BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

Nos. 22-CO-43 & 22-CO-843

MARLON A. WILSON, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

Cr. No. 2014-CF3-11881

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II. Whether the trial court erred in its application of the enhanced sentencing penalties under D.C. Code § 22-1804a(a)(2) by misinterpreting the enhancement as a mandatory minimum sentence?

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COUNTERSTATEMENT OF THE CASE

On October 1, 2014, a grand jury indicted appellant Marlon Wilson on two counts of robbery, in violation of D.C. Code § 22-2801; two counts of felony second-degree theft, in violation of D.C. Code § 22-3212(c); and two counts of completed and one count of attempted misdemeanor credit-

card fraud, in violation of D.C. Code §§ 22-3223(b)(1), (d)(1) (Record on Appeal (2016 R.) 12).[1]

A jury trial before the Honorable Milton C. Lee began on December 11, 2014 (2016 R. A at 16). At the close of the government's case-in-chief, Judge Lee granted Wilson's motion for judgment of acquittal on the attempted misdemeanor credit-card fraud charge (12/16/14 Transcript (Tr.) 116). On December 18, 2014, the jury convicted Wilson of all remaining counts except for the charge of robbery in Count One; for that count, the jury acquitted Wilson of robbery but convicted him of the lesser-included offense of first-degree theft (2016 R. 34).

The Court imposed a sentence of 12 months' imprisonment and three years of supervised release on Count One (first-degree theft as a lesser-included offense of robbery); 180 months' imprisonment and three years of supervised release on Count Two (robbery); 12 months' imprisonment and three years of supervised release on Counts Three and Four (second-degree theft); and 100 days' imprisonment on Counts Five

[1] The Record on Appeal from appellant's direct appeal in No. 16-CF-750 will be designated as "2016 R." The Record on Appeal in No. 22-CO-43 will be notated as "R1." The Record on Appeal in No. 22-CO-843 will be notated as "R2."

and Six (credit-card fraud) (2016 R. 71). The sentences for Count One and Counts Three through Six were concurrent to each other and consecutive to the sentence on Count Two, for an aggregate sentence of 16 years' incarceration and three years of supervised release (2016 R. 71). Wilson noted a timely direct appeal (No. 16-CF-750).

After trial, but before the sentencing hearing, Wilson filed numerous motions for new counsel and a new trial (2016 R. 35-38, 54). On May 23, 2016, Judge Lee denied Wilson's motions (2016 R. 62). Wilson timely appealed the denial of his post-trial motions (No. 16-CO-616). On February 15, 2018, this Court issued an unpublished Memorandum Opinion and Judgment (MOJ) affirming Wilson's convictions and sentence (R1. 25, Ex. 6).

After sentencing, but before the Court affirmed his convictions, Wilson filed several more pro se motions seeking to vacate his convictions, including a motion under D.C. Code § 23-110 (R1. 1-5). On March 29, 2018, Wilson filed motions to correct an illegal sentence and to reduce sentence pursuant to Super. Ct. Crim. R. 35 (R1. 9). On September 25, 2019, Wilson filed a supplemental motion to vacate his sentence pursuant to D.C. Code § 23-110 (R1. 18). The government filed a

consolidated opposition on March 12, 2020 (R1. 25). On January 11, 2022, the trial court issued an order denying Wilson's motions seeking relief under Super. Ct. Crim. R. 35 and denying Wilson's claims of ineffective assistance of counsel pursuant to D.C. Code § 23-110 (R1. 31). Wilson noted a timely appeal (No. 22-CO-43).

Wilson subsequently filed numerous additional pro se motions seeking to re-litigate various issues (R2. 1-10). The trial court issued an order on October 17, 2022, denying these motions (R2. 11). Wilson filed a timely Notice of Appeal (No. 22-CO-843) on November 6, 2022 (R2. 12).

The Court consolidated Wilson's appeals in an order issued on November 16, 2022.

The Offense Conduct

On July 6, 2014, Wilson sat down next to Jamey Piland at Shaw's Tavern and stole her wallet out of her backpack as it hung on the back of her bar stool (12/15/14 Tr. 47-78). Wilson then went to the Right Proper Brewing Company, sat down behind Areksamvia Voznitza, and stole her wallet out of her purse (12/16/14 Tr. 230-241). Wilson then proceeded to a nearby CVS drugstore, where he used the stolen credit cards to purchase gift cards (*id.* at 265).

The Sentencing Enhancement

On December 5, 2014, prior to trial, the government filed a Notice of Enhancement in which it notified Wilson that, if convicted in this case, he was subject to an increased sentence under D.C. Code § 22-1804a(a)(2), due to his prior convictions for robbery in Case 2005-FEL-5239 and second-degree burglary in Case 2006-CF2-2806 (2016 R. 21).

Specifically, in Case 2005-FEL-5239, Wilson pleaded guilty to a robbery offense that occurred on August 26, 2005 (see Motion to Supplement at Ex. 2).[2] In Case 2006-CF2-2806, Wilson pleaded guilty to a second-degree burglary offense that occurred on February 11, 2006 (see Motion to Supplement at Ex. 4). Each case involved a different victim (R1. 31 at 8). Wilson entered his guilty pleas in both cases on June 12, 2006, and was sentenced in both cases on September 21, 2007 (see Motion to Supplement at Exhs. 1-4). Wilson signed a separate Waiver of Trial in each case and the court entered a separate Judgment and Commitment Order in each case (see Motion to Supplement at Exhs. 1-4).

[2] Together with this brief, appellee will file a Motion to Supplement the Record with copies of the Superior Court records from appellant's previous cases.

The sentencing-enhancement provision was discussed in open court on multiple occasions by the trial judge and various counsel (10/15/14 Tr. 4; 10/17/14 Tr. 3-4; 11/7/14 Tr. 7; 6/10/16 Tr. 16). Wilson never asserted that the sentencing enhancement did not apply in this case.

The Sentencing Hearing

At the hearing, Wilson did not dispute the existence of the two prior convictions that triggered the sentencing enhancement (07/15/16 Tr. 12).[3] Wilson also did not dispute that these two convictions subjected him to an enhanced sentence in this case under D.C. Code § 22-1804a(a)(2). However, Wilson's counsel did argue that the enhancement papers did not require the court to impose the time "mandatorily," and counsel referred the court to the voluntary sentencing guidelines, which listed the enhanced 15-year penalty as a "soft as opposed to a hard requirement" (07/15/16 Tr. 13-14). Referring to the appendices to the *Voluntary Sentencing Guidelines Manual*, counsel argued that the

[3] At the sentencing hearing, the court asked whether there were any factual corrections to the pre-sentence report (07/15/16 Tr. 11). Wilson's sentencing counsel did not challenge Wilson's convictions for burglary or robbery on which the enhancement was based but did note that the pre-sentence report erroneously included an unscored 2007 theft case (*id.* at 11-12).

guidelines recognize that the enhanced 15-year penalty is a statutory minimum and not a mandatory minimum; the distinction is "very clear because [the enhancement is] not in the space where there would be an M indicating that it's mandatory" (07/15/16 Tr. 14).[4]

In her Memorandum in Aid of Sentencing, defense counsel requested that the court "impose a sentence at the lowest end of the applicable guideline range for each felony offense and to 30 days for each misdemeanor offense" (R1. 25, Ex. 2 at 8). Counsel also highlighted Wilson's supportive family members present in the courtroom, discussed his mental-health history, and criticized the severity of the government's requested sentence given the nature of the offenses (07/15/16 Tr. 14-18).

The government requested an aggregate sentence of 16 years' incarceration (R1. 25, Ex. 3 at 1). Specifically, the government requested

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[4] The *Voluntary Sentencing Guidelines Manual* issued by the District of Columbia Sentencing and Criminal Code Revision Committee on June 30, 2014, applies to all pleas and verdicts on and after that date and includes appendices listing applicable sentencing data for various offenses. An "M" listed in the minimum column for an offense delineates a mandatory minimum. Per § 3.6 of the *Manual*, a mandatory minimum term is "a term that must be imposed and cannot be suspended," while a statutory minimum term is one that "must be imposed but can be suspended."

that Wilson be sentenced pursuant to D.C. Code § 22-1804a(a)(2) to 180 months of incarceration for the robbery charge ("Count Two"), to run consecutively to all other charges, and requested various sentences up to 12 months' incarceration for each of the remaining five counts, all to run concurrently to each other and consecutively to the sentence for the robbery charge (R1. 25, Ex. 3 at 3-4).

The government argued that Wilson's extensive prior history of similar offenses and failure to accept responsibility for his actions made him a poor candidate for any sentence that included a period of probation (R1. 25, Ex. 3 at 1, 4-6). The government did not take a position on whether the sentencing enhancement was a "soft or hard minimum" (07/15/16 Tr. 15-17). Instead, the government requested a 15-year sentence for the robbery offense because of Wilson's record (*id.*). Government counsel indicated that if Wilson had shown any remorse for his conduct or acceptance of responsibility, the government "likely would have come in here and asked for maybe less than that 15 years" (*id.* at 16-17). The government also noted that its recommendation, while significant, nevertheless included a below-guidelines sentence on

Wilson's conviction for first-degree theft and a request for the statutory minimum sentence on the robbery conviction (R1. 25, Ex. 3 at 5).

The trial court addressed Wilson at the sentencing hearing (07/15/16 Tr. 19-25). Based on the court's review of Wilson's other cases, the court concluded that Wilson appeared to be "repeating the same thing over and over again," and that Wilson now faced "just an un-Godly sentence" (*id.* at 23). Although Wilson claimed he was heavily intoxicated on the night of the crimes in the instant case, the court "[did] not believe" that a person as intoxicated as Wilson claimed could have acted in "such a calculated manner" (*id.* at 24). The court went on to state:

> It pains me that I've got to give you the amount of time that I have to give you because it is a shout, it is. The statute does not give me wiggle room, and that's just what the legislature said, and my obligation is to do what the law says and I've got to do it, but it is an unpleasant thought . . . and it is, it disturbs me, makes me uncomfortable to have to do this, but I have to do it, and let me just say separate from the statute, the prior record dictates it, it does, even if it wasn't the statute, if somebody came in and said they wanted to do it, they might say it's on the heavy side, but you can't say that it's unreasonable, because it's the same thing over and over and over again. (07/15/16 Tr. 25.)

The court ultimately imposed an aggregate sentence of 16 years' imprisonment and three years of supervised release (2016 R. 71).

Direct Appeal

On direct appeal, Wilson argued, among other claims, that the enhancement provision in D.C. Code § 22-1804a(a)(2) did not apply because he was convicted of his prior crimes of violence on the same date (R1. 25, Ex. 6 at 13).

On February 15, 2018, this Court in 16-CF-750 and 16-CO-616 rejected Wilson's claims and affirmed his convictions (R1. 25, Ex. 6). Applying plain-error review, the Court rejected Wilson's claim that the sentencing enhancement in D.C. Code § 22-1804a(a)(2) was improperly applied to him. The Court noted that while "the differing language used in subsections (a)(2) and (c)(2) creates some ambiguity (perhaps better described as some tension between the subsections of § 22-1804a)," the ambiguity "does not enable [Wilson] to show that the trial court plainly erred in interpreting § 22-1804a as authorizing the enhancement in this case" (R1. 25, Ex. 6 at 13-14).

Wilson's Rule 35 and § 23-110 Motions

Prior to the Court's affirmance of his convictions, Wilson filed several pro se motions alleging ineffective assistance of counsel and requesting, among other things, that the trial court correct or reduce his

sentence (R1. 1-5). In his pro se filings, Wilson largely sought to relitigate his earlier allegations of ineffective assistance of trial counsel and to challenge the trial court's failure to conduct an inquiry pursuant to D.C. Code § 23-111 (R1. 25, Ex. 6). All of these claims were fully litigated in Wilson's direct appeal and denied by this Court in its MOJ issued on February 15, 2018.

Wilson's counsel also filed a motion to correct or reduce his sentence pursuant to Super. Ct. Crim. R. 35 (R1. 9), and a supplemental motion to vacate his sentence pursuant to D.C. Code § 23-110 (R1. 18). Wilson's Rule 35 motion argued that the enhancement provision in D.C. Code § 22-1804a is ambiguous and does not apply to Wilson's circumstances (R1. 9). The motion further argued that, although Wilson could not obtain relief from this Court pursuant to plain-error review, the trial court should afford relief under Rule 35(a) or, alternatively, through application of the rule of lenity (*id.*). Wilson's D.C. Code § 23-110 motion argued that his sentencing counsel was ineffective because she failed to challenge the applicability of the enhancement statute (R1. 18). The motion also highlighted the trial court's supposed reluctance to impose a 15-year "mandatory jail sentence" to support its claim that Wilson's

sentencing outcome would likely have been different if counsel had objected to the enhancement (*id.*).

The government filed a consolidated opposition to Wilson's motions on March 12, 2020 (R1. 25). The government argued that the enhancement provision was properly applied to Wilson, that the rule of lenity did not apply, that the sentence imposed by the trial court was proper in light of the enhancement provision, and that sentencing counsel's performance was not deficient or prejudicial to the defense (*id.*).

The Trial Court's Order

On January 11, 2022, the trial court issued an order denying Wilson's motions (R1. 31). Specifically, the trial court found Wilson's interpretation of the enhancement provision to be without merit and unsupported by the plain language of the statute (R1. 31 at 7). Wilson's reading of the statute would "deprive the government from seeking and the court from imposing an enhanced penalty simply because defendant was sentenced on the same date for separate and distinct conduct" – a reading of the statute the trial court said was "strained" and not contemplated by the D.C. Council when the statute was enacted (R1. 31 at 8). The trial court concluded that "[t]he clear purpose of the statute is

to punish more severely those offenders who had committed and been sentenced for two prior violent felonies without any reference to when the sentencing proceeding for the separate conduct occurred" (R. 31 at 8-9).

The trial court likewise rejected Wilson's ineffective assistance of counsel claim. In light of the trial court's interpretation of D.C. Code § 22-1804a, the court noted that "it is not deficient performance for counsel not to advance an argument that simply is not supported by a fair and reasonable reading of the statute" (R1. 31 at 9). Similarly, the trial court concluded that Wilson could not show prejudice from any alleged deficiency because "the imposed sentence recognized that defendant had 21 prior convictions that include instances of conduct very similar to the facts established at trial" (R1. 31 at 10). In sentencing Wilson to a lengthy period of incarceration, "the court recognized the mandatory nature of the enhancement provision and at the same time commented that the sentence imposed was not unreasonable given the repetitive nature of defendant's conduct" (R1. 31 at 10).

SUMMARY OF ARGUMENT

Wilson has failed to establish that his attorney's failure to challenge his exposure to enhanced penalties pursuant to D.C. Code § 22-1804a(a)(2) constituted ineffective assistance of counsel. The enhancement provision was properly applied to Wilson, and any challenge to its applicability would have been meritless. Thus, Wilson's attorney's performance was not deficient and did not prejudice the defense. Further, D.C. Code § 22-1804a is not ambiguous and the rule of lenity does not apply.

Wilson failed to assert that the trial court erred by interpreting D.C. Code § 22-1804a(a)(2) to impose a mandatory minimum sentence at either the sentencing hearing or in his direct appeal. Thus, this Court may review this claim, if at all, for plain error. The trial court did not commit plain error in its application of the enhanced sentencing penalties under D.C. Code § 22-1804a(a)(2) by misinterpreting the enhancement as a mandatory minimum. The trial court properly understood the enhancement to impose a statutory minimum, and appropriately applied the provision when sentencing Wilson to 180 months' incarceration for robbery.

ARGUMENT

I. The Trial Court Properly Denied Appellant's D.C. Code § 23-110 Motions Alleging Ineffective Assistance of Counsel.

Wilson argues that his attorney's failure to challenge his exposure to enhanced penalties at sentencing pursuant to D.C. Code § 22-1804a(a)(2) subjected him to "unfavorable" plain-error review in his direct appeal and therefore constituted ineffective assistance of counsel (Brief at 4). This argument is without merit. Because D.C. Code § 22-1804a(a)(2) was properly applied to Wilson, Wilson's attorney's performance was not deficient and did not prejudice the defense.

A. Standard of Review and Applicable Legal Principles.

On appellate review of a trial court's ruling on an ineffective assistance of counsel claim, the Court defers to the trial court's findings of fact unless they lack evidentiary support and reviews the trial court's legal conclusions de novo. *Logan v. United States*, 147 A.3d 292, 300-301 (D.C. 2016); *Kuhn v. United States*, 900 A.2d 691, 698-699 (D.C. 2006).

The "right to counsel" embodied in the Sixth Amendment is the right to effective assistance of counsel. *Strickland v. Washington*, 466

U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). *Strickland* establishes a two-part test for evaluating claims of ineffective assistance of counsel. *Id.* at 687. A defendant must be able to establish that: (1) counsel's performance was deficient; and (2) counsel's performance prejudiced the defense. *Id.* at 687; *see also Freeman v. United States*, 971 A.2d 188, 201 (D.C. 2009) ("An appellant alleging the constitutional ineffectiveness of his trial counsel must demonstrate both deficient performance and prejudice in order to merit relief under D.C. Code § 23–110.").

To establish deficient performance, a defendant must show that counsel made "errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, 466 U.S. at 687. In other words, a counsel's performance may not fall below an objective standard of reasonableness as measured by prevailing professional norms. *Id.* at 688. Subsequent evaluation of an attorney's performance must be highly deferential and "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Bell v. Cone*, 535 U.S.

685, 698 (2002) (quoting *Strickland*, 466 U.S. at 689). Counsel should be "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment[.]" *Burt v. Titlow*, 571 U.S. 12, 22 (2013) (quoting *Strickland*, 466 U.S. at 690).

It is not deficient performance for counsel to fail to file a meritless motion or decline to make a meritless objection. *Washington v. United States*, 689 A.2d 568, 571-2 (D.C. 1997) (failure to file a meritless motion does not constitute ineffective assistance of counsel); *Zanders v. United States*, 678 A.2d 556, 569 (D.C. 1996) ("[T]here is no professional obligation to file a motion that may have no merit.").

To prevail on an ineffective assistance of counsel claim, a defendant must also establish that counsel's deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 693. "As a general matter, a defendant alleging a Sixth Amendment violation must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Mickens v. Taylor*, 535 U.S. 162, 166 (2002) (quoting *Strickland*, 466 U.S. at 694). The likelihood of a different result must be substantial, not merely conceivable. *Gardner v.*

United States, 140 A.3d 1172, 1196 (D.C. 2016) (quoting *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (internal citations omitted)).

"Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland*, 466 U.S. at 700. A court reviewing such a claim may examine the two prongs of the *Strickland* test in whatever order makes sense, given the facts and circumstances of the case. *Id.* at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Id.* at 697.

When a defendant files a motion pursuant to D.C. Code § 23-110 asserting ineffective assistance of counsel, there is ordinarily a presumption in favor of holding a hearing on the motion. *Dorsey v. United States*, 225 A.3d 724, 728 (D.C. 2020). However, "a hearing on a § 23-110 motion is not necessary when the motion consists of (1) vague and conclusory allegations, (2) palpably incredible claims, or (3) allegations that would merit no relief even if true." *Little v. United States*, 748 A.2d 920, 922 (D.C. 2000) (quoting *Ready v. United States*, 620 A.2d 233, 234 (D.C. 1993) (internal quotation marks omitted)).

B. Sentencing Counsel Was Not Deficient in Failing to Challenge the Applicability of the Enhancement Provision to Wilson.

The sentencing-enhancement provision in D.C. Code § 22-1804a(a)(2) was properly applied to Wilson in the instant case. The government filed timely notice of the enhancement prior to trial (2016 R. 21). A plain reading of the statutory language establishes D.C. Code § 22-1804a(a)(2)'s appropriateness in this case; any challenge to its applicability would have been doomed to fail. Thus, failure to file a meritless motion was not deficient performance.

1. The Enhancement Provision Applied to Wilson.

Wilson argues that the language of D.C. Code § 22-1804a is "not clear about whether two charges that derived from separate acts but were sentenced on the same day count as two convictions," for purposes of the enhancement statute (Brief at 4-5). He asserts that the Notice of Enhancement "failed to expose him to enhanced penalties," and that the trial court's interpretation and application of the enhancement to his sentence was both "absurd" and "false" (Brief at 4, 7-8). Wilson further

argues that the supposed ambiguity in the statute triggers application of the rule of lenity (Brief at 8). Each of these claims is meritless.

D.C. Code § 22-1804a(a)(2) allows for an enhanced sentencing penalty for a defendant convicted of a crime of violence who has two prior convictions for crimes of violence. D.C. Code § 22-1804a(a)(2) states:

> If a person is convicted in the District of Columbia of a crime of violence as defined by § 22-4501, having previously been convicted of 2 prior crimes of violence **not committed on the same occasion**, the court, in lieu of the term of imprisonment authorized, shall impose a term of imprisonment of not less than 15 years and may impose such greater term of imprisonment as it deems necessary up to, and including, life without possibility of release.

Id. (emphasis added). The statute goes on to state that a person shall be considered to have been convicted of two crimes of violence if "the person has twice before on separate occasions been convicted of a crime of violence as defined by § 22-4501." D.C. Code § 22-1804a(c)(2).

Wilson points to the difference in the language of the two sections and asserts that his prior convictions fail to meet the strictures of D.C. Code § 22-1804a(c)(2) because he was sentenced for both convictions on the same date. This reading of the statute is not supported by case law, legislative history, or common sense.

Wilson cites no precedent equating "separate occasions" with "separate dates." For this reason, this Court already determined in Wilson's direct appeal that it was not plain error for the trial court to find the enhancement statute applicable to Wilson's circumstances (R1. 25, Ex. 6 at 14-15). This Court has interpreted the phrase "on more than one occasion" to require that the acts occurred "at two or more distinct times" and that there be "some time separation between the acts." *United States v. Smith*, 685 A.2d 380, 385 (D.C. 1996).[5] "Two or more distinct times" does not equate to two or more distinct dates.

[5] Other state supreme courts have held that "occasion" explicitly does not mean "date." The Wisconsin Supreme Court held that each conviction constitutes a "separate occasion," as the term was used in a repeat-offender statute, and further held that the statute "did not require that the . . . convictions occur in . . . separate court appearances." *State v. Hopkins*, 484 N.W.2d 549, 550 & 552 (Wis. 1992)). In *State v. Kintz*, the Washington Supreme Court declined to rule that the term "separate occasions" excludes events occurring on the same date. 238 P.3d 470, 476 (Wash. 2010). The court held that "the term 'separate occasions' . . . is unambiguous," and "the only reasonable interpretation of the term is a distinct, individual, noncontinuous occurrence or incident." *Id.* at 476 (quotation marks omitted). In its opinion, the Washington Supreme Court noted the lower court's observation that "[t]he legislature could have defined 'separate occasions" as separate days or dates or as separated by a minimum time period, but it did not do so." *Id.* at 476 (internal quotation marks omitted).

The statute here does not suffer from a fatal ambiguity. Rather, the two subparagraphs of D.C. Code § 22-1804a can be read in concert with one another. Specifically, D.C. Code § 22-1804a(a)(2) specifies the timing of when offenses have been "committed," while D.C. Code § 22-1804a(c)(2) focuses on separate occasions of "conviction." Under this reading, D.C. Code § 22-1804a(a)(2)'s use of the phrase "not committed on the same occasion" precludes the enhancement from applying to multiple convictions arising out of contemporaneous criminal acts. However, the statutory language permits a court to enhance the defendant's sentence based upon convictions arising from acts committed at different times on the same date. *See*, e.g., *United States v. Hudspeth*, 42 F.3d 1015, 1023 (7th Cir. 1994) (noting that Congress amended the Armed Career Criminal Act to apply to crimes "committed on occasions different from one another" to "preclude the classification of **simultaneous** offenses as separate offenses") (emphasis in original), *abrogated on other grounds, Kirkland v. United States*, 687 F.3d 878 (7th Cir. 2012). Similarly, the D.C. Code § 22-1804a(c)(2)'s requirement that someone has been "twice before on separate occasions . . . convicted of a crime of violence" precludes application of the enhancement based on simultaneous convictions – *i.e.*,

convictions in the same case – rather than judgments or sentences entered on the same court date.

Wilson's suggested interpretation of the term "separate occasions" would also conflict with D.C. Code § 22-1804a's apparent purpose. *See generally Washington v. District of Columbia*, 137 A.3d 170, 174 (D.C. 2016) ("[I]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.") (quotation marks omitted). When the D.C. Council adopted the current language in D.C. Code § 22-1804a, it eliminated the prior statutory requirement that the commission of the second violent felony occur after sentencing for the first violent felony. *See* D.C. Law 10-194 (Oct. 7, 1994); *see also Boswell v. United States*, 511 A.2d 29, 30 n.1 (D.C. 1986) (describing statutory requirements of prior provision, D.C. Code § 22-104a (1973)). In doing so, the D.C. Council made clear its intention to apply the sentencing-enhancement provision to a broader range of offenders. *See generally Johnson v. United States*, 225 U.S. 405, 415 (1912) ("A change of language is some evidence of a change of purpose[.]"). This substantive change in the law expanded the applicability of the sentencing enhancement, allowing it to be employed

without regard to the timing of offenders' prior sentencing hearings. Wilson's interpretation of the statute therefore directly conflicts with the legislative purpose of the statute as it exists today.

Wilson's reading of the statute would also produce arbitrary and absurd results. Applying Wilson's reading, he would have been eligible for the enhancement if he had been sentenced in his two prior cases on two successive dates, rather than on the same date. In other words, the sentencing enhancement would have been properly applied if he had been sentenced in Case 2005-FEL-5239 on September 21, 2007, and sentenced in Case 2006-CF22806 on the following day. Such a reading of the statute would make a defendant's sentence turn upon a calendar clerk's scheduling decision rather than on the nature of the defendant's previous criminal conduct. The Council could not have intended this outcome.

Reading D.C. Code §§ 22-1804a(a)(2) & 1804a(c)(2) together, a defendant's two prior convictions for crimes of violence must arise from two distinct acts to properly form the basis for application of the sentencing enhancement. Although Wilson was sentenced for his two prior convictions on the same date, these convictions involve separate

incidents against separate victims, occurring at separate times. The repeat-offender enhancement properly applied in these circumstances.

Finally, Wilson asserts that the rule of lenity should be applied in this case due to the alleged ambiguity in the enhancement statute. The rule is "to be invoked only where the statutory language, structure, purpose, and history leave the intent of the legislature in genuine doubt." *Holloway v. United States*, 951 A.2d 59, 65 (D.C. 2008). Only if, after application of traditional tools of statutory interpretation, a statute remains "grievously ambiguous [such] that the court can make no more than a guess as to what the statute means," will the rule of lenity apply. *Lee v. United States*, 276 A.3d 12, 18–19 (D.C. 2022) (internal citations omitted). "The rule of lenity does not . . . require courts to give criminal statutes their narrowest possible interpretation, and cannot substitute for common sense or the policy underlying a statute." *Alvarez v. United States*, 576 A.2d 713, 715 (D.C. 1990) (citing *Lemon v. United States*, 564 A.2d 1368, 1381 (D.C. 1989)). "Lenity thus serves only as an aid for resolving an ambiguity; it is not to be used to beget one. The rule comes into operation 'at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being

lenient to wrongdoers.'" *Albernaz v. United States*, 450 U.S. 333, 342 (1981) (quoting *Callanan v. United States*, 364 U.S. 587, 596 (1961)).

The rule of lenity is inapplicable here. Even if the slight difference in wording between D.C. Code §§ 22-1804a(a)(2) and 22-1804a(c)(2) creates some tension between the two provisions, that does not amount to a grievous ambiguity sufficient to trigger application of the rule of lenity. "The simple existence of some statutory ambiguity . . . is not sufficient to warrant application of [the] rule, for most statutes are ambiguous to some degree." *Muscarello v. United States*, 524 U.S. 125, 138 (1998). The wording of the enhancement provision, the legislative history of the statute, and the analysis provided by the Court in the direct appeal in this case support the trial court's decision to impose the enhanced sentence upon Wilson in this case.

2. Sentencing Counsel's Performance Was Not Deficient, as She Advocated for the Proper Application of the Sentencing- Enhancement Provision.

The sentencing-enhancement provision in D.C. Code § 22-1804a was properly applied to Wilson at his sentencing hearing. Thus, an objection to its application would have been destined to fail. Wilson's

sentencing counsel was not obligated to pursue a fruitless argument on Wilson's behalf. *See Washington v. United States*, 689 A.2d at 571-2; *Zanders v. United States*, 678 A.2d at 569.

Furthermore, counsel urged the court to read D.C. Code § 22-1804a as imposing a statutory or "soft" minimum sentence, as opposed to a mandatory or "hard" minimum sentence, as delineated in the *Voluntary Sentencing Guidelines Manual* (07/15/16 Tr. 13-14). She advocated for a sentence at the lowest end of the applicable guideline range for each felony offense based primarily on Wilson's traumatic childhood and mental-health history (R1. 25, Ex. 2). While she did not oppose the imposition of the enhancement provision, counsel zealously advocated for Wilson's interests within the framework of D.C. Code § 22-1804a. The fact that Wilson received a harsher sentence than he wanted does not transform counsel's otherwise satisfactory performance into a deficient one.

C. Wilson Was Not Prejudiced by Counsel's Failure to Challenge a Clearly Applicable Sentencing-Enhancement Provision.

Wilson has not demonstrated that his sentencing counsel's failure to challenge the sentencing-enhancement provision resulted in prejudice

to him. There is nothing in the record to suggest any likelihood of a different outcome had Wilson's counsel challenged the enhancement. *See Gardner v. United States*, 140 A.3d at 1196. Thus, there is no reasonable probability that, but for his counsel's failure to make such a meritless challenge, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694.

II. The Trial Court Properly Understood and Applied the Sentencing-Enhancement Provision by Adjudicating a Lawful and Appropriate Sentence for Wilson.

Wilson argues that the trial court's comments at the sentencing hearing on July 15, 2016, show that the judge understood the enhancement provision in D.C. Code § 22-1804a(a)(2) to impose a mandatory minimum sentence, as opposed to a statutory minimum sentence (Brief at 8-9). He also claims that the trial court's order denying the ineffective-assistance claim "makes it very clear" that the court construed the enhancement statute to require the 15-year term as a mandatory minimum (Brief at 8-9). Wilson asserts that, had the judge properly understood the statute, it is "entirely possible that he would not have imposed the fifteen-year sentence" (Brief at 9). However, Wilson

failed to object to his sentence on this ground either at the sentencing hearing or on direct appeal. He has therefore forfeited appellate consideration of this issue. Even if this Court were to consider Wilson's defaulted claim, Wilson cannot show plain error. The record establishes that the trial court properly understood the sentencing enhancement to impose a statutory minimum, and appropriately applied the enhancement provision when sentencing Wilson to 180 months' incarceration for robbery.

A. Standard of Review and Applicable Legal Principles.

An appellant's failure to raise an argument in his initial appeal amounts to a waiver of that argument in a subsequent appeal. *See Parker v. United States*, 254 A.3d 1138, 1142 (D.C. 2021). "Where a defendant has failed to raise an available challenge to his conviction on direct appeal, he may not raise that issue on collateral attack unless he shows both cause for his failure to do so and prejudice as a result of his failure." *Head v. United States*, 489 A.2d 450, 451 (D.C. 1985).

The Court reviews the denial of a motion for a reduction in sentence for an abuse of discretion. *Cook v. United States*, 932 A.2d 506, 507 (D.C.

2007). Sentences within statutory limits are generally unreviewable aside from constitutional considerations. *Id. (*quoting *Crawford v. United States*, 628 A.2d 1002, 1003-4 (D.C. 1993)). "Due process may be implicated if the sentencing judge relies on mistaken information or baseless assumptions, but a judge has wide latitude in sentencing matters and may consider any reliable information, from virtually any source, in deciding what sentence to impose." *Brocksmith v. United States*, 99 A.3d 690, 701 (D.C. 2014) (quoting *Saunders v. United States*, 975 A.2d 165, 167 (D.C. 2009) (internal citations omitted)).

"Where no objection was made during the sentencing proceeding, this [C]ourt applies plain-error review to a claim that the trial court erroneously believed that the sentence it imposed was mandatory." *Briscoe v. United States*, 181 A.3d 651, 655 (D.C. 2018); *see*, e.g., *Veney v. United States*, 738 A.2d 1185, 1198-99 (D.C. 1999) (plain error for trial judge to mistakenly believe imposition of a consecutive sentence was mandatory). Before an appellate court can correct an error under these circumstances, the defendant must establish: (1) error; (2) that is plain; and (3) that affects substantial rights. *Johnson v. United States*, 520 U.S. 461, 466–67 (1997) (citing *United States v. Olano*, 507 U.S. 725, 732

(1993)). If all three of the above conditions are met, an appellate court may exercise its discretion to notice a forfeited error, but only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.* (internal citations omitted).

B. Because Wilson Failed to Raise this Argument at the Sentencing Hearing or on Direct Appeal, the Court May Review His Claim Now Only for Plain Error.

At sentencing, defense counsel noted that D.C. Code § 22-1804a(a)(2) imposed a statutory minimum and not a mandatory minimum sentence (07/15/16 Tr. 13-14). Counsel did not subsequently object to the trial court's imposition of a 180-month sentence for robbery on the grounds that the court had misunderstood the sentencing-enhancement provision as a mandatory minimum. Counsel also did not object when the judge stated "[i]t pains me that I've got to give you the amount of time that I have to give you," or when he stated "[t]he statute does not give me wiggle room, and that's just what the legislature said, and my obligation is to do what the law says and I've got to do it, but it is an unpleasant thought," or when he said "it disturbs me, makes me uncomfortable to have to do this" (07/15/16 Tr. 25). Counsel also did not

raise an objection or indicate that she perceived that the court had misapplied the sentencing-enhancement provision when, after announcing sentence, the trial court asked if either party needed to raise any additional issues (*id.* at 28).

Nor did Wilson raise this issue in his direct appeal or in any of his post-conviction motions. Wilson asserted several bases for ineffective assistance of counsel in various filings, but never this one. He has also argued several times that the enhancement statute is ambiguous or was misapplied to his case. Only in his latest filing has he asserted, for the first time, that the trial court misinterpreted the enhancement as a mandatory minimum. He may not now raise that issue on collateral attack unless he can show both cause for his failure to do so in his direct appeal and prejudice. *See Head*, 489 A.2d at 451. Wilson has not, and cannot, establish good cause for failing to raise this issue in his direct appeal.

Because Wilson failed to preserve any challenge to his sentence on the grounds now asserted in this collateral appeal, this Court may consider his claim only if necessary to correct plain error. *See Briscoe,* 181 A.3d at 655; *Veney,* 738 A.2d at 1199.

C. The Trial Court Properly Understood and Applied D.C. Code § 22-1804a to Wilson.

Even if the Court of Appeals were to consider Wilson's claim on the merits, he would not prevail. While there have been occasions where both the trial court and counsel were somewhat imprecise in their descriptions of the enhancement provision's requirements, the record establishes that the trial court properly understood the sentencing enhancement to impose a statutory minimum and not a mandatory minimum.

The *Voluntary Sentencing Guidelines Manual* defines a mandatory minimum term as "a term that must be imposed and cannot be suspended," while a statutory minimum term is defined as one that "must be imposed but can be suspended." District of Columbia Sentencing and Criminal Code Revision Commission, *Voluntary Sentencing Guidelines Manual*, § 3.6, p. 23 (June 30, 2014). A statutory minimum is "mandatory" in that it must be imposed, although it may be suspended; accordingly, statutory minimums may sometimes be imprecisely referred to as a "mandatory" sentence, thereby causing confusion as to whether a true mandatory minimum sentence is being considered.

At the sentencing hearing in this case, Wilson's counsel noted that D.C. Code § 22-1804a(a)(2) imposed a statutory and not a mandatory

minimum sentence (07/15/16 Tr. 13-14). The trial court did not indicate that the court interpreted the statute differently. Moreover, Wilson's counsel advocated for a sentence at the lowest end of the applicable guideline range for each felony offense, a request that would have been improper if the sentencing enhancement required the court to impose a mandatory minimum (R1. 25, Ex. 2 at 8).

Government counsel erroneously referred to the sentencing enhancement's "mandatory minimum" 15-year sentence in his Memorandum in Aid of Sentencing (R1. 25, Ex. 3). However, he also acknowledged at the sentencing hearing that the government could have requested that the court impose a period of incarceration of less than 15 years for the robbery charge, thereby treating the enhancement provision as a statutory minimum (07/15/16 Tr. 16-17). Further, while government counsel did not take a position as to whether the enhancement created a "hard or soft minimum," he did not argue that the defense's requested sentence violated the enhancement provision's requirements (*id.* at 15-17).

Perhaps most importantly, at no point during the sentencing hearing did the trial court itself refer to the sentencing enhancement as

a "mandatory minimum." While the court expressed some discomfort with the severity of the sentence and noted its obligation to follow the law, the court never indicated that it was not exercising its own discretion in sentencing Wilson. Indeed, after expressing some unease with the harsh statutory minimum, the trial court explained the 15-year sentence for robbery as follows:

> [A]nd let me just say, **separate from the statute**, the prior record dictates it, it does, even if it wasn't the statute, if somebody came in and said they wanted to do it, they might say it's on the heavy side, but you can't say that it's unreasonable, because it's the same thing over and over and over again (07/15/16 Tr. 25) (emphasis added).

In its order denying Wilson's motions seeking relief under Super. Ct. Crim. R. 35(a) and 35(b), the trial court affirmed its understanding of the "mandatory" nature of the enhancement provision – that is to say, the obligatory nature of the 15-year statutory minimum – but never described it as a "mandatory minimum" (R1. 31 at 1, 4, 6, 7 & 10). The trial court reiterated that the imposed sentence reflected not just the application of the enhancement provision, but the fact that Wilson "had 21 prior convictions that included instances of conduct very similar to the facts established at trial" (R1. 31 at 10). The trial court also clarified that "[t]he displeasure expressed by the court of imposing an enhanced

penalty should not be taken as an indication that the sentence was not fully supported by consideration of the facts adduced at trial and in consideration of defendant's very substantial prior record" (R1. 31 at 10).

Simply put, the record does not support Wilson's claim that the trial court erroneously misinterpreted the sentencing enhancement statute as a mandatory minimum. *See Briscoe*, 181 A.3d at 655. The sporadically imprecise description of the sentencing enhancement as "mandatory" by the court and counsel does not constitute "clear or obvious" error. *Id.* at 661. This is particularly true in light of the remainder of the record, which establishes that the trial court and counsel understood the enhancement provision as a statutory minimum.

Wilson nonetheless asserts that "it is entirely possible that [the court] would not have imposed the fifteen-year sentence had he realized" that the statute established only a statutory minimum (Brief at 9). The judge's comments at sentencing about the appropriateness of the 15-year term for the robbery conviction utterly belie this contention. Given that the record shows that the judge would have imposed the same sentence – "separate from the statute" (07/15/16 Tr. 25) – Wilson cannot show any

prejudice arising from the trial court's alleged misunderstanding about the mandatory aspect of the enhancement provision.

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the Superior Court should be affirmed.

Respectfully submitted,

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Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

If you are incarcerated, are not represented by an attorney (also called being "pro se"), and not able to redact your brief, please initial the box below at "G" to certify you are unable to file a redacted brief. Once Box "G" is checked, you do not need a file a separate motion to request leave to file an unredacted brief.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21, amended May 2, 2023, and Super. Ct. Crim. R. 49.1, and removed the following information from my brief:

A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
(2) Taxpayer-identification number
(3) Driver's license or non-driver's' license identification card number
(4) Birth date
(5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)
(6) Financial account numbers

(7) The party or nonparty making the filing shall include the following:

(a) the acronym "SS#" where the individual's social-security number would have been included;
(b) the acronym "TID#" where the individual's taxpayer identification number would have been included;
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(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and (g) the city and state of the home address.

B. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

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/s/
Signature

22-CO-43 & 22-CO-843
Case Number(s)

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Thomas T. Heslep, Esq., on this 31st day of July 2023.

/s/
SARA B. HANSON
Assistant United States Attorney