of Columbia Superior Court must be brought in that court. This conforms with normal rules of habeas jurisprudence, where the appropriate venue for a habeas corpus petition challenging a conviction or sentence is in the district court for the district where the judgment was entered, to ensure the accessibility of evidence,

records, and witnesses. *See Hernandez v. Campbell*, 204 F.3d 861, 864 (9th Cir. 2000) (discussing appropriate venue for § 2254 petitions) (citing *Brown v. United States*, 610 F. 2d 672, 677 (9th Cir. 1980) (discussing appropriate venue under § 2255)).

Under District of Columbia law, a collateral motion to challenge a conviction and sentence may be filed in the D.C. Superior Court consistent with the following:

> 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.

D.C. Code § 23-110(a).

Unlike a prisoner convicted in a state court or in a United States district court, however, "a District of Columbia prisoner has no recourse to a federal judicial forum unless [he shows 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) (citations and internal quotation marks omitted). Section 23-110(g) clearly prohibits a prisoner convicted in the D.C. Superior Court from pursuing federal habeas relief if such prisoner has "failed to make a motion for relief under this section *or 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." *See* D.C. Code § 23-110(g). Federal courts therefore generally lack jurisdiction to entertain motions to vacate, set aside, or correct a sentence imposed by the D.C. Superior Court. *See Swain v. Pressley*, 430 U.S. 372, 377-78 (1977) (finding that § 23-110 divests federal courts of jurisdiction over such claims absent a showing that § 23-110 is inadequate or ineffective to test the legality of the detention). Where such relief is available, it must be sought in the United States District Court for the District of Columbia.

Ciacci by his own account has filed at least one motion under § 23-110 with the D.C. Superior Court that was denied and that denial was affirmed on appeal. Therefore, he has had the benefit of collateral review by the court with the constitutional authority to grant the relief he seeks. His dissatisfaction or disagreement with that decision does not make the remedial process ineffective or inadequate. Likewise, the fact that Ciacci may be procedurally barred from filing a successive motion under D.C. Code § 23-110 does not render this remedy ineffective or inadequate. *Chase v. Rathman*, 765 F. Supp. 2d 1, 2 (D.D.C. 2011). Ciacci fails to demonstrate that the remedy available to him under § 23-110 is or was ineffective or inadequate. Pursuant to the prohibition in § 23-110(g), this Court lacks jurisdiction and venue to entertain this Petition.

B. The Petition Appears Untimely

A one-year statute of limitation applies to applications for writs of habeas corpus, subject to certain tolling conditions. 28 U.S.C. § 2244(d). The statute reads in pertinent part:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of–
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing such by State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

The D.C. Superior and Appellate Court records affirmatively show that Ciacci's conviction in 2011 CF2 012334 was final on direct appeal on November 5, 2015 when the D.C. Court of Appeals denied his motion to recall the mandate.

See 13-CF-1359 (D.C. Ct. App. Nov. 5, 2015). Ciacci did not seek certiorari from the United States Supreme Court.

Moreover, while the statute of limitation was tolled while Ciacci's post-conviction Motion was pending, the D.C. Court of Appeals denied that Motion on September 21, 2016, and the mandate issued on October 13, 2016. Even if Ciacci was able to show that § 23-110 was "inadequate or ineffective to test the legality of his detention," D.C. Code § 23-110(g), and even if he brought a challenge in the correct federal district court, the statute of limitation on his claims appears to have expired no later than October 13, 2017. Unless Ciacci can show that he is entitled to equitable tolling of the statute, his claims would be time-barred.

IV. CERTIFICATE OF APPEALABILITY

Jurists of reason would not disagree with this Court's ruling herein, nor would such jurists disagree that Ciacci has failed to make a substantial showing to the contrary. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012). Any request for a certificate of appealability is DENIED. *See Miller El v. Cockrell*, 537 U.S. 322, 327 (2003); 28 U.S.C. § 2253(c)(1(A).

V. CONCLUSION

For the foregoing reasons:

(1) Ciacci's Application to Proceed in District Court Without Prepaying

Fees or Costs is GRANTED.

(2) The Petition is DISMISSED.

(3) Any request for a certificate of appealability is DENIED.

(4) The Clerk is DIRECTED to terminate this action and close the file.

IT IS SO ORDERED.

DATED: September 16, 2019 at Honolulu, Hawaii.

Derrick K. Watson
United States District Judge

Michael K. Ciacci v. United States Probation Office,; Civil No. 19-00476 DKW KJM; **ORDER GRANTING IN FORMA PAUPERIS APPLICATION; DISMISSING PETITION; AND DENYING CERTIFICATE OF APPEALABILITY**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:15-HC-2062-F

MICHAEL KEKOA CIACCI,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER
	)	
BRICK TRIPP,	)	
	)	
Respondent.	)	

Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 [DE-1]. The matter is before the court for an initial review pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts.

The instant petition is not a model of clarity, but it appears Petitioner was convicted after a jury trial of, *inter alia*, assault with a dangerous weapon, in the Superior Court for the District of Columbia. Pet. [DE-1], p. 1. Collateral challenges to sentences imposed by the District of Columbia Superior Court must be brought in that court pursuant to D.C. Code § 23-110. See United States v. Hunt, 946 F.2d 887, *1 (4th Cir. Oct. 7, 1991); Blair-Bey v. Quick, 151 F.3d 1036, 1042 (D.C. Cir. 1998); Perkins v. Henderson, 881 F. Supp. 55, 58-60 (D.D.C. 1995) (explaining that "D.C. Code § 23-110 is the functional equivalent of 28 U.S.C. § 2255"and that determining whether the remedy under § 23-110 is inadequate or ineffective "hinges on the same considerations enabling federal inmates to seek habeas review" outside of § 2255.) "District of Columbia prisoners have no recourse to any habeas corpus review unless they can demonstrate that the § 23-110 remedy is 'inadequate or ineffective' to test the legality of their detention."

F

Perkins, 881 F. Supp. at 59 (quoting D.C. Code D.C. Code § 23-100(g)).

Here, Petitioner's § 23-110 motion is still pending before the D.C. Superior Court. Pet. [DE-1], pp. 2-3, 6, 30. Petitioner "cannot avail himself of this federal forum merely because his prior attempts to challenge his conviction and sentence in the District of Columbia courts have not been successful." Pinkney, 802 F. Supp. 2d at 36. Moreover, Petitioner has failed to demonstrate that his pending motion pursuant to D.C. Code § 23-110 is inadequate or ineffective.

Accordingly, the instant habeas petition is DISMISSED, and the court DENIES a certificate of appealability. See 28 U.S.C. § 2253(c). In light of this disposition, Petitioner's pending motions [DE-3, 9] are DENIED AS MOOT. The Clerk of Court is DIRECTED to close this case.

SO ORDERED.

This 15 day of December, 2015.

James C. Fox

JAMES C. FOX
Senior United States District Judge

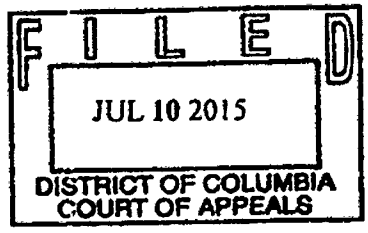
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 13-CF-1359

MICHAEL KEKOA CIACCI, APPELLANT,

v.

UNITED STATES, APPELLEE.



Appeal from the Superior Court
of the District of Columbia
(CF2-12334-11)

(Hon. Michael Ryan, Trial Judge)

(Submitted July 6, 2015 Decided July 10, 2015)

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

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Michael Kekoa Ciacci appeals his convictions[1] for Aggravated Assault While Armed (AAWA),[2] Assault with a Dangerous Weapon (ADW),[3] and Assault with Significant Bodily Injury (ASBI).[4] Appellant contends that the trial court committed several errors, each necessitating reversal of his convictions. Having reviewed the record, we hold that the trial court committed no reversible error, and affirm its judgment. However, we agree with appellant that his ADW and ASBI convictions merge with his AAWA conviction, and remand

[1] The jury acquitted appellant of the charge of Assault with Intent to Kill While Armed (AWIKWA), in violation of D.C. Code §§ 22-401, -4502 (2012 Repl.).

[2] D.C. Code §§ 22-404.01, -4502 (2012 Repl.).

[3] D.C. Code § 22-402 (2012 Repl.).

[4] D.C. Code § 22-404 (a)(2) (2012 Repl.).

with instruction to vacate the lesser-included convictions affected by merger.

I.

The underlying incident giving rise to this appeal stems from a brief acquaintanceship appellant had with the victim, Richard Lewis. Appellant and Lewis met on June 24, 2011, at a local bar, where the two struck up a conversation. Later in the evening, Lewis invited appellant to leave with him, and the two began an intimate relationship that lasted nearly a week. Appellant had no residence in the District of Columbia, and so Lewis offered him the use of his residence until July 3, 2011.

On July 1, 2011, Lewis and appellant went out for an evening of drinking; Lewis became intoxicated and appellant admitted to having "had a lot to drink." When the two returned to Lewis's residence, they began a "conversation" about how Lewis "perceived [his] relationship with [appellant] and whether or not [Lewis] discussed it with any of [his] friends."[5] The conversation deteriorated. Appellant became "more confrontational," raised his voice, and then accused Lewis of lying about what he had told his friends.[6] Lewis felt that the two "were about to come to a fight," so Lewis "moved away from him." The "next thing" that Lewis remembered was lying on his back on the floor, with appellant straddling him, holding a glass bottle raised above Lewis's head, and "screaming at [him], calling [him] a liar." Lewis remembered appellant "beating [him] overhead with a bottle" and "screaming" that he was "going to f**king kill [him]."[7] Lewis failed to recall anything further, and woke up "bleeding profusely from [his] head."

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[5] Lewis testified that the two previously had an "argument" about their acquaintanceship.

[6] Lewis's next-door neighbor, Leslie Brenowitz, testified that she heard a male say in a "fairly loud" voice that "I'll fucking kill you" and "[d]on't turn away from me." Brenowitz couldn't identify the voice, but testified that "[t]he voice didn't sound familiar" and that "it wasn't Rich[ard Lewis]." "[M]aybe" ten minutes later, Brenowtiz heard what "sounded like something being pushed or slammed."

[7] Appellant testified on his own behalf and admitted that he physically assaulted Lewis, but that he did so in self-defense because Lewis "seemed drunk" and "got a little aggressive" with him.

Lewis had Brenowitz, his neighbor, call 911 to report the incident.

Later that night, appellant walked into the Third District Metropolitan Police Department (MPD) station. Appellant approached MPD Officer Jeff Ramirez and told him "I think you guys are looking for me" because he "had gotten into an altercation with his roommate." While appellant was sitting in the station lobby, he also told Officer Daniel Merritt that "he got into a fight with his roommate, hit him in the head" and thought that "he hurt him." Appellant was placed under arrest and booked, a process that involves an officer asking the arrestee certain informational questions, such as the arrestee's name, date of birth, phone number, and emergency contact information. During this procedure, appellant—without responding to any specific question—stated to Officer Merritt that Lewis was "lucky [appellant] didn't kill him."[8]

On April 3, 2012, appellant was indicted on four criminal counts for his role in physically assaulting Lewis. Following a jury trial, appellant was acquitted of the most serious charge—AWIKWA—but was convicted of ADW, AAWA, and ASBI, and on November 15, 2013, sentenced to ninety-six months of incarceration and five years of supervised release. On November 27, 2013, appellant filed a *pro se* "notice of expedited appeal," which we hereby treat as a timely notice of appeal from the criminal convictions pursuant to D.C. App. R. 4 (b).

II.

We now address the merits.[9] Appellant's principal argument on appeal

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[8] Testimony from a second MPD officer confirmed that appellant made this statement during the booking process.

[9] Appellant's argument that the trial court committed reversible error when it denied his motion to suppress may be adjudicated succinctly. Appellant argues that he did not make a knowing and voluntary waiver of his constitutional rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and that his post-arrest statement "[h]e's lucky I didn't kill him" should be suppressed. We are not persuaded. We have held that when "a suspect is in custody" and "volunteers a statement—in the absence of interrogation or its equivalent—there is no *Miranda* violation even if the suspect was not advised of his rights." *Watson v. United States*, 43 A.3d 276, 290 (D.C. 2012). The record establishes that even assuming appellant was in custody, the questions posed to him were "related to booking," and such questions

(continued...)

that the court erred by failing to *sua sponte* exclude the evidence" of the photographs of Lewis's injury. *King*, *supra*, 75 A.3d at 118 (citation and internal quotation marks omitted).[11]

III.

Having concluded no reversible error occurred, we nonetheless agree with appellant – and the government concedes – that the case must be remanded with instruction to merge appellant's ADW and ASBI convictions with his AAWA conviction. *See Medley v. United States*, 104 A.3d 115, 132 (D.C. 2014) (citation omitted) (holding that appellant's convictions merge because "ASBI is a lesser-included offense of aggravated assault"); *see also McCoy v. United States*, 890 A.2d 204, 216 (D.C. 2006) (citation omitted) (holding that convictions for "ADW and AAWA also merged, as 'ADW is a lesser-included offense of AAWA'"). We therefore remand for the trial court to vacate appellant's ADW and ASBI convictions. No re-sentencing is required, as appellant was sentenced concurrently, and the affected convictions carried lesser sentences. *Medley*, 104 A.3d at 133 (citing *Collins v. United States*, 73 A.3d 974, 985 (D.C. 2013)).

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[11] Even if we were to excuse appellant's reversal of position on appeal, we conclude that the trial court did not plainly err in admitting the photographs. With respect to admissibility of photographs, "[t]he test . . . is whether the photograph accurately represents the facts allegedly portrayed by it." *Jones v. United States*, 27 A.3d 1130, 1142 (D.C. 2011) (citation omitted). This test may be met through testimony "provided by a witness who is not the photographer." *Washington Post v. District of Columbia Dep't of Empl. Servs.*, 675 A.2d 37, 43 (D.C. 1996) (citation omitted). The government met this burden. The record demonstrates that Lewis, the victim, testified that the photographs of his injuries were "a fair and accurate representation of what [he] looked like" after the attack. To the extent that appellant's chain-of-custody argument represents a second issue requiring inquiry, the record is bereft of evidence indicating that the government "failed to maintain continuous custody" over the photographs once they were in its possession, "nor any evidence of tampering or other mishandling." *Plummer v. United States*, 43 A.3d 260, 272-73 (D.C. 2012). Thus, appellant's argument doesn't go to the admissibility of the evidence, but rather "to the weight it could be given." *Id.* It follows that the trial court did not plainly err.

Accordingly, we remand for the trial court to vacate the lesser-included convictions affected by the merger. In all other respects, the judgment is

Affirmed.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

Copies to:

Honorable Michael Ryan

Juan Labarca
Director, Criminal Division

Peter H. Myers, Esq.
George Washington University Law School
2000 G Street, NW
Washington, DC 20052

Elizabeth Trosman, Esq.
Assistant United States Attorney

SUPREME COURT OF THE UNITED STATES RULE 14(1)(f),(i)(v)

Constitutional provisions

Article III, Section II, Clause III of the United States Constitution

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

The Sixth Amendment to the United States Constitution

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes

District of Columbia Code Section 22-401 Assault with intent to kill

"Every person convicted of any assault with intent to kill or commit first degree sexual abuse, second degree sexual abuse, or child sexual abuse, or to commit robbery to or mingling poison with food, drink, or medicine with intent to kill, or wil[l]fully poisoning any well, spring, or cistern of water, shall be sentenced to imprisonment for not less than 2 years or more than 15 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth Section 22-3571.01."

District of Columbia Code Section 22-402 Assault with dangerous weapon

"Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than 10 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in Section 22-3571.01."

District of Columbia Code Section 22-404(a)(2) Assault with significant bodily injury

"Whoever unlawfully assaults, or threatens another in a menacing manner, and intentionally, knowingly, or recklessly causes significant bodily injury to another shall be fined not more than the amount set forth in Section 22-3571.01 or be imprisoned not

more than 3 years, or both. For the purposes of this paragraph, the term significant bodily injury means an injury that requires hospitalization or immediate medical attention."

District of Columbia Code Section 22-404.01 Aggravated assault (a)"A person commits the offense of aggravated assault if: (1) By any means, that person knowingly and purposely causes serious bodily injury to another person; or (2) Under circumstances manifesting extreme indifference to human life, that person intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person, and thereby causes serious bodily injury. (b)Any person convicted of aggravated assault shall be fined not more than the amount set forth in Section 22-3571.01 or be imprisoned for not more than 10 years, or both. (c)Any person convicted of attempted aggravated assault shall be fined not more than the amount set forth in Section 22-3571.01 or be imprisoned for not more than 5 years, or both."

District of Columbia Code Section 22-4502 While armed (a)"Any person who commits a crime of violence, or a dangerous crime in the District of Columbia when armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle, stun gun, dirk, bowie knife, butcher knife, switchblade knife, razor, blackjack, billy, or metallic, or other false knuckles): (1)"May, if such person is convicted for the first time of having so committed a crime of violence, or a dangerous crime in the District of

Columbia, be sentenced, in addition to the penalty provided for such crime, to a period of imprisonment which may be up to, and including, 30 years for all offenses except first degree murder while armed, second degree murder while armed, first degree sexual abuser while armed, and first degree child sexual abuse while armed, and shall, if convicted of such offenses while armed with any pistol or firearm, be imprisoned for a mandatory-minimum term of not less than 5 years; and (e-1) In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in Section 22-3571.01. (f) Nothing contained in this section shall be construed as reducing any sentence otherwise imposed or authorized to be imposed. (g) No conviction with respect to which a person has been pardoned on the ground of innocence shall be taken into account in applying this section."

District of Columbia Code Section 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."

District of Columbia Code Section 23-110(g)"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 the Superior Court or by any Federal or State court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy motion is inadequate or ineffective to test the legality of the detention."

District of Columbia Code Section 24-403.01 Sentencing, supervised release

(b) "If an offender is sentenced to imprisonment, or to commitment pursuant to Section 24-903, under this section, the court shall impose a period of supervision ("supervised release") to follow release from the imprisonment or commitment. (2) If the court imposes a sentence of more than one year, the court shall impose a term of supervised release of: (A) Five years, if the maximum term of imprisonment authorized for the offense is 25 years or more;"

Title 28 United States Code Section 1651(a) "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Title 28 United States Code Section 2241(a) "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the strict courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had."

Title 28 United States Code Section 2254(a)"The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus

in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. (b)(1)An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that- (i)the applicant has exhausted the remedies available in the courts of the State; or there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant."

Title 28 United States Code Section 2255(e) "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 if it appears that the applicant has failed to apply for relief, by motion to the court which sentenced him, or that such 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."

Rules

Superior Court of the District of Columbia Rules of Criminal Procedure

Rule 16. Discovery and Inspection. "(a) Government's disclosure. (1) Information subject to disclosure. (E) Documents and objects. Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies of

portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense;"

Superior Court of the District of Columbia Rules of Criminal Procedure

Rule 17. Subpoena. "(c) Producing Documents and Objects. (3) Subpoena for Personal or Confidential Information About a Victim. After a complaint, indictment or information is filed, a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object."

Superior Court of the District of Columbia Rules of Criminal Procedure

Rule 33. New Trial. "(a) Defendant's Motion. Upon the defendant's motions the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment. (b) Time to File. (1) Newly Discovered Evidence. Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case. (2) Other grounds. Any motion for a new trial grounded on any reason other than newly discoverable evidence must be filed within 14 days after the verdict or finding of guilty."

District of Columbia Court of Appeals Rules of the Court

Rule 21. Writ of Mandamus and Prohibition, and other Extraordinary Writs.

"(a) Mandamus or Prohibition to a Superior Court Judge or a District of Columbia Officer: Petition, Filing, Service and Docketing. (1) A party petitioning for a writ of mandamus or prohibition directed to a Superior Court judge or a District of Columbia officer must file a petition with the Clerk of this court with proof of service on all parties to the proceeding in the Superior Court or before the affected agency. The party must also provide a copy to the judge or District of Columbia officer. The District of Columbia officer and all parties to the proceeding in the Superior Court other than the petitioner are respondents for all purposes. (2)(A) The petition must be titled "In re [name of petitioner]." (B) The petition must state: (i) the relief sought; (ii) the issues presented; (iii) the facts necessary to understand the issue(s) presented by the petition; and (iv) the reasons why the writ should issue. (C) The petition must include a copy of any order or opinion or parts of the record that may be essential to understand the matters set forth in the petition. (3) Up[on receiving the prescribe fee, the Clerk must docket the petition and submit it to the court. (b) Denial; Order Directing Answer; Briefs; Precedence. (1) The court may deny the petition without an answer. Otherwise, it must order the respondent(s) to answer within a fixed time. (2) The clerk must swerve the order to answer on all respondents. (3) Two or more respondents may answer jointly. (4) The District of Columbia officer may inform the court and all parties in

writing that he or she does not desire to appear in the proceedings, but the petition will not thereby be deemed admitted. This court may invite or order the Superior Court judge to address the petition or may invite an amicus curiae to do so. The Superior Court judge may request permission to address the petition but may not do so unless invited or ordered to do so by this court. (5) If briefing or oral argument his required, the Clerk must advise the parties of the dates by which briefs are to filed, and of the date of oral argument. (6) The proceeding must be given preference over ordinary civil cases. (7) The Clerk must send a copy of the final disposition to the Superior Court judge or District of Columbia officer. (c) Other Extraordinary Writs. An Application for an extraordinary writ other than one provided for in Rule 21 (a) must be made by filing a petition with the Clerk of this court with proof of service on the respondent. Proceedings on the application must conform, so far as is practicable, to the procedures prescribed in Rule 21 (a) and (b). (d) Form of Papers; Number of Copies. All papers must conform to Rule 32. Except by the court's permission, a paper must not exceed 30 pages. An original and 3 copies must be filed unless the court requires the filing of a different number by order in a particular case."

District of Columbia Court of Appeals Rules of the Court

Rule 41 Mandate: Contents; Issuance and Effective Date; Stay; Remand; Recall; and Disciplinary Matters. "(f) Recall of the mandate: Any motion to recall the mandate must be filed within 180 days from issuance of the mandate."

SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

United States
Plaintiff

v.

Michael Ciaeci
Defendant

CRIMINAL DIVISION
2014 MAY 22 PM 6 48
FILED

CN: 2011-CF2-12334

Honorable J. Michael Ryan

AMENDED AND SUPPLEMENTAL MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE AND JUDGMENT

Pursuant D.C. Code Section 23-110, Defendant Michael Ciaeci by and through himself, respectfully moves this Honorable court to vacate, set aside or correct sentence and judgment based on ineffective assistance of counsel and denial of Sixth Amendment right to effective assistance of counsel under Strickland v. Washington 466 U.S. 668, 698 (1984).

Mr. Ciaeci has made a good faith effort to obtain copy of his trial transcripts at earliest date possible. Mr. Ciaeci received a copy of his trial transcript without voir dire transcribed on April 2, 2014. Deadline for the government's opposition is June 27, 2014. The government stated in their motion that new special proceeding United States attorney has been assigned this month. Mr. Ciaeci's foregoing amended and supplemental motion to vacate, set aside or correct sentence and judgment with the benefit of trial transcripts will not unduly prejudice the government.

Mr. Ciaeci had been appointed public defender George Lane who represented him until June 20, 2012. Thereafter, Amanda David was appointed public defender from pretrial through the verdict and October 23, 2013 hearing where she was replaced by Kyle A. McGonigal. After

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Hsu v. U.S., 392 A.2d 972 (DC 1978) inquiry, on November 8, 2013, Mr. Ciacci was declared lead counsel and Mr. McGanigal declared stand-by counsel for sentencing hearing on November 15, 2013.

Mr. Ciacci was indicted April 3, 2012 on the counts: Assault with Intent to Kill While Armed (AWIKWA), Aggravated Assault While Armed Battle (AAWA), Assault with Dangerous Weapon Bottle (ADW), and Assult Significant Bodily Injury (ASBI). Counts allegedly arised on July 2, 2011.

Mr. Ciacci was found not guilty on AWIKWA and guilty on AAWA, ADW, and ASBI by jury trial on September 12, 2013. Judgment rendered were concurrent sentences, the greater totaling eight years straight prison time, and five years probation. Mr. Ciacci had no prior felony convictions and was recommended by CSOSA to a range of 48-120 months for AAWA count.

Mr. Ciacci's motion presents: first unanimity issue, second documentary evidence and photographs issue, third impeachments issue, fourth expert witnesses issue, fifth while armed and count enhancement issue, and sixth DNA test and stipulation issue.

UNANIMITY

On May 29, 2012, Mr. Lane had filed motion for bill of particulars in response to the government's failure to submit discovery, ten months after it was requested on July 4, 2011. Page two of the motion requested responses to vague allegations to determine location and time of the crimes charged, and determination of the specific act or acts of violence alleged.

Ms. David's September 28, 2012 filed motion to suppress statements and tangible evidence and memorandum of points and authorities in support thereof had not moved the court to have suppressed Leslie

Brenowitz' statement "I'll fucking kill you". Only statements allegedly made by Mr. Ciacci to law enforcement were discussed in the motion. Ms. David had moved the court to have suppressed Metropolitan Police Department (MPD) 3rd District Officer Daniel Merritt's statement "He's lucky I didn't kill him," and declined to have suppressed any other statements.

The government's October 26, 2012 filed opposition to defense motion to suppress also had been silent regarding Ms. Brenowitz' statement.

Before Mr. Ciacci's indictment had been filed. Ms. Brenowitz' grand jury testimony given on December 22, 2011, stated she heard "I'll fucking kill you" (Gr. Jr. Tn. pg. 5, lines 11-16). The governments potential witness list dated November 5, 2012 included Ms. Brenowitz.

Moreover, juror 552 had given the court a note dated September 11, 2013 at 10:25am, after George Washington University (GWU) hospital physician Dr. Bruce Abell had testified and before Mr. Ciacci had testified. The juror's question to the court had inferred Officer Merritt's statement "He's lucky I didn't kill him" established intent under AWIKWA Thus, at least one juror had been confused about which count the incident that constituted Officer Merritt's statement the government had been trying to establish.

The court never ruled on Mr. Ciacci's motion for bill of particulars. The government had not properly disclosed Ms. Brenowitz' statement in response to Ms. David's and both of Mr. Lane's Rosser letters. Ms. David had not compelled motion for bill of particulars, had not interviewed Ms. Brenowitz after her name was listed as potential government witness, and had not raised the omitted statements to the court at any point. Mr. Ciacci's Rosser letters also requested early Jencks submission.

The government presented five incidents which alleged statements at trial. Richard Lewis the complainant, testified Mr. Ciacci allegedly stated "I'm going to fucking kill you" (Tr.Tn.pg 143, lines 19-22). The court credited corroboration of complainant's statement to Ms. Brenowitz' testimony which she heard the statement "I'll fucking kill you" (Tr.Tn.pg. 207, lines 17-19). Officer Merritt testified Mr. Ciacci allegedly stated "He's lucky I didn't kill him" during alleged booking questions (Tr.Tn.pg. 74, lines 14-16). Officer Jameson Lehn testified Mr. Ciacci stated "He's lucky I didn't kill him" also during alleged booking questions (Tr.Tn. pg. 368, lines 22-25). Officer Jeff Ramirez testified Mr. Ciacci allegedly stated "I think you guys are looking for me" (Tr.Tn.pg. 219, lines 1-4) and "I had gotten into an altercation with my roommate" (Tr. Tn.pg. 219, lines 5-7) both at the front lobby desk.

The alleged statements represented separate factual incidents. The government had not attributed any of the three incidents to any of the four counts in the indictment or at trial.

Complainant (Tr.Tn. pg. 143, lines 19-24) and Ms. Brenowitz' (Tr.Tn.pg. 207, lines 18-25; pg. 208, line 1) similar statements were alleged to have been made during the alleged assaults in the indictment. Officer Merritt's (Tr.Tn.pg. 74, lines 5-16) and Officer Lehn's (Tr.Tn.pg 368, lines 22-25) identical statements were alleged to have been made over two hours after the assaults allegedly occurred and at the police station. Officer Ramirez' (Tr.Tn.pg. 219, lines 3-7) statements also were allegedly made couple hours after the alleged assaults and at the police station lobby. Thus, there were three separate factual incidents.

The government presented all three factual incidents to the jury without specificity to which relevant count in the indictment

each was raised. The jury had heard no testimony or discussion that distinguished between general and specific intent. AWIKWA omitted the required specific intent element under the jury instructions. General intent element had been instructed under all four counts. Since specific intent distinguished AWIKWA and AAWA counts, the jury essentially found Mr. Ciacci both not guilty and guilty on the same set of elements charged and instructed.

The jury had not unanimously agreed on which factual incidents and corresponding counts Mr. Ciacci was guilty and not guilty. Ms. David had not objected to the government's improper presentation of duplicitous counts.

The jury had not been instructed or given testimony that stated Ms. Brenowitz' statement was the incident that established concurrent intent to charge AWIKWA. The law enforcement officer's statements were not directly linked by the government to any of the elements of the remaining three counts: AAWA, ADW, and ASBI.

During the first of two motion for judgment of acquittal proceedings held after the government's case in chief, the court had ruled Ms. Brenowitz statement under oath "I'll fucking kill you" constituted concurrent intent (Tr. Tn. pg. 233, lines 11-25). The Court had ruled officer Merritt's statement "He's lucky I didn't kill him" was proper since the Gerstein included the alleged statement made by Mr. Ciacci (Tr. Tn. pg. 380, lines 8-21; pg. 383, lines 15-17). The court's understanding of recordation and police procedure had ruled Officer Ramirez' statements "I think you guys are looking for me" and "I had gotten into an altercation with my roommate" and Officer Lehn's statement "He's lucky I didn't kill him" were not proper (Tr. Tn. pg. 380, lines 15-17). The jury had not been present during the MJOA.

Furthermore, Ms. David had been aware of the several separate factual incidents and the several statements since the government presented at the November 5, 2012 motion to suppress hearing. The government presented officer Ramirez' statement at front lobby area, Officer Merritt's statements at front lobby area, and video of Mr. Ciacci's lips moving without sound (MTS. Tn. pg. 34, lines 8-25; pg. 35, lines 1-25).

Ms. David expressed confusion to the court regarding when the alleged "He's lucky I didn't Kill him" was made and where the statement allegedly occured (MTS. Tn. pg. 92, lines 12-17). Ms. David had not explained her lack of preparation and had not forced the government to then specify particulars at the hearing. Mr. Ciacci's motion for bill of particulars had not been addressed at the hearing. Mr. Ciacci's Rosser letters that requested early Jencks disclosure had not been addressed as well. At a minimum, Ms. David should have addressed the insufficiency of the indictment at the hearing to clear away any confusion she had with regard to the statements alleged.

At the motion to suppress hearing, Ms. David had not moved to suppress single alleged statement to officer Ramirez (MTS. Tn. pg. 92, lines 18-21). Ms. David had moved to suppress all alleged statements to Officer Merritt (MTS. Tn. pg. 92, lines 22-25; pg. 93, line 1; pg. 94, lines 8-11). Only one of those alleged statements to Officer Merritt were presented at trial.

The suppression hearing had not remedied any confusion. Ms. David had not raised the issue of unanimity when the government withheld statements and particulars to understand the indictment before and during the government's case in chief. Special unanimity instruction had been required to address Sixth Amendment to the U.S. Constitution and Super. Ct. Crim. Proc. R 31

violations. U.S. v. Bruce, 89 F.3d 886, 890 (D.C. Cir. 1996); U.S. v. Russell, 134 F.3d 171, 176 180 (3d Cir. 1996); Davis v. U.S., 448 A.2d 242 (D.C. 1982).

Ms. David presented two separate and differing defenses at trial. Mr. Cizeli's self-defense testimony and substantial defense mitigating sufficiency of the evidence through Dr. Abell and Detective Smith's testimonies had been presented. Thus, special unanimity instruction had also been required to address the separate legal incidents. Horton v. U.S., 541 A.2d 604 (D.C. 1988); Brown v. U.S. 542 A.2d 1231 (D.C. 1988); Scarborough v. U.S. 522 A.2d 869 (D.C. 1987).

DOCUMENTARY EVIDENCE AND PHOTOGRAPHS

Ms. David had not interviewed or subpoenaed to testify at trial, MPD 3rd District crime scene search officer Janice Brown to discuss color photographs taken of the scene and at George Washington University hospital or the crime scene report she had produced.

Ms. Brown had not testified at trial. The July 12, 2011 dated crime scene report only stated digital images were taken. Details describing depictions or the total number of photographs produced in the report were not stated.

Ms. David should have forced the government to explain why Ms. Brown's expert opinion chose not to produce trial exhibits that Jose Mendoza, friend of Complainant, allegedly produced instead. Reynoso v. Giurbino, 462 F.3d 1099, 1100-20 (9th Cir. 2006); Goodman v. Bertrand, 467 F.3d 1022, 1023-31 (7th Cir. 2006); Byrd v. U.S., 614 A.2d 25 (D.C. 1992). Also, there was no trial testimony that indicated Ms. Brown produced any of the government trial exhibits 16-19 and Mr. Mendoza could have not taken those photographs allegedly produced between 2am and 7am on July 2, 2011.

The government had informed Ms. David that the photographs submitted to

her through discovery were produced by Mr. Mendoza. Months after discovery had been submitted. Public Defender Services intern investigator Katie Redmond interviewed by telephone on March 21, 2013 Mr. Mendoza and produced a report of the telephone interview with him.

Mr. Mendoza told Ms. Redmond he had taken some photographs of the scene at the apartment but had not confirmed producing the photographs at the hospital.

Ms. Redmond's report indicated Mr. Mendoza told her he did not have the original digital images anymore. Mr. Mendoza said he deleted the photographs since he did not think it was right to be collecting any kind of evidence, and further disposed of that cell phone which he produced the photographs with.

Mr. Mendoza also told Ms. Redmond he had not talked to police or the government attorneys before he had moved to California.

Ms. Redmond's report should have triggered subpoena of Mr. Mendoza's testimony in any form. Ms. David had failed to probe and investigate further. Sannier v. Quarterman, 476 F.3d 349, 357-58 (5th cir. 2007); Morales v. Mitchell, 507 F.3d 916, 936 (6th cir. 2007); Woodard v. U.S., 719 A.2d 966 (D.C. 1998).

The complainant had inaccurately testified at the grand jury (Gr. Jr. Tr. pg. 23, lines 14-25; pg. 24, lines 7-19) and at trial (Tr. Tr. pg. 185, lines 12-21) that Mr. Mendoza had produced several photographs the government presented as exhibits.

Ms. David knew both the originals had been destroyed on purpose and Mr. Mendoza was unavailable to have testified. Also, Ms. Redmond could have testified to the bad faith destruction of the original photographs.

Ms. Redmond's report of her interview of Mr. Mendoza and Ms. Brown's crime scene report verified neither Mendoza nor Brown produced government trial exhibits 20-23. Ms. David had subsequently failed on several occassions

to have objected to their admission during discussion of preliminary matters before voir dire of the jury and direct testimony of complainant. Ms. David had only objected to showing those particular exhibits to the jury during the government's opening statement. Moreover, the government had no alternative means to present similar evidence to that of government trial exhibits 20-23.

Ms. David's failures to have not requested the court evaluate the authenticity of government trial exhibits 16-23 was error. Barnes v. U.S., 365 F.2d 509, 511 n.5 (D.C. Cir. 1966); Taylor v. U.S., 661 A.2d 636, 643 (D.C. 1995). The government bore the burden to have shown claim of custody and preservation of all discoverable evidence.

Failure to have not raised the issue of authenticity foreclosed available court sanctions. Suppression of the photographs had been available if the issue was raised.

The complainant's face and skin in government trial exhibits had clearly depicted a dark redness. The depiction of dark redness was not consistent with the original image found in the duplicates produced to defense counsel under discovery. The government trial exhibits were enlarged and reproduced for trial in a manipulated manner that prejudiced the degree of injury the complainant allegedly sustained. Ms. David should have recognized this manipulation and demanded the government produce the original photographs.

Since each photograph in the government's trial exhibits had been manipulated, the government's authentication of those photographs had not been sufficient to have admitted into evidence.

The government authenticated photographs based on testimony. The manipulated reproduction of duplicate copies could not have constituted fair and accurate. The manipulation rendered the photographs inadmissible.

Ms. David could have introduced duplicate copies of the original

photographs without the manipulation to have shown the prejudice of the government's trial exhibits.

Ms. David requested the government produce complainant's 2009 GWU hospital medical records in defense Rasser letter filed October 2, 2012. The government had informed Ms. David in November 3, 2012 e-mail that the government was not in possession of those records. Ms. David's failure to not investigate and subpoena complainant's 2009 GWU hospital medical records had been inattention.

Ms. David could have established any fact relating to the admission of the photographs required into on direct examination such as the possibility the photographs had depicted a different set of injuries.

Complainant stated briefly to GWU hospital staff (recorded in his 2011 GWU hospital medical records) that his 2009 injuries included insertion of plates and layered suturing. Ms. David had knowledge of extrinsic evidence to explain the inconsistencies between the severity of injuries alleged during complainant's testimony and injuries identified in his 2011 GWU hospital medical records. The inconsistencies were visualized in the photographs produced during discovery. The potential exculpatory evidence should have triggered subpoena of complainant's 2009 GWU hospital medical records. Duncan v. Ornoski 528 F.3d 1222, 1239 (9th cir. 2008); Lambright v. Schriro, 485 F.3d 512, 525-30 (9th cir. 2007); Holsomback v. White, 133 F.3d 1382, 1385-89 (11th cir. 1998); Gray v. U.S., 617 A.2d 521 (D.C. 1992).

Two different cervical collars or neck braces were depicted in the government's production of photographs during discovery. Two different sets of injuries were improperly amalgamated into one set of documentary evidence that purportedly represented one alleged set of injuries incurred on July 2, 2011.

Government trial exhibit 16 was one of the discovery produced photographs that depicted complainant wearing cervical collar or neck brace in a hospital bed. There was no neck injuries stated in any record or testimony. The cervical collar or neck brace had been precautionary (Gr.Jr.Tn.pg.2-3, lines 4-10). The exhibits depicted no injuries other than the redness digitally generated and manipulated on complainant's face. Complainant's authentication constituted wearing the cervical collar or neck brace (Tr.Tn.pg.151, lines 23-25; pg. 185, line 1). Ms. David should have objected to the exhibit based on lack of relevancy and forced the government to prove Ms. Brown produced the photograph because she thought, complainant lying in hospital bed with cervical collar or neck brace he had not needed, was relevant in her ~~expert~~ opinion.

The government directed the complainant during direct testimony point to alleged injuries allegedly depicted in government trial exhibit 17 (Tr.Tn.pg. 158, lines 2-6). The complainant had pointed to an area manipulated by redness and stated was dried blood (Tr.Tn.pg.158, lines 7-15). No injury was identified. An unaltered copy of exhibit 17 depicted no clear injury. The alleged dried blood was actually wet hair. The alleged injuries were not found in complainant's 2011 GWU hospital medical records. Ms. David should have objected to the exhibit since foundation had not been sufficiently laid and forced the government to specify its probative value.

Complainant testified government trial exhibit 18 depicted the start of what he described as a "U" shaped injury from left to right at the backside of his head (Tr.Tn.pg. 156, lines 16-22). Complainant's 2011 GWU hospital medical records and the supplemental police report had both not confirmed the "U" shaped injury. The complainant had been referring to the laceration sutured and depicted in exhibit 21. The right to left "U" shape was a horizontal description. The actual laceration depicted in exhibit 21

was vertical. The inconsistencies should have triggered an objection. Foundation had not been sufficiently laid to have admitted the exhibit.

Government trial exhibit 19 was an enlargement of exhibit 18. An unaltered copy of exhibit 19 showed complainant's wet hair more clearly where he alleged the "U" shaped laceration from right to left had allegedly began. Exhibit 19 depicted an alleged injury on the right side of complainant's head and not on the back side of his head. There had been no testimony at trial or grand jury and no indication in both complainant's 2011 GWU hospital medical records and Officer Merritt's supplemental police report that Mr. Cineed allegedly struck complainant on the right side of his head. Exhibit 19, like exhibit 18, Ms. David should have objected based on insufficient foundation laid. Complainant could have not authenticated depictions that had not represented July 2011 GWU hospital related injuries.

Complainant during direct testimony alleged government trial exhibit 20 had depicted blue stitches located in an area on his head he had not identified (T.Tn.pg. 159, lines 12-15). An unaltered copy of the exhibit 20 depicted no sutures. Blue iodine used by EMS technicians was lathered in complainant's hair. 2011 GWU hospital medical records confirmed the exhibit had not been produced before 7am on July 2, 2011. Mr. Mendoza had not produced that photograph. Complainant claimed the blue color from iodine was blue suturing and had not accurately identified the contents in the exhibit. Foundation had not been sufficiently laid to have admitted the exhibit into evidence.

Government trial exhibit 21 had been blurry and the subject not clearly depicted. An unaltered copy of the exhibit somewhat discerned a vertical laceration sutured in layers and what appeared to be staples. The injury the exhibit depicted was inconsistent with complainant's 2011 GWU hospital

medical records. Dr. Abell assessed a Six centimeters (6cm) laceration in length and exhibit 21 depicted at least one laceration several inches longer than 6cm. Complainant could not have authenticated the injury depicted in the exhibit. Foundation had not been sufficiently laid.

Government trial exhibit 22 depicted skin with follicles and some redness the complainant claimed was an abrasion (Tr.Tn. pg. 160, lines 1-4; pg. 160, lines 21-25; pg. 161, lines 1-2). The part of the body depicted was not discernible. An unaltered copy of the exhibit depicted no abrasion. Complainant could not have authenticated the exhibit. Ms. David should have objected based on lack of relevancy. Exhibit 22 depicted nothing in particular.

Complainant alleged government trial exhibit 23 depicted multiple and deep bruising Dr. Abell's examination had not recorded (Tr.Tn. pg. 160, lines 5-7; pg. 161, lines 3-7). An unaltered copy of the exhibit depicted less bruising and abrasions. Dr. Abell's examination also had not recorded abrasions on the left side of complainant's body. Unlike possible bruising, the abrasions had not developed after Dr. Abell's examination. Complainant would have had to have been admitted to the hospital with the abrasions visible. Complainant could have not authenticated the exhibit. Foundation had not been sufficiently laid.

Ms. David failed to object to the authentication and subsequent admission of government trial exhibits 16-23. Spears v. Mullin, 343 F.3d 1215, 1229 (10th cir. 2003); cf. U.S. v. Webster, 750 F.2d 307 (5th cir. 1984); Sheffield v. U.S., 397 A.2d 963, 967 n.4 (D.C. 1979); Williams v. U.S., 382 A.2d at 7 (D.C. 1978). Those exhibits were shown to the jury on a large screen right next to their booth. The prejudice had been amplified by the digital enlargements of the manipulated exhibits.

Government trial exhibits 9, 11, and 12 had not depicted blood splatter. The government inferred blood splatter was evident during their closing argument (Tr.Tn.pg.398, lines 23-25; pg. 399, lines 1-4; pg.403, lines 5-12). The complainant had not testified to any blood splatter on any of the wall spaces in the exhibits. Officer Merritt had not testified to blood splatter when he authenticated the three exhibits (9, 11, 12) during direct testimony as well.

An unaltered copy of each exhibit depicted at most, one drop of a substance and not necessarily blood. The alleged bottles depicted in the exhibits included red wine. Exhibits 9 and 11 had not depicted two or more drops. Exhibit 12 had depicted no drops of substance on any wall spaces. Blood splatter constitutes multiple indications of blood and is used to reconstruct the acts alleged. None of the exhibits depicted splatter of any kind on any of the wall spaces. The exhibits are cumulative. The inference was improper. Ms. David should have objected to the admissions. Foundation had not been sufficiently laid.

Moreover, the improper inference had been used antecedent by the government to have alleged complainant had been straddled for twenty minutes and beaten repeatedly with an alleged bottle. Complainant's claim had been rebutted, but the improper inference solely corroborated the allegation. Ms. David should have also been prepared for the reference in the exhibits to blood splatter since the government had complainant testify to alleged blood splatter in those same exhibits at the grand jury (GrJr.Tn.pg. 26, lines 14-24). Foundation had not been sufficiently laid.

The government had requested the court allow them to send large posters which were blown-up reproductions of government trial exhibits to the jury room during their deliberations. Exactly which exhibit was

enlarged had not been stated. Since all the photographs were uniformly manipulated, which ever exhibit was blown-up as supplement had the possibility of prejudice. The jury had not requested for a closer look at the exhibit's contents. The blown-up exhibits were cumulative. These exhibits had not been presented to the jury or admitted into evidence during testimony. Ms. David had acquiesced without reasonable inquiry (Tr.Tn.pg.461, lines 24-25). The prejudicial exhibits infected jury deliberation. Failure to object was error.

Ms David had the government trial exhibits and the remaining color photographs, produced during the government's June 18, 2012 discovery submission, in her possession at the start of her appointment as defense counsel on June 28, 2012. Mr. Ciacci's motion to suppress Ms. David had authored was filed September 28, 2012 and the hearing occurred on November 5, 2012. Complainant's 2011 GUH hospital medical records were also produced under June 18, 2012 discovery. Ms. Redmond's report of her interview of Mr. Mendoza and Ms. David's communications with Dr. Abell both occurred in March of 2013. Trial had been held beginning September 9, 2013. Ms. David had ample time and opportunity to have raised a meritorious suppression motion of the photographs. Ms. David's negligence constituted performance below an objective standard of reasonableness under prevailing norms. U.S. v. Weathers, 493 F.3d 229, 230-39 (D.C. Cir. 2007); U.S. v. Little, 851 A.2d 1280 (D.C. 2004); Wright v. U.S., 606 A.2d 763 (D.C. 1992); Hockman v. U.S., 517 A.2d 44 (D.C. 1984).

IMPEACHMENTS

Complainant testified at trial he had lost consciousness (Tr.Tn.pg. 144, lines 17-20) and that he didn't recall telling his emergency trauma physician

Dr. Abell he had never lost consciousness (Tr. Tn. pg. 178, lines 2-9). Ms. David had not completely impeached complainant with his July 2011 GWU hospital medical records regarding his conversation with Dr. Abell about never losing consciousness and had not request the court to admit those records into evidence. Dr. Abell would later confirm complainant told him he had never lost consciousness during his direct testimony (Tr. Tn. pg. 252, lines 3-7). Mr. Ciucci had testified as well that complainant had not lost consciousness (Tr. Tn. pg. 297, lines 18-21; pg. 297, line 25; pg. 298, lines 1-11).

Complainant also testified at trial that Mr. Ciucci had caused alleged pain in his leg (Tr. Tn. pg. 143, lines 11-15; pg. 156, lines 12-17; pg. 161, lines 17-25; pg. 162, lines 1-7), which allegedly required use of a cane (Tr. Tn. pg. 52, lines 2-4; pg. 161, lines 22-25; pg. 162, lines 1-2). Later during trial, Ms. David had Dr. Abell read complainant's discharge record from his July 2011 GWU hospital medical records which stated: special care items, referrals, or equipment were not prescribed or needed upon discharge (Tr. Tn. pg. 256, lines 15-16; pg. 256, lines 21-23). Ms. David had not attempted to impeach complainant regarding his alleged leg pains and use of a cane with his discharge record. Ms. David failed to completely impeach complainant.

Ms. David had also neglected to impeach complainant on two points regarding his grand jury testimony. Complainant claimed two weeks after the alleged incidents occurred that he was diagnosed with a concussion, struck on both sides of his head, struck on his arms and hands, and struck on his left shoulder and left leg (Gr. Jr. Tn. pg. 17, lines 11-13; pg. 17, lines 22-25; pg. 18, lines 1-3; pg. 23, lines 9-10). Complainant had also claimed to have been very mobile immediately after allegedly regaining consciousness (Gr. Jr. Tn. pg. 20, lines 3-25; pg. 21, lines 1-20).

However at trial, complainant's testimony omitted injuries he had been

admitted to GWU hospital with and injuries he told the grand jury he suffered. Complainant's July 2011 GWU hospital medical records and his July 12, 2011 grand jury testimony both contradict his trial testimony. Medical records showed no concussion or injuries to the arms while allegedly blocking strikes. Ms. David had not attempted to impeach complainant's inconsistent trial testimony with these portions of his grand jury testimony and medical records.

Complainant's grand jury testimony also claimed Mr. Mendoza produced government trial exhibits 9-23 (Gr. Jr. Tr. pg. 23, lines 14-25; pg. 24, lines 1-19), contrary the trial record which stated his friend (Mr. Mendoza) had produced exhibits 20-23 (Tr. Tr. pg. 21, lines 10-22). At trial, complainant authenticated the photographs allegedly produced by Mr. Mendoza that became exhibits. Ms. David had not impeached complainant's inconsistent testimonies.

Government trial exhibit 20 could not have been produced after 7am July 2, 2011. Even if Mr. Mendoza claimed to have produced photographs at the hospital, he had not been present before 7am to have produced that photograph at the hospital. Ms. David should have moved the court instruct the jury to completely disregard government trial exhibit 20.

Moreover, the government had not offered any testimony that stated who produced government trial exhibits 16-19.

Ms. David should have impeached complainant about whether he had suffered a neck injury. Complainant inferred his neck had been injured during trial testimony (Tr. Tr. pg. 155, line 25; pg. 156, lines 1-3; pg. 157, lines 23-25; pg. 158, line 1) and during his grand jury testimony (Gr. Jr. Tr. pg. 23, lines 4-10). Ms. David should have had complainant confirm no neck injury occurred. Ms. David should have argued improper authentication

of government trial exhibit 16 since the photograph only depicted the cervical collar or neck brace and was not probative of relevant facts.

Complainant during his trial testimony claimed to have been allegedly straddled and struck repeatedly for twenty minutes by Mr. Ciacci (Tr.Tn.pg. 176, lines 21-24). Ms. David had not interviewed complainant's neighbor and government witness Ms. Brenowitz before trial. Ms. David had not been prepared to highlight inconsistencies in the actual minutes complainant was allegedly straddled.

Ms. Brenowitz testified after complainant that any alleged straddling and loss of consciousness totaled ten minutes before complainant allegedly began knocking on her door (Tr.Tn.pg. 207, lines 5-25; pg. 208, lines 1-19). Ms. David's failure to have been prepared led to prejudicial inferences made by the government during their closing argument (Tr.Tn. pg. 404, lines 16-22; pg. 405, lines 15-20; pg. 428, lines 14-25). Ms. David had not been able to object successfully during the government's closing arguments as well.

Had Ms. David impeached complainant thoroughly, outcome of the trial would have been different, and thus counsel was ineffective. Gonzalez-Soberal v. U.S., 244 F.3d 273, 279 (1st cir. 2001); Johnson v. U.S., 413 A.2d 499 (D.C. 1980); Benjamin v. U.S., 453 A.2d at 812 (D.C. 1982).

Second officer Merritt testified at trial that complainant had both several contusions and cuts on his head and body (Tr.Tn.pg. 83, lines 21-25 thru pg. 86, lines 1-9). Officer Merritt also produced supplemental police report which stated complainant had not exhibited any bruises and only injury had been at the back left side of his head. However, Ms. David had not admitted those portions of the supplemental police report into evidence during Officer Merritt's cross-examination. Instead,

Ms. David had moved her impeachments in at the end of the defense case in chief.

This court later denied Ms. David's request to have admitted portions of Officer Merritt's supplemental police report as evidence for the truth of the matter (Tr. Tn. pg. 402, lines 1-7). To have not moved impeachments into evidence in real time during cross-examination denied Mr. Craig's right to present a defense to the jury. The avenues to have admitted the supplemental police report into evidence without a limiting instruction were no longer available as result of withholding impeachments. For example, under the hearsay exception by party opposition, Detective Jeffrey Smith could have admitted the portions of the supplemental police report during his direct testimony. Officer Merritt spoke to Detective Smith that morning on July 2, 2011 and provided him information that became the supplemental report (MTS. Tn. pg. 80, lines 19-22; pg. 82, lines 3-24; pg. 83, lines 6-25; pg. 84, lines 1-6).

Officer Merritt's statement at trial regarding alleged contusions and cuts on complainant's head and body had not been corroborated by his motion to suppress hearing testimony. Officer Merritt had not stated anything about any injury to complainant's body, and had not stated he visualized cuts or contusions. Officer Merritt had corroborated complainant's allegation he received contusions and cuts on his head and body (Tr. Tn. pg. 63, lines 8-10), and agreed under cross-examination at trial that he stated otherwise in his supplemental police report (Tr. Tn. pg. 85, lines 8-25; pg. 86, lines 1-9). Also, Officer Merritt referred to contusions as bruises at trial (Tr. Tn. pg. 83, line 25; pg. 84, line 1).

However, Ms. David had not fully completed the impeachment of Officer Merritt after she had elicited his acknowledgment to his inconsistent testimonies. Moreover, the error had been compounded when Ms. David neglected to have

moved the court to admit the impeachment of Officer Merritt into evidence with her other impeachments at the end of defense case in chief. Ms. David's expectation that the jury would not be prejudiced by withholding her impeachments until the end of defense case in chief was error, Strickland v. Washington, 466 U.S. at 690-91 (1984); Rompilla v. Beard, 545 U.S. 374, 390-93 (2005) (citing Wiggins v. Smith, 539 U.S. 510, 534-38 (2003)); Reaves v. U.S., 694 A.2d 52 (D.C. 1997).

Third, Ms. Brenowitz testified during direct testimony she had heard only one loud voice on the night in question (Tr. Tn. pg. 207, lines 5-11; pg. 207, lines 17-23). Complainant testified at trial he had raised his voice at least once during the alleged argument antecedent to the alleged assault (Tr. Tn. pg. 139, lines 10-15). Ms. Brenowitz had not corroborated complainant's testimony (Tr. Tn. pg. 139, lines 20-22) that Mr. Ciacci allegedly screamed "you're lying". Mr. Ciacci testified complainant got loud and started screaming (Tr. Tn. pg. 295, lines 3-9; pg. 312, lines 24-25; pg. 313, lines 1-11).

A double wall, a bedroom, a hallway, a staircase leading to a different floor, and an open floor space with cathedral ceilings stood between Ms. Brenowitz and the loud voice she testified hearing while watching her own television. Reasonable investigation would have provided mitigating circumstances.

Ms. Brenowitz stated she had believed the loud voice was an altercation and telephone conversation during her grand jury testimony (Gr. Jr. Tn. pg. 4, line 25; pg. 5, lines 1-5). Ms. Brenowitz had not identified the loud voice as belonging to Mr. Ciacci. However, an inference that the voice had belonged to Mr. Ciacci was made when Ms. Brenowitz' trial testimony insufficiently alleged the voice had not belonged to the complainant.

Also, Ms. Brenowitz had testified her communication with complainant was generally short, primarily constituted greetings, and that she had not

heard him raise his voice before (Tr. Tn. pg. 212, lines 24-25; pg. 213, lines 1-7). Ms. David should have fully impeached Ms. Brenowitz that she had no comparative example to have testified that the voice she alleged had not belonged to complainant.

Ms. David had not fully impeached Ms. Brenowitz' voice identification testimony of what she heard, where she heard the statement, and who made the statement.

Ms. David's failure to have impeached three key government witnesses was ineffective assistance. Higgins v. Renico, 470 F.3d 624, 632-33 (6th cir. 2006); Abell v. U.S., 436 A.2d 804 (D.C. 1981); Goodman v. Bertrand, 467 F.3d 1022, 1023-31 (7th cir. 2006).

EXPERT WITNESSES

On the first day of trial before jury selection, Ms. David told the Court Dr. Abell would be called to give factual testimony and not expert testimony. Ms. David intended to limit Dr. Abell's testimony to what treatment he provided to the complainant and the condition of the complainant when he entered the hospital (Tr. Tn. pg. 10 lines 21-25; pg. 11, lines 1-5).

Ms. David elicited Dr. Abell's qualifications. Dr. Abell testified he was a trauma specialist, licensed to practice in the District of Columbia for over twenty-one years (Tr. Tn. pg. 246, lines 3-14).

Dr. Abell was prevented from giving testimony about the significance of the complainant's blood alcohol level during direct examination (Tr. Tn. pg. 252, lines 24-25; pg. 253, lines 1-12).

Ms. David had not elicited testimony from Dr. Abell about the size of the injuries he examined. Dr. Abell had not been shown any of the government trial exhibits to confirm or deny the alleged injuries depicted in them. Ms. David had neglected to address the inconsistencies between Dr. Abell's

examination and the exhibits which should have constituted fact-based questioning.

On cross-examination, the government had elicited expert testimony from Dr. Abell. Dr. Abell testified his opinion about the difference between abrasion and laceration (Tr. Tn. pg. 256, lines 14-18); about the layers of skin on a scalp (Tr. Tn. pg. 258, lines 23-25; pg. 259, lines 1-8); about the force of trauma (Tr. Tn. pg. 259 lines 10-18); about what an avulsion is (Tr. Tn. pg. 260, lines 10-24); and about what constitutes a bruise and whether bruising is visible hours after trauma (Tr. Tn. pg. 267, lines 2-11).

Ms. David had not objected to Dr. Abell's expert testimony for the government. The government's elicited opinion testimony from Dr. Abell was so descriptively graphic that the testimony may have inferred the exhibits were authentic.

Ms. David had not elicited relevant testimony about complainant's intoxication levels upon initial examination to Gull hospital. An intoxicated complainant assaulting Mr. Ciraci was relevant and goes to Mr. Ciraci's self-defense theory. The 2009 Gull hospital medical records stated complainant's blood-alcohol level to be at 229 mg/dL (Tr. Tn. pg. 252, lines 24-25). 100 mg/dL constitutes intoxication and 500 mg/dL is fatal. Complainant had been very intoxicated.

Ms. David had not elicited Dr. Abell's opinion that had complainant not been very intoxicated, Dr. Abell would have not admitted complainant into the hospital and sutured him before discharging him upon initial examination.

Moreover, the government had elicited Dr. Abell's opinion about bruising and then inferred during their closing argument, that Dr. Abell's examination which recorded no bruising, could be explained by the possibility the bruising had yet to visibly develop. The government had been able to

elicit the foundation to infer a component of serious bodily injury (required element of AAWA count) (Tr. Tn. pg 267, lines 8-11) and Ms. David had not been able to infer an element of ASBI count (Tr. Tn. pg. 253 lines 1-12).

Ms. David had erroneously limited Dr. Abell's testimony. U.S. v. Safavian, 528 F.3d 957, 967 (D.C. Cir. 2008); Paine v. Massie, 339 F.3d 1194, 1201-02 (10th cir. 2003); Clifford v. U.S., 532 A.2d 628 (D.C. 1987); Cooper v. U.S., 368 A.2d 554 (D.C. 1977).

Ms. David neglected to have elicited expert testimony from Detective Smith. Detective Smith could have testified as an expert witness regarding the alleged blood splatter in government trial exhibits 9, 11, and 12.

Officer Merritt authenticated government trial exhibits 7-14 allegedly produced by Ms. Brown (Tr. Tn. pg. 64, lines 3-25). Officer Merritt had given no testimony alleging blood splatter and the government had not attempted to elicit. Complainant had also not testified to any blood splatter or blood on wall (Tr. Tn. pg. 147, lines 22-25 thru pg. 151, lines 1-25). Foundation to infer alleged blood on walls or splatter had not been sufficiently laid.

The government described a single drop in government trial exhibits 9 and 11 during their closing argument as constituting blood splatter (Tr. Tn. pg. 398, lines 23-25; pg. 399, lines 1-8). The government followed up this fabricated description by improperly inferring alleged splatter occurred as result of Mr. Ciucci allegedly straddling and beating complainant with an alleged bottle for twenty minutes.

Ms. David should have been prepared for at least testimony about alleged blood splatter since complainant's grand jury testimony described alleged spots on his walls as blood splatter (Gr. Jr. Tn. pg. 26, lines 18-24).

Ms. David had not been prepared to present Detective Smith's testimony. Dugas v. Coplan, 428 F.3d 317, 332 (1st cir. 2005); Richey v. Bradshaw, 498 F.3d 344, 362-64 (6th cir. 2007); Stewart v. Wolfenbarger, 468 F.3d 338,

361 (6th Cir. 2006); Curry v. U.S., 498 A.2d 534 (D.C. 1985).

WHILE ARMED AND COUNT ENHANCEMENT

The alleged weapon was one of the several bottles shown in several government trial exhibits. In Ms. Brown's expert opinion, none of the bottles were material or relevant to have seized at complainant's apartment. The alleged weapon had not been recorded in the property record (PD 81), had not been entered into physical evidence at trial, had not shattered (Tr. Tn. pg. 151, lines 3-6; pg 274, lines 18-23), and there were no corroborating witnesses who could have testified Mr. Ciacci had been armed with an alleged bottle.

Thus, the government should have been required to prove the alleged weapon was readily available in order to have enhanced Mr. Ciacci's Assault with intent to Kill and Aggravated assault counts under D.C. Code 22-4502. Readily available was both a sentencing factor and an essential element of Mr. Ciacci's AWIKWA and AAWA counts, and an essential element of his ADW count.

The terms "actual use" and "within reach" as stated in Mr. Ciacci's jury instructions were not interchangeable with readily available since readily was a term of art that incorporates the requirement of constructive possession.

Constructive possession required that Mr. Ciacci knew the location of the alleged weapon, that he had the ability to exercise dominion and control over it, and that he intended to exercise dominion and control over the alleged weapon.

Complainant shared an apartment with his roommate Rod Rochwiak (Tr. Tn. pg. 110, lines 22-25; pg. 111, lines 1-3). So, the government also had to have established Mr. Ciacci was more than a mere visitor to the

premises and had a possessory intent in its contents. There had been no indication in the record Mr. Ciacci had a possessory intent in any of the alleged bottles, in complainant's apartment, shown in government trial exhibits. Complainant had testified that Mr. Ciacci staying at his apartment was temporary (Tr. Tr. pg. 120, lines 23-25; pg. 121, lines 1-4).

The mere presence of Mr. Ciacci on the premises or proximity to the alleged weapon had not in isolation deduced he had the requisite intent beyond a reasonable doubt.

Mr. Ciacci had testified he didn't think he was reaching for a bottle. (Tr. Tr. pg. 318, lines 19-24). The government had not established Mr. Ciacci meant to exercise dominion or control over the alleged bottle beyond a reasonable doubt.

Moreover, the element and factor readily available had increased Mr. Ciacci's maximum penalty for AWIK and AA and should have been required to be disclosed by indictment, submitted to trial by jury, and proven beyond a reasonable doubt.

Readily available had been omitted form Mr. Ciacci's AAWA and ADW jury instructions. Ms. David had not proposed jury instruction to include readily available and failed to have objected to its omission in the instructions. Jackson v. Edwards, 404 F.3d 612, 627-28 (2d Cir. 2005); U.S. v. Prigmore, 243 F.3d 1, 17-24 (1st Cir. 2001); Patterson v. Haskins, 316 F.3d 596, 610 (6th Cir. 2003); Robertson v. Cain, 324 F.3d 297, 309-10 (5th Cir 2003); Cox v. Donnelly, 432 F.3d 388, 389-90 (2d Cir. 2005).

The jury could only speculate about whether Mr. Ciacci had possessed the critical intent to exercise dominion or control over the alleged bottle. The enhanced sentence had exposed Mr. Ciacci to an aggravating circumstance greater than that authorized by the jury's

guilty verdicts. Since the jury had not passed on readily available, the court could not have increased the potential term of imprisonment.

Furthermore, Ms. David's opening argument placed the alleged bottle in Mr. Ciaccio's hand (Tr. Tn. pg. 55, line 20). Ms. David had effectively shifted away the government's burden to prove constructive possession and thus, readily available beyond a reasonable doubt. Ms. David's burden shifting had been fatally prejudicial and effectively counterproductive. Mullaney v. Wilbur, 421 U.S. 684, 703-04 (1975) (citing Speiser v. Randall, 357 U.S. 513, 525-26 (1958)); Fisher v. Gibson, 282 F.3d 1283, 1310-11 (10th cir. 2003).

DNA TEST AND STIPULATION

The government had not tested any of the physical evidence for biological material before the first scheduled trial on November 5, 2012. The government's Brady issue had been the possible exculpatory evidence not tested which had been discussed at the November 5, 2012 proceeding that became motion to suppress hearing (MTS. Tn. pg. 27, lines 19-22).

The government had not been ready to proceed but had stated they were ready to proceed without testing the physical evidence (MTS. Tn. pg. 6, lines 12-14). Ms. David moved the court for an independent DNA test in response to the government's Brady issue. The defense initially delayed trial, but this court absorbed the delay on the record.

Four months had passed before this court's March 18, 2013 order that authorized an independent DNA testing of evidence which may contain biological material under the Innocence Protection Act. The government's laboratory had already initially completed their test report.

There was no indication when the laboratory which defense counsel had chosen, had received the physical evidence to test. The one page

forensic report was dated September 3, 2013, a week before trial had begun.

The government's lab results were recorded on CD-Rom and included dozens of pages of quantitative analyses and procedural documents. The defense's lab results were not recorded or submitted to either defense counsel or the government. The one page forensic report had no raw data or procedures to analyze or compare with the government's lab results.

The defense lab's forensic report stated they had not tested MPD items 1, 2, 5 and 6. The defense lab had not used the cotton swabs of complainants DNA and had not tested both shoes in MPD property record. The record had not stated if the lab received MPD items 1, 2, 5 and 6.

Written notice ordered by this Court that the evidence was received from the government to defense lab and from defense lab to the government had not been provided to defense counsel by defense lab or the government.

Written notice ordered by this court of integrity sealed chain of custody had not been provided to defense counsel.

At a minimum, when this court asked Ms. David early on the first day of trial if defense was ready to proceed, instead of responding yes (Tr. Tn. pg. 2, lines 23-25; pg. 3, lines 1-2), Ms. David should have notified the court that the defense would be unable to proceed due to insufficient results from court ordered independent DNA test.

Adequate preparation would have discovered the Brady issue had still remained, a week before trial was set to begin.

Mr. David should have contacted MPD Keith Williams to discuss chain of custody since he received the evidence from the defense lab as stated in their forensic report.

Ms. David should have contacted DNA Diagnostic Center to have obtained a complete defense forensic report with all data be provided for the purpose of trial.

Ms. David should have contacted the defense's DNA expert, to prepare a continuance or suppression motion. There was no indication in the case file submitted from Ms. David to stand-by counsel Mr. McGonigal that the defense was prepared to present a DNA expert.

The defense lab results, if the results were sufficiently provided to defense counsel, could have only stated the presence of blood was indicated on a pair of jeans in the government's physical evidence. Identification could not have been made to confirm the government's lab identification results.

When comparing the defense's one page DNA lab report to the government's four page DNA report summarizing all data, the defense lab had not stated the tests completed in their report. PCR DNA, STR loci, Amelogenin, Kastle Meyer, and Hematrace tests were not stated as completed by defense lab whereas the government's lab had stated completion of all such tests in their report.

The defense's lab report had not indicated which test was used for the presumptive test for presence of blood and which test was used to confirm the presence of blood. The defense's lab report had submitted to Ms. David insufficient basis to conclude the presence of blood. The report is without any procedure or methodology to have stated a conclusion.

The defense's lab report had not indicated any allele frequency data produced. No indication if material was preserved. There was no indication in the defense's lab report if notes, recordings, computer generated materials, and other documents were retained.

The government's lab report had been completed on March 29, 2013. The lab executed AmpF/STR Identifier Plus test on March 7, 2013 and another of the same test on June 27, 2013. The government's lab report does not indicate the amended test or basis for a second allele frequency test in June. Also, the results of the amended second test were included on the CD-Rom.

On November 5, 2012, Ms. David misled Mr. Ciacci. Mr. Ciacci had not been notified that the government had not tested any of the physical evidence. Ms. David misinformed Mr. Ciacci that he had to demand an independent DNA test at that moment otherwise the right would be waived.

On September 9, 2013, Ms. David misled Mr. Ciacci as well. Ms. David had told Mr. Ciacci the defense lab report confirmed the government's lab report and the best option would be to stipulate to the government's DNA results. Ms. David also told Mr. Ciacci that arguing DNA results to the jury would be disadvantageous because the data she said, would put the jury to sleep and that would not be good for Mr. Ciacci.

The defense's lab report had not confirmed the government's lab report and DNA test results. All that had been confirmed was that the blue jeans had the presence of blood. Absolutely nothing more had to be stipulated.

At a minimum, Ms. David should have not stipulated to the government lab's identification results of blood on MPD item 4, the blue jeans, MPD items 5 and 6, the shoes, and all the corresponding government trial exhibits which showed Ms. Larry's markings on them. A complete report from the defense lab should have been obtained before stipulating to the government's entire DNA report and testimony of government DNA expert Candace Larry. Ms. David should have consulted a DNA expert before stipulating to Ms. Larry's testimony particularly since

summary of Ms. Larry's expert testimony had not been provided pre-trial to Ms. David.

As result of the stipulation, ten government trial exhibits (2-6, 28-32) were admitted into evidence. The stipulation had been read in open court which stated Ms. Larry's uncontested lab results (Tr. Tn. pg. 102, lines 3-8). The court also told the jury, "You should consider any stipulation of fact to be undisputed evidence" (Tr. Tn. pg. 102, lines 24-25). The jury understood that the stipulation had been an acquiescence to the blood in evidence. The stipulation presented to the jury on the first day of testimony had been prejudicial.

As result of the stipulation, the government had also made inferences during closing argument that had been very inflammatory and prejudicial (Tr. Tn. pg. 402, lines 21-23 thru pg. 404, lines 1-7).

Moreover, Officer Merritt had testified he remembered seeing black markings on the blue jeans where he alleged blood had been (Tr. Tn. pg. 78, lines 17-21). The black markings were put there by Ms. Larry sixteen months after Officer Merritt last observed the blue jeans. Ms. David had not impeached Officer Merritt regarding black markings, instead she and the government had stipulated to the black markings being produced by Ms. Larry (during bench conference) (Tr. Tn. pg. 79, lines 8-25; pg. 80, lines 1-11). Officer Merritt's erroneous testimony had never been corrected in open court and Ms. David failed to attack his credibility. Ms. David's duty to advocate Mr. Ciacci's cause had not been reasonable.

Mr. Ciacci had not been notified of any of the non-compliance to the March 18, 2013 court order. The court, the government, and Ms. David had not raised the issue of non-compliance and Ms. David had not raised any non-compliance issues with regard to her June 19, 2013

filed Rosser letter regarding DNA.

Ms. David's informed decision to have stipulated to the government's DNA test results, DNA expert's testimony, and all corresponding trial exhibits denied Mr. Ciacci a substantial defense. Draughon v. Dretke, 427 F.3d 286, 296 (5th cir. 2005); Driscoll v. Delo, 71 F.3d 701, 709 (8th cir. 1995); Harris v. U.S., 441 A.2d 268 (D.C. 1982); Gaillis v. U.S., 586 A.2d 726 (D.C. 1991).

Therefore, Mr. Ciacci respectfully moves this court to vacate, set aside or correct sentence and judgment and grant such other and farther relief as may be warranted.

I declare under penalty of perjury the foregoing is true and correct.

Respectfully Submitted,

Executed: May 19, 2014

Michael Ciacci prose
DOB: March 13, 1980
334756, SE2, 47
1901 D Street, SE
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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing to be served upon plaintiff's attorney Mary Ann Snow at 555 4th Street, NW Washington, D.C. 20530, on this 19th day of May, 2014.

Michael Ciacci prose

Additional material from this filing is available in the Clerk's Office.