

Rule 4. Preliminary Consideration by Judge; Appointment of Counsel

(a) Reference to judge; dismissal or order to answer. The original motion shall be presented promptly to the judge who presided at the movant's trial and sentenced him or her, or, if the judge who imposed sentence was not the trial judge, then it shall go to the judge who was in charge of the part of the proceedings being attacked by the movant. If the appropriate judge is unavailable to consider the motion, it shall be presented to another judge in accordance with the procedure of the court for the assignment of its business.

(b) Initial consideration by judge. The motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned. If it conclusively appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief, the judge shall make an order for its summary dismissal and cause the movant to be notified. Otherwise, the judge shall order the prosecutor to file an answer or other pleading within the period of time fixed by the court or take such other action as the judge deems appropriate.

(c) After preliminary consideration by judge. The Court has discretion to appoint counsel to represent the movant pursuant to D.C. Code § 11-2601 in the interest of justice at any time, provided the movant is eligible for appointment under that section.

(d) To conduct discovery. In any case in which the assistance of counsel is required in order to effectively make use of discovery procedures under either the Rules of Criminal Procedure or the Rules of Civil Procedure or elsewhere in the usages and principles of law, the Court shall appoint counsel to represent the movant, provided the movant is eligible for appointment under D.C. Code § 11-2601.

(e) To conduct an evidentiary hearing. The Court shall appoint counsel to represent the movant if the court determines that an evidentiary hearing is required under Rule 8, provided the movant is eligible for appointment under D.C. Code § 11-2601.

COMMENT

Because D.C. Code § 23-110 permits dismissal only if it "conclusively" appears that the movant is not entitled to relief, the word "conclusively" is substituted for "plainly" in the Federal Rule. The Court has the authority to appoint counsel "in the interests of justice" in any proceeding under D.C. Code § 23-110. *Doe v. United States*, 583 A.2d 670, 673 (D.C. 1990). The Federal Rule has been modified to consolidate all provisions concerning the appointment of counsel in one rule. This modification has been made in recognition of the practice in the Superior Court of appointing new counsel prior to or soon after sentencing in a case in which a claim for post-conviction relief appears likely. This practice is consistent with the requirement that appellate counsel investigate and file a motion under D.C. Code § 23-110 based upon ineffective assistance of trial counsel, as part of appellate counsel's appointment. *See Shepard v. United States*, 533 A.2d 1278 (D.C. 1987); *Johnson v. United States*, 633 A.2d 828 (D.C. 1993). However, if the files and records of the case conclusively demonstrate that a movant is not entitled to relief under this section, then the Court need not appoint counsel. *See Doe*, 583 A.2d at 672 ("In order to demonstrate a need for the appointment of counsel, a petitioner usually must satisfy the same criteria that would entitle the petitioner to a

hearing on the § 23-110 motion).

Appointment of counsel is required if the Court determines that an evidentiary hearing is needed. *Garmon v. United States*, 684 A.2d 327 (D.C. 1996). Generally, counsel should also be appointed in a case in which the Court determines that depositions may be taken.