No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2007

MARQUETTE E. RILEY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

Robert S Becker
Counsel of Record
5505 Connecticut Avenue, N.W.
No. 155
Washington, D.C. 20015
(202) 364-8013
Attorney for Petitioner
(*Appointed by the Court*)

Filed: April 9, 2008

QUESTIONS PRESENTED

1. Whether Petitioner's Sixth Amendment right to be represented by counsel at every critical stage of his criminal prosecution was violated because, after the right attached and after he refused to waive it when police first sought to interrogate him, a detective repeatedly entered the interrogation room, without first providing counsel to assist Petitioner, and used psychological tactics intended to coerce a confession, and after 14 hours in which Petitioner was provided no food, obtained a written confession?
2. Whether Petitioner's Fifth Amendment protection against self incrimination was violated when the Trial Court, over objection, admitted the coerced confession obtained in violation of Petitioner's Sixth Amendment rights in the government's case-in-chief?

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OPINION BELOW

The Opinion of the D.C. Court of Appeals affirming Petitioner Marquette E. Riley's conviction and sentence is published at *Riley v. United States*, 923 A.2d 686 (D.C. 2007). It is reproduced in the Addendum to this Petition. Add. A-3 – A-22.

JURISDICTION OF THE COURT

The judgment of the District of Columbia Court of Appeals was entered May 3, 2007. That Court denied Mr. Riley's Petition for Rehearing and Suggestion of Rehearing *en Banc* January 10, 2008. Add. A-30. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution states in relevant part, "No person … shall be compelled in any criminal case to be a witness against himself…." The Sixth Amendment to the U.S. Constitution states in relevant part, "In all criminal prosecutions, the accused shall … have the Assistance of Counsel for his defence." To assist the Court, D.C. Code § 23-113 is reproduced in the Addendum. A- 23 – A-24.

STATEMENT OF THE CASE

The U.S. Attorney filed Complaints[1] in the D.C. Superior Court September 7, 1996 charging Riley and codefendants Antonio "Tony" Marks, Sayid Muhammad and James Antonio "Tony" Stroman with first-degree premeditated murder while armed in violation of D.C. Code §§ 22-2401 and 22-3202.[2] Simultaneously, Metropolitan Police homicide investigators obtained warrants to arrest them.

The grand jury indicted Riley for conspiracy to commit assault and murder in violation of D.C. Code § 22-105(a) (Count A), possession of a firearm during a crime of violence or dangerous offense in violation of D.C. Code § 22-3204(b) (Count B), unauthorized use of a vehicle in violation of D.C. Code § 22-3815 (Count C), assault with intent to kill while armed in violation of D.C. Code §§ 22-501 and 22-3202 (Count D), two counts of first-degree premeditated murder while armed in violation of §§ 22-2401 and 22-3202 (Counts E and F), and destruction of property in violation of D.C. Code § 22-403 (Count G).

Counsel moved to suppress Riley's statements because police had interrogated him after he asserted his right to counsel and to remain silent. The government opposed Riley's motion. The Trial Court denied the motion April 22, 1998.

Jury selection began that day and the trial ended April 29. The jury returned guilty verdicts April 30, 1998 on two counts of first-degree premeditated murder, possession of a firearm during a crime of violence, and assault with intent to kill while armed (Counts B, D, E and F). The Trial Court sentenced Riley to 30 years to life on each murder count, 5 to 15 years for possession of a firearm during a violent crime, and 10 to 30 years for assault with intent to kill while armed. Riley's aggregate D.C. sentence totaled 70 years to life, and he would have to serve mandatory terms totaling 65 years before becoming eligible for parole.

Petitioner filed a timely Notice of Appeal on July 9, 1998. A Panel of the D.C. Court of

[1] The Complaint and supporting warrant affidavit charging Petitioner is reproduced in the Addendum, A-25 – A-29.

[2] Statutory citations are to the 1981 codification in effect at the time of this crime.

Appeals affirmed Riley's conviction in an opinion filed May 3, 2007. Petitioner filed a Petition for Rehearing and Suggestion of Rehearing *en Banc* June 22, 2007, which the D.C. Court of Appeals denied January 10, 2008.

STATEMENT OF FACTS

These homicides were part of a long-running feud between rival gangs, the Fairfax Village Crew in Southeast Washington and the Rushtown Crew in Suitland, Maryland.

Wayne Brown, a drug dealer, testified that in the summer of 1996 Rushtown Crew members Russell Tyler and Lawrence Lynch were shot and Lynch died of his wounds. Tr. 4/23/98, 43, 48.[3] Believing that the Fairfax Village Crew committed the crimes, Marks, Muhammad and other gang members discussed seeking revenge. *Id.* at 45, 49 – 50.

Stroman, a Rushtown Crew member, testified that in mid-August Fairfax Village Crew members attacked him. Tr. 4/27/98, 59 – 61. On August 20 Stroman, Muhammad, Riley and "TJ" went to Marks's house. *Id.* at 63 – 64. Several other individuals were at the house, and Muhammad said he knew where the Fairfax Village Crew would be that evening. *Id.* at 67 – 70. Stroman drove a blue car with Muhammad, Marks and Riley as passengers. *Id.* All were armed.

Larnell "Shawn" Littles, 19, and Larell "Ike" Littles, 12, were outside their home in the 3800 block of Pennsylvania Avenue, S.E., with Robert Johnson, 13, who testified that a car drove into the parking lot next door and several people jumped out of it and started shooting. Tr. 4/23/98, 138 – 44. Shawn ran toward the house. *Id.* at 144. Johnson hid behind some bushes and after the shooters left he saw Ike lying on the ground. *Id.* at 148 – 9.

Stroman testified that Muhammad jumped out of the car. Tr. 4/278/98, 71. After he shot Larnell Littles, according to Stroman, Muhammad started shooting at Larell Littles. *Id.* at 72. Then, Muhammad ordered the others to start shooting, and Marks and Riley complied. *Id.* at 72 – 3. He said they drove back to Marks's house. *Id.* at 75, 101 – 3.

[3] References to transcripts of proceedings will be designated "Tr." Followed by the date of the proceeding and relevant page number.

Brown said he went to Marks's house shortly after the defendants returned from Fairfax Village and retrieved the shotgun he had loaned to Marks earlier. Tr. 4/23/98, 55. The defendants and several other men were there talking about the shooting, and they decided to burn the blue car used in the crime, he testified. *Id.* at 62. Brown bought gasoline and then followed in another car as Muhammad and Riley drove to a place where they could burn the vehicle. *Id.* at 66 – 8.

With assistance from the Prince George's County Police, D.C. detectives arrested Muhammad, Marks, Riley and Stroman early September 9, 1996 at their homes in Suitland, and took them to the Prince George's County Police headquarters. Investigators arrested Riley at about 7 a.m. and MPD detectives Oliver Garvey and Don Sauls attempted to interview him at about 9 a.m. Tr. 4/20/98, 151. When they advised Riley of his rights using a Prince George's County Police rights waiver form, Riley indicated that he did not want to answer questions without a lawyer present. Garvey asked if "he was sure he did not want to talk to us? He said, yes." *Id.* at 148 – 50, 154. They left the interrogation room and Garvey gave the form to a Prince George's County detective, saying Riley had "invoked." *Id.* at 150, 154.

At about 10:45 a.m., on orders from his supervisor, Prince George's Det. Dwight S. DeLoach entered the interrogation room and told Riley "how important it was for him to tell his side of the story." Tr. 4/20/98, 161, Tr. 4/21/98, 208. He had been ordered to focus on the Fairfax Village homicide. Tr. 4/20/98, 163. DeLoach did not advise Riley of his rights, Tr. 4/21/98, 208, even though Riley denied involvement in the Fairfax Village homicides. *Id.* at 210. DeLoach next entered the interrogation room at 1:30 p.m. "to basically check on him and also talk to him again," and "he wanted to tell me his side of what his participation was in D.C.… He kept blurting out things." Tr. 4/20/98, 168. DeLoach advised Riley of his rights and Petitioner again checked the box indicating he did not want to answer questions without a lawyer present. Tr. 4/20/98, 170. DeLoach said, "I told him, in order for me to discuss this case with him to go into the details of the case, in order for him to talk to me about the case, that he had to sign this waiver of rights." Tr. 4/21/98, 217. After Riley changed his answer DeLoach began questioning him about the D.C. homicide. Tr. 4/20/98. 173. DeLoach rejected Riley's denial of involvement,

Id. at 194, and left Appellant alone until about 6:40 p.m., when he took Riley to be booked and presented before a commissioner for a bond hearing. Tr. 4/20/98, 174.

While being fingerprinted Riley asked to talk to Muhammad, DeLoach said. Tr. 4/20/98, 176 & Tr. 4/21/98, 190. At about 7:30 p.m. he brought Muhammad into the room. Tr. 4/20/98, 177. "I told Sayid to talk to Marquette," and the "very first word that was said was Mr. Muhammad told Mr. Riley to go ahead and tell us everything because the police knew, he told them everything that he knew," DeLoach testified. *Id.*, Tr. 4/21/98, 194. DeLoach then worked with Riley from 8 p.m. to 9:41 p.m. on a written statement.[4] Tr. 4/21/98, 197.

In a mid-trial *voir dire* DeLoach examined a log notation that at 6 p.m. on September 9, 1996 an attorney had called to say he represented Riley and that police should not question him. Tr. 4/27/98, 193 – 4. The detective said the note was in Prince George's Police Sgt. Daniel Smart's handwriting, and that no one had told him about the call. *Id.*[5]

Smart could not recall when he learned that Petitioner had refused to waive his rights. Tr. 4/28/98, 210. When he ordered DeLoach to interview Riley he "was aware … that … Garvey, had … attempted to interview Mr. Riley. I did not know ... if they had obtained anything from him. I do know they were in there for a very brief period of time." *Id.* at 211. Smart said he wrote the note on the log when the lawyer called but did not communicate that information to DeLoach because "I don't know who Mr. Marc O'Bryan is.… It has been my position that if an attorney wants to represent someone they will at least come down to the station … in person…." *Id.* at 215. He added that, "I was aware that Mr. Riley had waived his rights to an attorney and it is my understanding that an attorney can't call someone and say I am representing this individual without that person requesting an attorney." *Id.* He said that normally he would have informed the defendant about such a call but he did not do so in this case. *Id.* at 215 – 6.

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[4] Police did not provide food to Riley until after he signed the confession, over 14 hours after they arrested him.

[5] The note said "Mark O'Brian called. Advised he was representing Marquette Riley gave phone number 627-8970. Recess/desist." Tr. 4/27/98, 197.

REASONS FOR GRANTING THE WRIT

When police arrested Petitioner his Sixth Amendment right to counsel had already attached because the government filed a criminal complaint two days earlier charging him with first-degree premeditated murder. In his first meeting with Metropolitan Police homicide detectives, Riley asserted his right to counsel and to remain silent. On the Prince George's County Police Advice of Rights and Waiver Form executed at 9:05 a.m. he checked "No" beside the question asking "Do you want to make a statement at this time without a lawyer?"[6] The detectives confirmed that Riley did not want to talk to them and then left the room. "To me, when somebody doesn't want to talk to me they don't want to make any statements, they don't want to talk. To me at any time that's invoke, if it's with an attorney or without an attorney," Garvey explained. Tr. 4/20/98, 155. The detectives turned the rights waiver form over to Prince George's County detectives working on the case and never re-entered the room.

At about 10:45 a.m. DeLoach violated Appellant's Fifth and Sixth amendment rights when he entered the interrogation room intent on interviewing Riley about the D.C. homicides. *Maine v. Moulton*, 474 U.S.159, 177 n. 14, 106 S. Ct. 477, 88 L. Ed. 2^{d} 481 (1985). During the 30-minute session DeLoach used several psychological ploys to induce Riley to confess, but did not ask any questions or advise Petitioner of his rights.

When DeLoach re-entered the interrogation room at 1:30 p.m., six hours after Riley's arrest, he again violated Petitioner's rights. Police had not provided Riley a lawyer and he had remained tethered in the room almost the entire time. DeLoach again intended to obtain a statement, and even if the Court accepts his claim that Petitioner blurted out his denial of involvement in the homicides, it must view those statements as the product of the coercive earlier session. When the detective advised him of his rights, Riley again indicated that he did not want to talk without a lawyer present. DeLoach coerced him to change his response on the form. In the

[6] The Prince George's Police rights waiver differs from the PD 47 form used by the Metropolitan Police Department, which asks two separate questions: "Do you want to answer any questions?" and "Are you willing to answer questions without having an attorney present?"

90-minute session that began at 1:45 p.m., Riley maintained that he was not involved. Before leaving the room again DeLoach expressed disbelief and suggested that Riley reconsider his answers. This Court has held that if police reinitiate interrogation there is an irrebuttable presumption that the waiver is invalid.

Neither the lapse of time between interviews nor Riley's purported request to speak with Muhammad and subsequent admissions cured the constitutional violations. Therefore, the Trial Court violated Petitioner's Fifth and Sixth Amendment rights by permitting the government to introduce his confession in its case-in-chief, and he is entitled to a new trial.

The holding of the D.C. Court of Appeals affirming Riley's conviction conflicts with 35 years of this Court's precedent regarding when the Sixth Amendment right to counsel attaches and the procedures investigators must follow after a criminal defendant asserts the right before they interrogate him. The Court below's holding conflicts as well with a long line of this Court's Fifth Amendment precedent excluding from evidence at trial confessions obtained in violation of the defendant's right to counsel and to remain silent.

The first question before this Court is whether Riley was deprived of his Sixth Amendment right to counsel when, at 10:45 a.m., DeLoach began the interrogation process that culminated in Appellant's giving a written statement nearly 10 hours later.

Denial of the Sixth Amendment right to counsel at a critical stage in the prosecution is a structural error in the trial process requiring reversal of the conviction. *Gideon v. Wainwright*, 372 U.S. 335, 343, 83 S. Ct. 792, 9 L. Ed. 2^{d} 799 (1963) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)). The Court ruled earlier, in *Spano v. New York*, 360 U.S. 315, 324, 79 S. Ct. 1202, 3 L. Ed. 2^{d} 1265 (1959), that in a case in which the jury hears a confession obtained in violation of the right to counsel, the conviction must be reversed. [7] It rejected a government argument that the conviction should stand if the defendant could have

[7] Spano argued that admission of the confession violated his rights under the Fourteenth Amendment, but the Court found that his Sixth Amendment right to counsel had attached before he was interrogated. *Spano, supra*, at 323.

been convicted without the confession. Even in *Stein v. New York*, 346 U.S. 156, 192, 73 S. Ct. 1077, 97 L. Ed. 1522 (1953), a case much criticized in *Spano* and later in *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), the Court recognized that

> reliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence. A beaten confession is a false foundation for any conviction, while evidence obtained by illegal search and seizure, wire-tapping, or larceny may be and often is of the utmost verity. Such police lawlessness therefore may not void state convictions while forced confessions will do so.

The Court held that if the Trial Court determined in a hearing that Appellant's confession was involuntary he was entitled to a new trial, even if the government had produced sufficient other evidence to support the conviction. *Id.* at 394. Jackson, whose case began before *Miranda* was decided, had not been advised of his right to counsel or to remain silent.

This Court has concluded that the right to counsel is one of the "constitutional rights so basic to a fair trial that [its] infraction can never be treated as harmless error." *Chapman v. California*, 386 U.S. 18, 23, 87 S. Ct. 824, 17 L. Ed. 2d 703 (1967). In such cases the defendant is automatically entitled to a new trial.

The second question the Court must decide is whether admission of Riley's statements in the government's case-in-chief deprived Petitioner of his Fifth Amendment privilege against self-incrimination.

This Court has taken a more elastic view in examining waivers of the protection against self-incrimination. In *Miranda v. Arizona*, 384 U.S. 436, 401 – 500, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the Court held that the appellants had not been given adequate warnings of their rights under the Fifth Amendments and, therefore, they had not knowingly and intelligently waived those rights. As a result their convictions in trials where the confessions had been admitted into evidence had to be vacated, without regard for whether other evidence was sufficient to support the verdicts.

But the Court held in *Chapman, supra*, at 23, that harmless-error analysis is to be applied to trial errors that deprive defendants of their federal constitutional rights. In a case addressing

admission of an involuntary confession, the Court defined trial error as "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Arizona v. Fulminante*, 499 U.S. 279, 307 – 8, 111 S. Ct. 1246, 113 L. Ed. 2d 202 (1991).

When a defendant challenges trial errors the government has the burden of proof. In applying the harmless-error test this Court may review the record *de novo*, and must be able to say that "admission of the confession … did not contribute to … [the] conviction." *Id.* at 295 – 6.

INVESTIGATORS OBTAINED RILEY'S CONFESSION IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL

Before police arrested him Riley had already been charged with murdering Larell Littles.[8] When police arrived at his residence Petitioner was no longer a suspect, he was a defendant in a murder case "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Kirby v. Illinois*, 406 U.S. 682, 689, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972)

This Court said,

> it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches [] at or after the time that adversary judicial proceedings have been initiated against him…. This is not to say that a defendant in a criminal case has a constitutional right to counsel only at the trial itself. The *Powell*[9] case makes clear that the right attaches at the time of arraignment, and the Court has recently held that it exists also at the time of a preliminary hearing. But the point is that, while members of the Court have differed as to existence of the right to counsel in the contexts of some … cases, all of those cases have involved points of time at or after the initiation of adversary judicial criminal proceedings — whether by way of formal charge, preliminary hearing,

[8] In its Opposition to Rehearing, 5 n. 5, the government, for the first time, argued that the Complaint only charged the first-degree murder of Larell Littles. Because the Sixth Amendment right is offense specific, it claimed, it attached only to that charge, and not to charges that eventually arose from the murder of Larnell Littles and the assault on Robert Johnson. Therefore, according to the government, DeLoach could have questioned Riley about the latter crimes, even if Riley's waiver was invalid.

[9] *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932).

indictment, information, or arraignment.

Kirby, *supra*, at 688 – 9. In this case, the custodial interrogation of Riley was a "critical stage" of the prosecution and the Sixth Amendment right to counsel applied. *Michigan v. Jackson*, 475 U.S. 625, 629, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986).

> [A]fter a formal accusation has been made — and a person who had previously been just a "suspect" has become an "accused" within the meaning of the Sixth Amendment — the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation.

Id. at 632.

The MPD detectives who first interviewed Riley recognized that they could not talk to him once he refused to waive his right to have a lawyer present.

Police induced Riley to talk in violation of his right to counsel

There is no doubt in this case that when DeLoach entered the interrogation room he intended to elicit a confession from Riley about the Littles homicides. That is what his superior, Sgt. Smart, told him to do, and that is why he informed Petitioner that Muhammad, Marks and Stroman had already begun telling police their versions of events. The fact that DeLoach did not ask Riley any questions during his 30-minute discourse is irrelevant. *See, e.g. Brewer v. Williams*, 430 U.S. 387, 399, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977); *Rhode Island v. Innis*, 446 U.S. 291, 299, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980)(applying the same principle in the context of a request under the Fifth Amendment for the assistance of counsel).

In *Brewer*, this Court said, "[t]here can be no serious doubt …that [the detective] deliberately and designedly set out to elicit information … just as surely as and perhaps more effectively than if he had formally interrogated him." *Id.* at 399. The Iowa courts recognized that Williams had a right to counsel, but held that he waived it due to the "time element involved on the trip, the general circumstances of it, and more importantly the absence on the Defendant's part of any assertion of his right or desire not to give information." *Id.* at 401. Although the detective asked no questions, Williams responded to the use of psychology with the specific

intent to elicit incriminating information, this Court said. *Id.* at 402 – 3.

In *Innis*, officers did not ask questions or engage Innis in conversation; but they discussed the fact that Innis had been arrested near a school for handicapped children and that a child might find the shotgun and injure someone with it. Eventually Innis directed the officers to the weapon. *Id.* at 294 – 5. This Court held that Innis had been interrogated, saying:

> the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.

Id. at 300 – 301.

In this case DeLoach clearly stated that he intended to obtain a statement from Riley. Telling Petitioner that his codefendants had given statements implicating him, and that the detective did not believe his denials of involvement so he should reconsider what he wanted to say, were tactics specifically designed to overcome Petitioner's will not to waive his rights. DeLoach knew that if his ploys worked Riley would incriminate himself. As the Court said in *Fellers v. United States*, 540 U.S. 519, 523 – 4, 124 S. Ct. 1019, 157 L. Ed. 2^{d} 1016 (2004):

> We have held that an accused is denied "the basic protections" of the Sixth Amendment "when there [is] used against him at his trial evidence of his own incriminating words, which federal agents . . . deliberately elicited from him after he had been indicted and in the absence of his counsel." *Massiah v. United States*, 377 U.S. 201, 206, 84 S. Ct. 1199, 12 L. Ed. 2^{d} 246 (1964); cf. *Patterson v. Illinois, supra* (holding that the Sixth Amendment does not bar postindictment questioning in the absence of counsel if a defendant waives the right to counsel).
>
> We have consistently applied the deliberate-elicitation standard in subsequent Sixth Amendment cases, see *United States v. Henry*, 447 U.S. 264, 270, 100 S. Ct. 2183, 65 L. Ed. 2^{d} 115 (1980)("The question here is whether under the facts of this case a Government agent 'deliberately elicited' incriminating statements . . . within the meaning of *Massiah*"); *Brewer, supra* at 399 … (finding a Sixth Amendment violation where a detective "deliberately and designedly set out to elicit information from [the suspect]"), and we have expressly distinguished this standard from the Fifth Amendment custodial-interrogation standard, see *Michigan v. Jackson,* … ("[T]he Sixth Amendment provides a right to counsel . . . even when there is no interrogation and no Fifth Amendment

> applicability"); *Rhode Island v. Innis*, … ("The definitions of 'interrogation' under the Fifth and Sixth Amendments, if indeed the term 'interrogation' is even apt in the Sixth Amendment context, are not necessarily interchangeable")….

The Rights Waiver Riley Signed Was Invalid

If an "accused" invokes the right to counsel before interrogation, as Riley did, "any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." *Michigan v. Jackson, supra*, 475 U.S. at 636. Chief Justice Rehnquist summarized this "bright-line rule" as

> a prophylactic rule that once a criminal defendant invokes his Sixth Amendment right to counsel, a subsequent waiver of that right — even if voluntary, knowing, and intelligent under traditional standards — is presumed invalid if secured pursuant to police-initiated conversation. …[S]tatements obtained in violation of that rule may not be admitted as substantive evidence in the prosecution's case in chief.

Michigan v. Harvey, 494 U.S. 344, 345 & 349, 110 S. Ct. 1176, 108 L. Ed. 2^{d} 293 (1990). If the defendant initially asserts his right to counsel and subsequently signs a waiver after police have initiated contact, there is an irrebuttable presumption that the waiver is invalid. *Id.* at 356 (Stevens, J. concurring).

At the outset a defendant who has been advised of the right to counsel may waive his right under the Sixth Amendment if he does so knowingly, intelligently and voluntarily. *See, e.g., Patterson v. Illinois*, 487 U.S. 285, 292 & n. 4, 108 S. Ct. 2389, 101 L. Ed. 2^{d} 261 (1988). But because custodial interrogation is inherently coercive and the adversary so skilled, the Court holds the government to a much higher standard when it claims that a defendant who initially asserted the right has subsequently relinquished it while still in custody. It has employed the test enunciated in *Johnson v. Zerbst, supra*, 304 U.S. at 464, requiring the government to prove "an intentional relinquishment or abandonment of a known right or privilege." *Michigan v. Jackson, supra*, 475 U.S. at 633.

Once Riley asserted his right to counsel at the 9 a.m. interview with Garvey, police were prohibited from approaching him to elicit a statement until they provided him a lawyer, and they could reinitiate communication only in the lawyer's presence. *Minnick v. Mississippi*, 498 U.S.

146, 153, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990).

DeLoach's claimed ignorance of Petitioner's request for counsel does not remove the taint

The government has conceded that DeLoach knew before the first time he entered the interrogation room that Riley had asserted his right to counsel. Gov't Opposition to Defendant's Motion To Suppress Statements, 3. But subsequently, Sgt. Smart testified that he did not become aware of Riley's request for a lawyer until after Appellant gave oral and written statements, and DeLoach said he was unsure of when he learned that Appellant had asserted his rights.[10] It is irrelevant whether DeLoach actually knew Riley had asserted his right to counsel at 9 a.m. This Court has repeatedly stated that

> Sixth Amendment principles require that we impute the State's knowledge from one state actor to another. For the Sixth Amendment concerns the confrontation between the State and the individual. One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court).

Michigan v. Jackson, supra, at 634 (citing *Moulton, supra*, 474 U.S. at 170 – 1).

> [C]ustodial interrogation must be conducted pursuant to established procedures, and those procedures in turn must enable an officer who proposes to initiate an interrogation to determine whether the suspect has previously requested counsel…. Whether a contemplated reinterrogation concerns the same or a different offense, or whether the same or different law enforcement authorities are involved in the second investigation, the same need to determine whether the suspect has requested counsel exists. The police department's failure to honor that request cannot be justified by the lack of diligence of a particular officer.

Arizona v. Roberson, 486 U.S. 675, 687 – 8, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988)(citing *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)).

After Riley asserted his Sixth Amendment right to counsel at 9 a.m. investigators made

[10] The prosecutor said that Prince George's County Circuit Court Judge Thomas P. Smith made a finding that when DeLoach entered the interrogation room at 10:45 a.m. he was aware of Garvey's failed effort to interview Appellant. Tr. 4/21/98, 265 – 6. The finding was based on testimony in a suppression hearing. In *State v. Riley*, CT96-1902A (P.G. Cty.), Judge Smith issued a Memorandum and Order of Court March 19,1997, a year before the trial in this case, denying Appellant's motion to suppress the same statements. That case involved a homicide in Suitland earlier in August 1996. Riley pleaded guilty in that case to first-degree murder.

no effort to provide counsel to him, and DeLoach violated Appellant's rights by attempting to elicit incriminating statements from him. Therefore, Riley never gave a valid waiver of his Sixth Amendment right to counsel by signing the second rights waiver form, by blurting out denials of involvement, or by agreeing to give a statement after he talked to Muhammad.

Police deprived Riley of access to the lawyer retained to represent him before he gave a written statement

At about 6 p.m. a lawyer informed Sgt. Smart by telephone that he had been retained to represent Riley and asked that police "cease and desist" further questioning. Smart wrote a note about the call but did not inform DeLoach of it, and although he normally would tell a person in custody that a lawyer called, he did not recall telling Riley about the call. *Id.* at 215 – 16. Smart erroneously believed Riley had waived his right to counsel before the lawyer called and it was his understanding that a lawyer cannot assert the right to counsel for a client.

Relying on *Moran v. Burbine*, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2^{d} 410 (1986), the Trial Court ruled that

> there is no obligation [on] police to stop their interrogation when they get a call from the attorney, advise the suspect that they received a call from somebody who claimed to [be] his attorney, or, indeed, to be candid with the attorney about their intentions with respect to the suspect.

Tr. 4/28/98, 226. This ruling flowed in large measure from the Trial Court's erroneous conclusion that Riley had asserted his right to remain silent but later validly waived it, and never asserted his right to counsel. *Id.* at 225.

The facts of Riley's interrogation are readily distinguishable from those in *Moran,* in which the Court held that,

> [o]nce it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law…. Nor do we believe that the level of the police's culpability in failing to inform respondent of the telephone call has any bearing on the validity of the waiver.

Id. at 422 – 3. It added that "deliberate and reckless withholding of information is objectionable

as a matter of ethics," but is not relevant to the constitutionality of the waiver unless "it deprives a defendant of knowledge essential to his ability to understand the nature of the rights and the consequences of abandoning them." *Id.* at 423 – 4.

Because the interrogation occurred before Burbine was charged with murder, the Court rejected his claim that police violated his Sixth Amendment right to counsel. In doing so the Court clearly stated that once the Sixth Amendment right attaches, as it had in Riley's case because he had been charged, "it follows that the police may not interfere with the efforts of a defendant's attorney to act as a medium between [the accused] and the State" during the interrogation. *Id.* at 428 (citations and internal quotations omitted).

Because Riley had asserted his Sixth Amendment right to counsel, police were required under *Michigan v. Jackson, supra,* and *Edwards, supra,* to provide access to his lawyer before they made any further attempts to question him. Unless the lawyer was present Riley could not give a valid waiver, and Smart's actions preventing the lawyer retained by Appellant's sister from representing him was a further violation of Appellant's Sixth Amendment rights.

INVESTIGATORS VIOLATED APPELLANT'S FIFTH AMENDMENT PROTECTION AGAINST SELF-INCRIMINATION

In *Miranda, supra,* 384 U.S. at 444, this Court concisely explained that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant, unless it demonstrates the use of procedural safeguards effective to secure the privilege against self incrimination." Although a person in custody may waive the right, "[i]f … he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Id.* at 444 – 5. "If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request…." *Id.* at 472. "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self incrimination and his right to … counsel." *Id.* at 475.

The Court has very clearly differentiated the Sixth Amendment right to counsel that attaches once charges have been filed from the Fifth Amendment right discussed in *Miranda*. The Fifth Amendment right is general, barring interrogation about any crime absent a valid waiver, while the Sixth Amendment right is "offense specific" and can be invoked only in relation to crimes that have already been charged. *McNeil v. Wisconsin*, 501 U.S. 171, 174, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991).

The Fifth Amendment right to counsel protects the privilege against self-incrimination. *Minnick, supra*, 498 U.S. at 147. *See, also, United States v. Gouveia*, 467 U.S. 180, 188, 104 S. Ct. 2292, 81 L. Ed. 2d 146 (1984)(Court required counsel in *Miranda* and *Escobedo*[11] to protect the privilege against self-incrimination rather than to vindicate the Sixth Amendment right to counsel). The Sixth Amendment right protects the defendant during a critical stage of the litigation "where the results might well settle the accused's fate and reduce the trial itself to a mere formality." *Moulton, supra*, at 169. This is so because, when a suspect is formally charged with a crime, the government's role shifts from that of an investigator seeking to solve a crime to that of a prosecutor bent on obtaining a conviction. The Sixth Amendment right attaches at the point when the accused is "confronted, just as at trial, by the procedural system or by his expert adversary, or by both." *United States v. Ash*, 413 U.S. 300, 310, 93 S. Ct. 2568, 37 L. Ed. 2d 619 (1973). In Riley's case, as DeLoach admitted in the suppression hearing, the

> police were not … merely trying to solve a crime, or even to absolve a suspect. … They were rather concerned primarily with securing a statement from defendant on which they could convict him. The undeviating intent of the officers to extract a confession from petitioner is therefore patent. When such an intent is shown, this Court has held that the confession obtained must be examined with the most careful scrutiny.

Spano, supra, 360 U.S. at 323 (citations omitted). Concurring in *Spano*, Justice Douglas wrote,

> [t]his is a case of an accused, who is scheduled to be tried by a judge and jury, being tried in a preliminary way by the police. This is a kangaroo court procedure whereby the police produce the vital evidence in the form of a confession which is useful or necessary to obtain a conviction. They in effect deny him effective representation by counsel.

[11] *Escobedo v. Illinois*, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964).

Id. at 326. This Court explained that after charges have been filed in cases like Riley's, confrontations between the accused and police are "critical stage[s]" in the prosecution, citing its statement in *Massiah, supra,* that in such situations "counsel could have advised his client on the benefits of the Fifth Amendment and could have sheltered him from the overreaching of the prosecution." *Ash, supra,* at 312.

As discussed above at 9, the Court has applied different standards of review in considering whether defendants are entitled to new trials. If police violate the Fifth Amendment right to obtain a statement, the reviewing court conducts *de novo* review of the entire record and applies harmless-error analysis. If they violate the Sixth Amendment right the appellate court reviews the record *de novo* and must reverse the conviction if police failed to honor the defendant's request for counsel.

DeLoach could not approach Riley seeking a statement

The Court held in *Edwards, supra,* that when a suspect asserts his Fifth Amendment right to counsel's assistance, police interrogation must end.

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation, even if he has been advised of his rights. We further hold that an accused, … having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with police.

Id. at 451 U.S. 484 – 5. The *Edwards* rule preserves "the accused's choice to communicate with police only through counsel." *Patterson, supra,* 487 U.S. at 291. *See, also, Minnick, supra,* 498 U.S. at 153; *Shea v. Louisiana,* 470 U.S. 51, 52, 105 S. Ct. 1065, 84 L. Ed. 2^{d} 38 (1985); *Roberson, supra,* 486 U.S. 680; *Oregon v. Bradshaw,* 462 U.S. 1039, 1043, 103 S. Ct. 2830, 77 L. Ed. 2^{d} 405 (1983).

Thus, DeLoach was prohibited at 10:45 a.m. and again at 1:30 p.m. from entering the interrogation room to obtain Riley's statement about the Littles homicide. The rights waiver form Riley signed in the second session is as invalid under Fifth Amendment analysis as it is under

Sixth Amendment analysis. Because police failed to provide counsel, and in fact prevented counsel from meeting with Riley, admission of his confession violated his Fifth Amendment rights and cannot be considered harmless beyond a reasonable doubt. See above at 15.

THE PANEL'S HOLDING CANNOT STAND IN LIGHT OF THIS COURT'S PRECEDENT

Relying on *Kirby, supra*, 406 U.S. at 688 – 9, the Panel erroneously concluded that Riley's Sixth Amendment right to counsel had not attached because no "adversary judicial proceedings [had] been initiated" against him "by way of formal charge, preliminary hearing, indictment, information or arraignment." *Riley v. United States, supra*, at 880 – 1. Noting incorrectly that D.C. Code § 23-113 states that " 'prosecution' of an individual commences with the filing of a complaint *to obtain an arrest warrant,*" the Panel asserted that, "these are not the same 'formal' charges of which *Kirby* speaks." *Id.* at 881 (emphasis added).[12]

The purpose of § 23-113 is to establish statutes of limitations for crimes under D.C. law, when the limitation period begins, and what events toll the limitations period.[13] Council of the District of Columbia Report, Bill No. 4-104, the "District of Columbia Criminal Statute of Limitations Act of 1982" (Judiciary Report), 1, 6. It puts a "complaint [] filed before a judicial officer empowered to issue an arrest warrant" on the same footing as an indictment or information. § 23-113(c)(3). The report accompanying Bill 4-104 makes clear that subsection (c) "would [] provide, for the first time, statutory criteria for determining when an offense has been committed and when a prosecution has commenced." Judiciary Report, 6. "The basic purpose of this subsection is to insure that the accused will be informed of the decision to prosecute and the

[12] *Kirby* is distinguishable on its facts, as is *United States v. Gouveia*, 467 U.S. 180, 184, 104 S. Ct. 2292, 81 L. Ed. 2d 146 (1984), also cited by the Panel. Kirby was arrested without a warrant after police found him in possession of items taken in a robbery. Gouveia, a federal prison inmate, was subject to administrative detention before he was indicted. The Court rejected his claim that he had been deprived of his Sixth Amendment right to counsel while in detention because he had not been arrested or charged.

[13] D.C. Code § 23-561, D.C. Crim. R. 4 and D.C. Crim. R. 9, establish procedures for obtaining arrest warrants. Rule 4 requires the filing of a Complaint, "a written statement of the essential facts constituting the offense charged," to obtain a warrant. Rule 9 establishes a nearly identical procedure for obtaining a warrant based on an indictment or information.

general nature of the charge within such time to allow the defendants to prepare their defenses before evidence of their innocence becomes weakened with age." *Id.*

Although the language of the statute is unambiguous, the Panel erroneously interpreted it as establishing a procedure for obtaining a warrant, with the filing of a complaint as the first step. Its conclusion is purely one of nomenclature. In the Panel's view, the right to counsel attaches upon the filing of an Indictment or Information, even if the defendant has not been arrested. But because the document identified in § 23-113 is called a Complaint, the Panel held, the right does not attach until arraignment, even though that document serves the same function as an Indictment or Information.[14]

As a practical matter the September 7, 1996 Complaint was the only charging document in this case until the grand jury returned an indictment over a year later. It started the prosecution of Riley for first-degree murder within the meaning of the statute and the Sixth Amendment.

The Panel concluded that

> If this court were to hold that the Sixth Amendment right to counsel attaches when the government files a complaint to obtain an arrest warrant, "we would be granting greater protection to persons arrested with warrants than without, thus discouraging the use of warrants in making arrests." … Moreover, "holding that . . . the issuance of an arrest warrant is akin to the initiation of adversary judicial proceedings would result in swinging the pendulum of criminal justice far too distant from society's interest in effective and meaningful criminal investigations."

Riley v. United States, supra, at 881. In reaching this conclusion the Panel relied on *United States v. Moore*, 112 F.3^{d} 1154, 1156 (8th Cir, 1997)(which specifically limits its holding to application of Fed. R. Crim. P. 3); and *United States v. Duvall*, 537 F.2^{d} 15, 17 – 18 (2^{d} Cir. 1972)(addressing issuance of an arrest warrant under Fed. R. Crim. P. 4). Citing *Chewning v.*

[14] Relying on this statement by the Panel, the government argued in its Opposition to Rehearing, 7 n. 6, for the first time, that the Sixth Amendment right to counsel did not attach until the D.C. grand jury indicted Riley in March 1997 because he was detained in Prince George's County and was not arraigned on any D.C. charges until then. Despite DeLoach's testimony at trial that police arrested Riley on the D.C. warrant, the government argued for the first time that the warrant was never executed, so Petitioner could not claim that his Sixth Amendment right attached when the government filed the Complaint and obtained the warrant. *Id.*

Rogerson, 29 F.3d 418, 420 (8th Cir. 1994), the *Moore* Court, *supra*, specifically stated that it was not addressing whether the Sixth Amendment right to counsel attaches under state law upon the filing of a criminal complaint. The *Duvall* Court noted that in interpreting a New York statute similar to § 23-113 the Second Circuit had held that the right attached when the government filed a complaint to obtain a warrant. *Id.* at 17 (citing *United States ex rel. Robinson v. Zeiker*, 468 F.2d 159 (2d Cir. 1972), *cert. denied*, 411 U.S. 939, 93 S. Ct. 1892, 36 L. Ed. 2d 401 (1973)).

There is no precedential basis for the Panel's conclusion that it would violate Fifth Amendment equal protection principles to recognize the Sixth Amendment right to counsel when a defendant is arrested on a warrant after a Complaint has been filed, but not to afford the same protection to a suspect arrested without a warrant. In *Michigan v. Jackson, supra*, this Court clearly resolved that issue in favor of the accused.

This Court has drawn a similar distinction between suspects and accused persons in other contexts, holding, for example, that a show-up identification shortly after a warrantless arrest does not implicate the Sixth Amendment right to counsel, but a line-up identification after a charge is filed does. *Kirby*, *supra*, at 689; *Gilbert v. California*, 388 U.S. 263, 272, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967)(line-up in absence of counsel after charges filed violates Sixth Amendment). In the former situation society's interest in quickly identifying and detaining the perpetrator, and the innocent detainee's interest in exoneration, militate in favor of permitting the show-up without counsel. *Stovall v. Denno*, 388 U.S. 293, 301 – 2, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967). In the latter, "the government's role has shifted from investigation to accusation," the defendant is "faced with the prosecutorial forces of organized society," and counsel must be present. *Michigan v. Harvey*, 494 U.S. 344, 358, 110 S. Ct. 1176, 108 L. Ed. 2d 293 (1990)(quoting *Kirby, supra*, at 682.).

Holding that the Sixth Amendment right to counsel attaches with the filing of a complaint under § 23-113(c) will not, as the Panel claimed, discourage police from obtaining arrest warrants. D.C. Code § 23-581 clearly defines the limited circumstances under which police may

make arrests without first obtaining warrants. If anything, the Panel's opinion is an invitation to over-reaching by local police.

The Panel held that because the Prince George's Police rights waiver form is ambiguous, asking whether the suspect is willing to answer questions without a lawyer present, the Trial Court correctly found that Appellant asserted his right to remain silent but not his right to counsel. *Riley v. United States, supra*, at 882 – 3. The Panel is wrong for several reasons. First, the Maryland Court of Special Appeals has interpreted a "No" answer on that form as an assertion of both rights. *Waitland v. State*, 49 Md. App. 636, 435 A.2^{d} 102, 105 (Md. 1985). Second, if the waiver form is read as not explicitly explaining the right to counsel and ascertaining whether Riley was willing to waive the right, it does not satisfy the requirements of *Miranda, supra*, 384 U.S. at 475. Third, to the extent that the question on the form is ambiguous, it must be construed in Riley's favor because a criminal defendant's silence cannot be construed as a waiver. *Id.*; *Johnson v. Zerbst, supra*, 304 U.S. at 464.

Finally, contrary to the Panel's holding, this is not a case where the defendant made an ambiguous verbal request for counsel, or, after waiving the right and submitting to interrogation for some period, changed his mind and asserted the right. To hold in this situation that Riley waived his Fifth Amendment right to counsel by answering "No" to an ambiguous question posed in a standard police form would violate fundamental common law principles — that ambiguity in a document is to be construed against the party that drafted it — and would encourage police to employ vague rights waivers to circumvent *Miranda*.

CONCLUSION

For the reasons stated above and any others that appear to the Court, Petitioner Marquette E. Riley respectfully requests that the Court grant his Petition for Writ of Certiorari, vacate his conviction, and remand the case for a new trial with instructions that all oral and written statements police obtained from him in this case must be suppressed.

Respectfully submitted,

Robert S. Becker, Esq.
D.C. Bar No. 370482
PMB # 155
5505 Connecticut Avenue, N.W.
Washington, D.C. 20015
(202) 364-8013
Attorney for Marquette E. Riley
(*Appointed by the Court*)

A D D E N D A

INDEX TO ADDENDA

MARQUETTE E. RILEY, SAYID MUHAMMAD, AND ANTONIO T. MARKS, APPELLANTS v. UNITED STATES, APPELLEE

Nos. 98-CF-1045, 98-CF-1169, and 98-CF-1218

DISTRICT OF COLUMBIA COURT OF APPEALS

923 A.2d 868; 2007 D.C. App. LEXIS 239

June 22, 2004, Argued
May 3, 2007, Decided

PRIOR HISTORY: [1]**

Appeals from the Superior Court of the District of Columbia. (F-2594-97, F-2595-97, F-2596-97). (Hon. Frederick H. Weisberg, Trial Judge).

COUNSEL: Robert S. Becker, appointed by the court, for appellant Riley.

Kenneth H. Rosenau, appointed by the court, for appellant Muhammad.

Peter N. Mann, appointed by the court, for appellant Marks.

Heather R. Phillips, Assistant United States Attorney, with whom Roscoe C. Howard, Jr., United States Attorney at the time the brief was filed, John R. Fisher, Assistant United States Attorney at the time the brief was filed, and Elizabeth Trosman and J. Patrick Rowan, Assistant United States Attorneys, were on the brief, for appellee.

JUDGES: Before WASHINGTON, Chief Judge, and TERRY and SCHWELB, Senior Judges. *

* Judge Washington was an Associate Judge of the court at the time of argument. His status changed to Chief Judge on August 6, 2005. Judge Terry was an Associate Judge of the court at the time of argument. His status changed to Senior Judge on February 1, 2006. Judge Schwelb was an Associate Judge of the court at the time of argument. His status changed to Senior Judge on June 24, 2006.

OPINION BY: TERRY

OPINION

[*872] TERRY, *Senior Judge*: Appellants Riley and Marks were convicted of **[**2]** two counts of first-degree murder while armed, one count of assault with intent to kill while armed, and one count of possession of a firearm during a crime of violence. Appellant Muhammad was convicted of the same offenses, plus one count each of unauthorized use of a vehicle and destruction of property. On appeal, Riley and Muhammad argue that their Fifth and Sixth Amendment rights were violated during police questioning and that the **[*873]** statements they made to the police should therefore have been suppressed. Muhammad also contends that the trial court abused its discretion in denying his motion to sever his case from those of his co-defendants and in limiting the scope of his counsel's cross-examination. Additionally, each appellant maintains that the admission of his co-defendants' confessions violated the strictures of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). We affirm.

I. THE FACTS [1]

1 Our summary of the facts is based on the evidence presented at trial by the government and on the testimony at the pre-trial suppression hearing. None of the appellants testified or presented any evidence at trial.

A. *Events Leading Up to the Murders*

In the early 1990s, a group of teenagers from Suitland, **[**3]** Maryland, formed a group called the Rushtown Crew. [2] The Rushtown Crew was friendly at first with another group from the District of Columbia known as the Fairfax Village Crew. A feud developed between the crews, however, after a fistfight involving members of both groups occurred at a go-go concert. The feud continued to escalate, and in July of 1996, Russell Tyler, a member of the Rushtown Crew, was shot and wounded (but not killed) by members of the Fairfax Village Crew. Following this shooting, the three appellants, who were associated with the Rushtown Crew, discussed going to the Fairfax Village area and shooting at members of the rival crew.

2 According to the testimony, a "crew" is another name for a gang.

A few weeks after Russell Tyler was shot, Lawrence Lynch, also a member of the Rushtown Crew, was shot and killed. The day after this shooting, some members of the Rushtown Crew, including the three appellants and two of their acquaintances, Wayne Brown and James Stroman, were discussing Lynch's murder. Appellant Muhammad was "doing more of the talking than others." He declared that the Rushtown Crew "should go [to Fairfax Village] and handle their business," that the Fairfax **[**4]** Village Crew had "gone too far," and that it was time that "they got theirs." Appellant Marks then asked to borrow Brown's pump shotgun "to have it around his house just in case Fairfax Village came back through, shooting again."

B. *The Murders*

On the evening of August 20, 1996, Muhammad told Stroman that he had found out where some members of the Fairfax Village Crew were going to be that night. Stroman, Muhammad, and Riley then drove to Marks' house and picked him up. They were riding in a blue Chevrolet Spectrum that Muhammad had stolen the night before from Shadyside Gardens. Muhammad told Stroman that the four of them -- Stroman, Muhammad, Riley, and Marks -- were "going to deal with" the Fairfax Village Crew. When they left Marks' house, it was after dark. Muhammad was carrying a rifle, Riley had a .38 caliber revolver, Marks had a pump shotgun (which belonged to Brown), and Stroman had a sawed-off shotgun. Muhammad told Stroman, who was driving, to head toward the Fairfax Village area, and eventually he instructed Stroman to stop the car outside a bank on Pennsylvania Avenue.

At that time Annabelle Littles was living in a house on Pennsylvania Avenue, S.E., with her two sons, Larnell, **[**5]** age nineteen, and Larell, age twelve. Her house was next door to a bank and was attached to another town house on the opposite side. At approximately 9:00 p.m. on August 20, Ms. Littles was at home with her two sons. She was inside the house, while her sons **[*874]** were outside in the front yard tossing a football with Larell's friend, Robert Johnson, Jr.

When Stroman stopped the car outside the bank, Muhammad got out and "ran up behind" a "tall guy and two other shorter guys." Muhammad pulled out his gun and began shooting. After Muhammad fired the first volley, "the tall boy fell [and] the other shorter guy was like crawling up toward the house." Muhammad then shot at "the shorter guy." Muhammad looked back at his three friends in

the car and said, "Get out and kill him." Riley and Marks then jumped out and started shooting while Stroman waited in the car. The "other shorter guy" got away by "running on the side of the house behind the bushes."

After being shot, Larnell Littles, the "tall guy," was able to get up and run to the front door. His mother, hearing the shots, went to the door to see what was happening, and as she opened the front door, she saw Larnell standing there. Larnell came **[**6]** inside and said, "Ma, I been shot," then fell to the floor. Robert Johnson, Jr., the "shorter guy" who did not get shot, ran into the house as appellants drove away and told Ms. Littles that Larell was hurt and would not get up. She immediately went outside and found Larell lying on the ground.

The police arrived about a minute later. An ambulance took Larnell to District of Columbia General Hospital, where he was pronounced dead. Larell was transported by ambulance to Children's Hospital, where he was placed on a respirator, but he died the next day.

Larell had two bullet wounds, and Larnell had shotgun pellet wounds as well as bullet wounds. Crime scene search officers recovered .22 caliber shell casings and 12-gauge shotgun shells from the scene of the shooting. During the course of the ensuing investigation, the police recovered a .38 caliber revolver from Marks' home, a Ruger .22 caliber sawed-off semi-automatic rifle from an alley behind Muhammad's home, and a sawed-off 12-gauge shotgun from Riley's home, as well as the Mosberg 12-gauge shotgun which Brown had lent to Marks earlier that evening. Forensic evidence linked the shell casings and bullets recovered at the scene to two **[**7]** of these weapons. The .22 shell casings were determined to have been fired from the Ruger semi-automatic rifle, while the shotgun shells were found to have been fired from the Mosberg shotgun.

C. *After the Murders*

Later that evening, all three appellants, along with other members of the Rushtown Crew, were gathered at Marks' house. Marks and Muhammad were bragging about how they had shot "two boys" from Fairfax Village on Pennsylvania Avenue. Stroman said that he had been driving, and Riley said that his gun had jammed when he tried to shoot Larnell Littles. Muhammad told everyone that he had shot both victims. All three appellants stated that they shot at the Littles brothers because they thought they were members of the Fairfax Village Crew. [3]

3 Other evidence established, however, that neither Larnell nor Larell Littles was associated with the Fairfax Village Crew.

As the conversation continued, Brown told appellants that they should burn the car that they had used in order to destroy any fingerprint evidence. Brown then called his friend Robin Milbourne to ask for a ride. When Milbourne arrived, Brown went with her to get gasoline. After they returned from the gas station, they followed **[**8]** Riley and Muhammad, who **[*875]** were driving the blue Spectrum, to a deserted area of the District of Columbia, where Muhammad set the Spectrum on fire. After the car had been burned, Milbourne drove Brown, Riley, and Muhammad back to Marks' house in her car. During the ride back, Riley and Muhammad discussed their actions that night in detail.

D. *Appellants' Arrest and Interrogation*

Early in the morning of September 9, almost three weeks later, police officers arrested all three appellants for the murders of the Littles brothers. Officers from both Prince George's County, Maryland, and the District of Columbia Metropolitan Police Department were involved in the investigation, arrest, and questioning of appellants. All three appellants confessed to the murders. [4]

4 Each appellant filed a motion to suppress his statement to the police, and after a hearing the trial court denied all three motions. On appeal Riley and Muhammad contend *inter alia* that the denial of their motions was erroneous. Marks does not challenge the denial of his motion, but he raises other issues.

1. *Riley's Interrogation*

After appellant Riley was arrested on September 9, he was taken to the Prince George's County police station **[**9]** and placed in an interview room by himself. At approximately 9:00 a.m., two Metropolitan Police detectives, Oliver Garvey and Donald Sauls, entered the room. Detective Garvey read Riley his rights from a Prince George's County rights waiver form and told Riley that he had been arrested for the murders of Larnell and Larell Littles. The detective instructed Riley to read the rights form himself and to answer the four questions printed on the form by checking either the "yes" or the "no" box next to each question. Riley checked the "no" box next to the question, "Do you want to make a statement at this time without a lawyer?" Detective Garvey asked him if he was "sure he did not want to talk to us," and he said "yes." Garvey then told Riley that he "couldn't talk to him any more since he did not want to make a statement without a lawyer present" and left the room. Detective Garvey gave the signed rights form to a Prince George's County detective and told him that Riley had "invoked." In his testimony Garvey explained that the term "invoked" in this instance meant that Riley did not want to make any statements, either with or without an attorney.

At about 10:45 a.m., Detective Dwight DeLoatch, **[**10]** of the Prince George's County Police, briefly entered the interview room to talk to Riley about the murders. At that point he had not spoken with Detective Garvey and did not know whether Riley had previously been interviewed or advised of his rights. DeLoatch told Riley that there were "two sides to every story and that [he] wanted to hear [Riley's] side of the story." Detective DeLoatch also mentioned that he was familiar with the Fairfax Village killings and that other individuals had already implicated Riley in those events. DeLoatch told Riley that he would be back later and walked out of the room.

Detective DeLoatch returned to the interview room about an hour later to escort Riley to the bathroom. On his next visit, at about 1:30 p.m., Detective DeLoatch found Riley more willing to talk; indeed, Riley kept "blurting out" that he did not have anything to do with the Littles murders. The detective replied that before he could talk to Riley and ask him questions, he had to "advise him of his rights" and that Riley had to sign a waiver form. DeLoatch then produced a Prince George's County waiver form, but Riley did not give any indication that he had previously seen such a form. **[**11]** Detective DeLoatch reviewed each question with Riley and told **[*876]** him to mark his response to the four questions. Riley again checked "no" in response to the question which asked if he would make a statement without a lawyer. Immediately after he checked "no," he told Detective DeLoatch without prompting "that he wanted to talk to [DeLoatch], but he didn't want to write anything down." DeLoatch responded that the question to which Riley was answering "no" was not concerned with written statements, but rather with whether Riley wished to talk. After hearing this, Riley then checked "yes" next to the question, scratched out his earlier "no" answer, and initialed the change.

During the ensuing conversation, Riley told Detective DeLoatch that he had no involvement in the Littles murders and that he did not even enter the District of Columbia on the day they were shot. DeLoatch responded that he knew

Riley "wasn't telling the whole truth about the whole incident and that [he] knew that [Riley] was one of the ones that went to D.C." to shoot at the Fairfax Village Crew. Detective DeLoatch eventually left the room after an hour and a half of discussion, saying that he was going to let Riley "think **[**12]** about it" and that he would be back later to talk with him. Riley was then left alone in the interview room from about 3:00 p.m. until 6:40 p.m.

At 6:00 p.m., Sergeant Daniel Smart, also of the Prince George's County Police, received a telephone call from a man named Mark O'Brien, who said that he was Riley's attorney and that the police should "cease and desist any further efforts to interrogate Riley." Sergeant Smart did not relay this message to Detective DeLoatch because he did not know who Mr. O'Brien was, and he "was aware that Riley had waived his rights to an attorney and it [was his] understanding that an attorney can't call someone and say I am representing this individual without that person requesting an attorney." Riley was not told about O'Brien's telephone call.

At 6:40 p.m., Detective DeLoatch took Riley to be presented before a commissioner. During the processing, Riley asked if DeLoatch could arrange a meeting between Riley and Muhammad. DeLoatch replied that he could and set up such a meeting in another interview room at 7:30 p.m. In the course of their conversation, which lasted about five minutes, Muhammad told Riley to "cooperate," saying that "the police knew everything **[**13]** that [Muhammad] knew" because he (Muhammad) had confessed and told them where the weapons were. After learning that Muhammad had told the police "everything," Riley said he wanted to tell his side of the story to the police.

Detective DeLoatch then spoke with Riley in detail about the shootings, and Riley gave a written statement. In that statement, which was completed at 9:40 p.m., Riley expressly stated that he was aware of his rights, that he did not want an attorney present, and that he had never asked for an attorney. [5]

5 Riley was given something to eat at 9:00 p.m. after he said he was hungry. Detective DeLoatch did not recall hearing Riley ever ask for food earlier that day. Riley testified, however, that he did ask for food early in the day, but was rebuffed.

Riley's testimony at the suppression hearing directly contradicted that of Detective DeLoatch. Riley said that he never "blurted" anything out concerning his innocence and that Detective DeLoatch always initiated the conversation. Riley also stated that when he checked "no" on the waiver form at 1:30 p.m., he meant that he "didn't want to talk without a lawyer." [6] **[*877]** He admitted that he understood his rights as a result of a **[**14]** previous arrest on August 22, just a few weeks earlier. Riley also denied that he had asked to speak with Muhammad, [7] but he did admit that the two of them had a conversation at the police station, in the course of which Muhammad told him that he had confessed.

6 The court specifically discredited this statement and instead credited Detective DeLoatch's testimony that immediately after Riley checked the box that said "no," he told Detective DeLoatch that he was willing to talk, but that he did not want to make a written statement.

7 The court also discredited this statement, crediting instead Detective DeLoatch's testimony that Riley specifically asked to speak with Muhammad.

The trial court ruled that Riley's statement was admissible because "Riley at no time requested the assistance of an attorney during the period of custodial interrogation," and because the Prince George's County rights waiver form was ambiguous. The court relied

on Riley's express written statement that he responded "no" to the question about whether he had ever requested a lawyer. Though he had invoked his right to remain silent earlier in the day by responding "no" to the ambiguous Prince George's County waiver of **[**15]** rights form, the court found that he made a voluntary, knowing, and intelligent waiver of his *Miranda* rights [8] at 1:40 p.m.

8 *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

2. *Muhammad's Interrogation*

Muhammad was arrested during the early morning hours of September 9. Detective Troy Harding of the Prince George's County Police took him to the Prince George's County police station at approximately 8:05 a.m. He was then left alone in the interview room until 9:05 a.m., when Detective Harding came in and read Muhammad his rights. Muhammad said he was willing to make a statement without a lawyer present at that time, and stated that he did not know anything about the murders. He was then left alone again while the police questioned others. According to Detective Harding, Muhammad did not appear to be distressed, did not complain, and was given a bathroom break.

At about 3:00 p.m., Detective Roger Irwin of the Prince George's County Police entered the interview room to speak with Muhammad. Detective Irwin, who had interviewed Marks earlier in the day, told Muhammad that other suspects had admitted involvement in the murders and had given up their weapons. When he asked Muhammad if he would also **[**16]** give up his weapon, Muhammad agreed to take the detective to the place where the weapon was. Muhammad then signed a consent-to-search form, and Detective Irwin took Muhammad to his mother's house to get his gun. On the way there, Detective Irwin asked Muhammad to confirm the waiver of his rights and had him sign another waiver of rights form. On the way back to the police station, Irwin took Muhammad to a "drive-through" fast-food restaurant to get him a hamburger, french fries, and a soft drink because Muhammad said he was hungry.

Irwin and Muhammad arrived back at the police station at approximately 4:30 p.m. Muhammad was then interviewed for the first time by District of Columbia officers, and in the course of those interviews he agreed to make a videotaped statement concerning his involvement in the murders. After the statement was taped, he was asked once again if he had been advised of his rights and if he would make a statement without a lawyer present. Muhammad confirmed that he had been advised of his rights and then gave a written statement in which he confessed again to the murders. Detective Irwin testified that **[*878]** Muhammad appeared "very calm, relieved," and "remorseful" as **[**17]** he was writing his statement. Muhammad never gave any indication that he was unhappy with his treatment.

The trial court, after hearing this evidence, [9] concluded that Muhammad "was advised of his rights, and in writing made voluntary, knowing, and intelligent waiver of those rights, and agreed voluntarily to make a number of statements about both this offense and [other] offenses in Maryland."

9 Muhammad did not testify at the suppression hearing.

E. *The Confessions*

On the day that these appellants were arrested, each of them gave statements implicating himself and his two co-defendants in the shooting of the Littles brothers. All three appellants moved for severance and for suppression of their co-defendants' statements on *Bruton* grounds. *See Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). The government argued that

each confession could come in against the confessing appellant as a statement of a party opponent and that all the confessions could be admitted against co-defendants as statements against penal interest. The court ruled, however, that each confession would be admissible only against the particular individual who made it.

Following a lengthy discussion, the court and the parties **[**18]** agreed that the prosecutor would have each appellant's statement retyped, deleting any references to co-defendants and substituting the pronoun "I" wherever the pronoun "we" appeared in any of the statements. Appellants were permitted to raise additional concerns and were accommodated by the court when they suggested other changes or redactions. After all of the redactions were completed, the defense attorneys did not make any further objections, nor did they suggest any other changes.

At trial the statements, as redacted, were read to the jury. The prosecutor read the portions of each statement that corresponded to the detectives' questions, and the testifying detectives read the answers. Before the reading of each statement, the court instructed the jury to consider it only in determining the guilt or innocence of the confessing defendant and not as it related to any of the co-defendants. These instructions were repeated twice more during the trial.

1. *Muhammad's Statement*

Muhammad's redacted confession, as read to the jury, contained references to Marks' house and Muhammad's presence at Marks' house on the night of the shooting:

> Q. Okay, Mr. Muhammad, we're investigating an incident **[**19]** that happened on August 20th, at about 9:30, on Pennsylvania Avenue, the 3800 block of Fairfax Village. It was on a Tuesday evening at about 9:30. Could you tell us what happened that particular night?
>
> A. I went over there and I had my deuce-deuce. I had turned around and seen these two guys, three dudes. They were standing on Pennsylvania Avenue. They were down by, I think it was by a bank. They were leaning up against a wall. So I seen them. So I knew that since they were out, that they was with Fairfax Village because they were out there. I hopped out of the car and hopped out of the car with my gun. I chased them. And they laid in the grass. And I just started shooting. That's all that happened. Then I ran back and jumped in the car and went back down Pennsylvania Avenue. But if -- but if I had known that the 12 year old, that young, I would not have shot **[*879]** him because I didn't know he was that young. I really -- I couldn't really see because it was dark outside and I was looking from a distance.
>
> And when I got out of the car, they ran around the corner. I still couldn't tell because they were running around the corner. But when they ran on the grass, I still couldn't tell. That **[**20]** was -- that it was happening so fast.
>
> Q. Okay. Let's go back to where you came from over on Gaylord. Where were you before you got to Pennsylvania Avenue?
>
> A. Just standing on Gaylord.
>
> Q. You got a particular place on Gaylord?

A. No, I was outside for a while, then I was at Tony's house for a minute. But then I just went outside for a while. Then I left from outside.

Q. Okay, you mentioned something about another Tony.

A. Yeah, Tony, I don't know his last name. I just know Tony. Lives on Brookfield.

Q. Brookfield. Okay. Where on Brookfield, do you know?

A. At the top.

Q. The top. Does he have any family members that you know of?

A. He got a sister.

Q. A sister. You know his sister's name?

A. I think her name is Sherry.

Q. Okay. So that Tony was with you?

A. Yeah. [10]

Q. Okay. And what did he do on Pennsylvania Avenue, do you remember?

A. He had the one shot. And he -- he ain't really get out. He got out of the car. I think he shot it. But he ain't shoot nobody because he was like too -- too far back. And then when he shot, I guess it just hit that -- probably the one that hit the sign or whatever, the Fairfax Village sign or whatever.

Q. After you come back from the shooting, where -- **[**21]** where did you go from there?

A. Came back from the shooting, I went and put my gun in my house. Then I stayed in for a while and then I came back down.

Q. Did you ever go back to Tony's house on Gaylord Drive that night?

A. I don't think that I remember. I think probably I did. I don't know. I can't really remember what I did. But I know I went home and put my gun in the house. Then I came back down later that night.

Q. Do you remember going inside of his house or watching TV?

A. No, because there was -- matter of fact, I remember because I took my gun in the house and then I went and burnt the car. I went to burn the car. Then I was standing out on Brookfield.

10 "Tony from Brookfield," who according to Muhammad's statement was present at the shootings, was James Stroman. "Tony from Gaylord," whose presence at the scene was not mentioned by Muhammad, was appellant Marks. This distinction was made clear to the jury promptly after the reading of the statement.

2. *Marks' Statement*

Marks' statement described the events of August 20:

> Tuesday night I got into a little blue car. Started driving around D.C. or whatever and went onto Pennsylvania Avenue at Fairfax shopping center. So James [Stroman] **[**22]** pulled up to the parking lot, turned around and parked. I jumped out, ran to the

> grass, started shooting. I then jumped back into the car and came back around the way.
>
> * * * * *
>
> **[*880]** [James was] looking out the window, then he pulled out the short joint and he shot it off because I remember hearing a boom.
>
> * * * * *
>
> Then he started yelling, get in the car, get in the car.

When Marks was asked how he knew to go back to the car, he replied, "Tony . . . Tony James started yelling . . . Get in the car, get in the car." Marks also stated that James Stroman drove him to his (Stroman's) home on Gaylord Drive.

3. *Riley's Statement*

Riley's statement described the events of August 20:

> I was at Tony's house earlier that day. The people from Fairfax tried to run me down. They jumped out of their car with their guns and chased me.
>
> * * * * *
>
> I had a .38 caliber and James [Stroman] had the sawed-off shotgun.
>
> I was just riding. I seen some dudes sitting outside. James pulled the car in the shopping center, made a U-turn, and stopped. I got out of the car. James got out of the car and . . . stood by the car door.
>
> I tried my gun and it got jammed. I tried to unload it but could not. Then I ran back to the
>
> **[**23]** car. I got into the car and went back to Maryland to Tony's house. I got into the Spectrum . . . drove it to D.C. and burned it.

II. RILEY'S CONTENTIONS

A. *Riley's Sixth Amendment Right to Counsel*

Riley asserts that his Sixth Amendment right to counsel had already attached when he was arrested during the early morning hours of September 9 because the government had filed a criminal complaint charging him with first-degree murder in order to obtain an arrest warrant on September 7. Relying on this assertion, Riley maintains that he should have been informed by the police that a lawyer had telephoned the police station on his behalf before the police made any further attempts to question him. These arguments fail because, under controlling Supreme Court precedent, Riley's Sixth Amendment right to counsel had not yet attached when he was arrested on September 9.

It has been settled law for thirty-five years that [HN1] a person's Sixth Amendment right to counsel attaches only "at or after the time that adversary judicial proceedings have been initiated" against that person "by way of formal charge, preliminary hearing, indictment, information or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 688-689, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972); **[**24]** *accord, e.g., United States v. Gouveia*, 467 U.S. 180, 187, 104 S. Ct. 2292, 81 L. Ed. 2d 146 (1984); *United States v. Moore*, 122 F.3d 1154, 1156 (8th Cir. 1997); *see United States v. Duvall*, 537 F.2d 15, 18-19 (2d Cir. 1976). Riley contends nevertheless, relying on D.C. Code § 23-113 (c)(3) (2001), that as soon as an Assistant United States Attorney filed a complaint charging him with murder to obtain an arrest warrant on September 7, the government had committed itself to prosecuting him, and he

was "faced with the prosecutorial forces of organized society." *Kirby*, 406 U.S. at 689.

There is no denying that D.C. Code § 23-113 (c)(3) does state that the "prosecution" of an individual commences with the filing of a complaint to obtain an arrest warrant. [11] However, [HN2] obtaining an arrest warrant has never been deemed to be the point at which the Sixth Amendment right **[*881]** to counsel attaches. *Kirby*, 460 U.S. at 689; *see Gouveia*, 467 U.S. at 190 (stating that the Sixth Amendment right to counsel has never been held to attach at the time of arrest); *Beck v. Bowersox*, 362 F.3d 1095, 1102 (8th Cir. 2004) ("this court and other circuits have repeatedly held that the [Sixth Amendment right to counsel] does not attach with an arrest, **[**25]** [or] even an arrest preceded by the filing of a complaint"); *State v. Beck*, 687 S.W.2d 155, 160 (Mo. 1985) (stating that an arrest warrant is not a "formal charge" as that term is used in *Kirby*); *see also Martinez v. United States*, 566 A.2d 1049, 1051-1052 (D.C. 1989) (grand jury indictment of the defendant was the first "formal charge" against him even though arrest warrants had previously been issued).

> 11 D.C. Code § 23-113 (c)(3) provides that [HN3] "[a] prosecution is commenced when . . . a complaint is filed before a judicial officer empowered to issue an arrest warrant."

The Sixth Amendment right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated against [the defendant]." *Kirby*, 406 U.S. at 689 (citations omitted). Though filing a complaint to obtain an arrest warrant involves criminal charges, these are not the same "formal" charges of which *Kirby* speaks. The phrase "charged by the United States attorney" has different meanings in different contexts. *See Marrow v. United States*, 592 A.2d 1042, 1046 n.9 (D.C. 1991). If this court were to hold that the Sixth Amendment right to counsel attaches when the government files a complaint to **[**26]** obtain an arrest warrant, "we would be granting greater protection to persons arrested with warrants than without, thus discouraging the use of warrants in making arrests." *Moore*, 112 F.3d at 1156; *see Duvall*, 537 F.2d at 18-19. Moreover, "holding that . . . the issuance of an arrest warrant is akin to the initiation of adversary judicial proceedings would result in swinging the pendulum of criminal justice far too distant from society's interest in effective and meaningful criminal investigations." *State v. Beck*, 687 S.W.2d at 160. Thus we conclude that [HN4] the filing of a complaint containing a criminal charge in order to obtain an arrest warrant does not give rise to the Sixth Amendment right to counsel. What matters is "the initiation of adversary *judicial* criminal proceedings -- whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby*, 406 U.S. at 689 (emphasis added); *accord, e.g., United States v. Rorie*, 518 A.2d 409, 412-413 (D.C. 1986) (citing *Kirby*).

Because no "adversary judicial criminal proceedings" were initiated against Riley until after September 9, no Sixth Amendment right to counsel had attached on September 9, the date on which **[**27]** he was arrested. The police therefore had no obligation to inform Riley that they had received a telephone call on September 9 from someone claiming to be his attorney or to terminate their interrogation. *See Moran v. Burbine*, 475 U.S. 412, 422-423, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986) ([HN5] police are not required under the Sixth Amendment to inform a suspect of his attorney's efforts to reach him (citing, *inter alia*, *Kirby* and *Gouveia*)). The trial court was correct when it ruled that the police were not constitutionally required to suspend their interrogation of Riley when they received the call from Mr. O'Brien, or even to advise him of Mr. O'Brien's call. [12]

12 This case differs from *Moran v. Burbine* in that it involves "no" answers on the waiver of rights card as well as an available attorney. That distinction cannot be decisive here, however, because by the time the attorney's availability became known, Riley had already indicated to Detective DeLoatch that he was willing to talk (he just did not want to give a *written* statement) and had changed his "no" on the waiver of rights form to "yes."

We recognize that there are several state court decisions that do not accept the holding of *Moran v Burbine*. *See State v. Cobb*, 251 Conn. 285, 559-561, 743 A.2d 1 **[**28]** & n.3, 251 Conn. 285, 743 A.2d 1, 151-153 & n.3 (1999) (Katz, J., dissenting) (collecting cases). These decisions, however, are all based on state constitutions, whereas only the United States Constitution -- as interpreted and applied in *Moran*, as well as the *Kirby* and *Gouveia* line of cases -- governs cases in the District of Columbia. *See Bolling v. Sharpe*, 347 U.S. 497, 498-499, 74 S. Ct. 693, 98 L. Ed. 884 (1954).

[*882] B. *Riley's Fifth Amendment Rights*

1. *Riley's Right to Counsel*

Riley argues that he invoked his Fifth Amendment right to counsel at 9:00 a.m. on September 9, during the initial interrogation by Detectives Sauls and Garvey, when he checked "no" in the box next to the question "Do you want to make a statement at this time without a lawyer?" on the Prince George's County rights waiver form. The trial court found, however, that he did not invoke his Fifth Amendment rights at that time, and there is evidentiary support for its finding.

Under case law interpreting the Fifth Amendment, [HN6] custodial interrogation must cease if, at any time during the questioning, the suspect clearly and explicitly requests an attorney. *Davis v. United States*, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994); *Edwards v. Arizona*, 451 U.S. 477, 484-485, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). If the suspect **[**29]** clearly requests an attorney, interrogation may lawfully resume only if the suspect "initiates further communication, exchanges or conversations with the police." *Edwards*, 451 U.S. at 485. However, the Supreme Court has stated that "if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning." *Davis*, 512 U.S. at 459 (emphasis in original; citations omitted). [13] Police officers have no duty to clarify ambiguous statements that might arguably contain a request for an attorney. *Id.* at 461-462; *see United States v. Cooper*, 85 F. Supp. 2d 1, 20 (D.D.C. 2000). A court, moreover, must consider the totality of the circumstances "to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel." *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979).

13 In *Davis* the Court held that a defendant's comment one and a half hours into an interrogation, "maybe I should talk to a lawyer," was not sufficiently clear **[**30]** to establish that he had invoked his right to counsel. 512 U.S. at 459.

The trial court found, as a fact, that Riley did not explicitly invoke this right when he answered "no" to the question "Are you willing to make a statement at this time without a lawyer?" The court interpreted this "no" answer as clearly invoking his right to remain silent,

but not his right to an attorney under the Fifth Amendment. In explaining its finding, the court said that "when a person answers no to the [question of whether he is willing to make a statement without a lawyer], it is impossible to know whether the person . . . is not willing to make a statement without a lawyer but is willing to make a statement with a lawyer or whether the person is not willing to make a statement." The Prince George's County waiver form, the court said, was "inherently ambiguous." [14] The court noted that Riley did not explicitly **[*883]** ask for a lawyer at any time on September 9, and when he was specifically asked late in the day on September 9 whether he had *ever* requested a lawyer that day, he responded "no." Riley further demonstrated that he did not ask for a lawyer when, at 1:43 p.m. on September 9, he again answered "no" **[**31]** upon being asked whether he was willing to make a statement without a lawyer, but clarified that statement by saying to Detective DeLoatch, "I don't want to make a written statement, but I'm willing to talk to you." Taking all of these facts into consideration, we hold that Riley failed to invoke his right to counsel under the Fifth Amendment. *See Gresham v. United States*, 654 A.2d 871 (D.C. 1995) (holding that defendant's confession to the police need not be suppressed because defendant did not clearly assert his right to counsel during interrogation when he asked his girl friend, in the presence of the police, to call his mother and tell her to get him a lawyer). [15]

14 In this case the ambiguity was in the question posed on the rights card and not, as in *Davis*, in the defendant's statement. This makes no difference in the result, however, since Riley admitted that he did not ask for a lawyer.

15 *Tindle v. United States*, 778 A.2d 1077 (D.C. 2001), does not support Riley's argument. In *Tindle*, which involved the same Prince George's County rights waiver form as the one that was used here, the defendant checked "no" when asked whether he wanted to make a statement without an attorney, just **[**32]** as in this case. The two cases can be distinguished on their facts, however, because in *Tindle*, unlike the instant case, there was no evidence suggesting that the defendant did not request an attorney, and the government in *Tindle* did not contest the defendant's claim that he had requested an attorney.

Wantland v. State, 49 Md. App. 636, 435 A.2d 102 (1981), can be distinguished on the ground that it is a pre-*Davis* decision. The standard for determining whether a defendant has invoked his right to counsel has become considerably more explicit since *Davis*.

2. *Riley's Waiver of the Right to Remain Silent*

There is no doubt that Riley invoked his right to remain silent at 9:00 a.m. on September 9. The issue before us here, however, is whether he waived that right a few hours later, at 1:43 p.m. on September 9.

"The admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his right to cut off questioning was scrupulously honored." *Michigan v. Mosley*, 423 U.S. 96, 104, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975). In *Stewart v. United States*, 668 A.2d 857 (D.C. 1995), this court listed four factors, originally set forth in *Mosley*, that must be considered in determining **[**33]** whether a suspect's rights have been "scrupulously honored":

> (1) was the suspect orally advised of his rights and did he orally acknowledge them; (2) did the police immediately cease questioning and make no attempts to resume or ask him to reconsider;

> (3) was there a sufficient break (in *Mosley*, two hours) between the first and second interrogations and was the second performed at a different location by a different officer about a different crime and (4) were *Miranda* warnings given before the second questioning session.

Mosley, 423 U.S. at 119; *see Stewart*, 668 A.2d at 863. "The *Mosley* Court envisioned a case-by-case approach involving an inquiry into all of the relevant facts to determine whether the suspect's rights have been respected." *United States v. Dell'Aria*, 811 F. Supp. 837, 842 (E.D.N.Y. 1993) (cited in *Stewart*, 668 A.2d at 863).

[HN7] In reviewing a trial court's denial of a motion to suppress evidence, this court may not disturb the trial court's findings of fact if they are supported by substantial evidence. *E.g.*, *Stewart*, 668 A.2d at 863; *see* D.C. Code § 17-305 (a) (2001). However, we review *de novo* whether the defendant's rights were "scrupulously **[*884]** honored" and whether the **[**34]** police conduct constituted "interrogation" because these are questions of law. *Jones v. United States*, 779 A.2d 277, 281 (D.C. 2001) (en banc), *cert. denied*, 535 U.S. 906, 122 S. Ct. 1207, 152 L. Ed. 2d 145 (2002); *Stewart*, 668 A.2d at 863.

The trial court ruled that "with one failing, which I find to be inadvertent, the police did scrupulously honor [Riley's] right to remain silent . . . having invoked his right to remain silent at 9:00 a.m. that morning and having decided to waive his rights at 1:30 or 1:43 that same afternoon." In coming to this decision, the court reviewed the events of September 9 following Riley's arrest. The court first noted that the police properly terminated their questioning when Riley invoked his right to remain silent at 9:00 a.m. However, Detective DeLoatch then improperly entered Riley's interview room at 10:45 a.m. with the express purpose of eliciting a statement from Riley and interrogating him. Though this was not a proper re-initiation of questioning under *Michigan v. Mosley*, the trial court concluded, and we agree, that under the totality of the circumstances this isolated act did not invalidate Riley's subsequent waiver of rights or make his confession inadmissible.

In *Peoples v. United States*, 395 A.2d 41 (D.C. 1978), **[**35]** the defendant was arrested in Maryland at 9:00 a.m. and thereafter invoked his rights. Despite this invocation, improper questioning ensued, and the defendant admitted to past criminal involvement in the District of Columbia and gave a written confession. Six hours after making this confession, the defendant was again informed of his rights by a magistrate, and he indicated that he understood them. He was then taken back to the police station, where he asked to speak to a District of Columbia police officer. This officer again read the defendant his rights, and the defendant waived them, giving a four-page written statement on the crimes he had committed, signing each page, and initialing a further waiver of his *Miranda* rights. Though the defendant's initial confessions early in the day were inadmissible, this court held that the trial court did not err in finding appellant's subsequent confession to be voluntary and untainted. 395 A.2d at 44. Although the defendant in *Peoples* was interviewed about the same crime after invoking his right to remain silent, we held that under the totality of the circumstances the *Mosley* **[**36]** requirements were satisfied, and thus the statements were admissible.

In the case at bar, we are satisfied that, under the totality of the circumstances, the *Mosley* requirements, as applied in *Peoples*, were met. [16] Riley invoked his right to remain silent at 9:00 a.m., and the questioning was immediately terminated. Riley was then left alone for a substantial period of time, more

than four hours, except for the brief improper remarks that Detective DeLoatch directed at Riley at 10:45 a.m. Later, while Riley was being escorted to the bathroom at around 1:30 p.m., he initiated a conversation on the subject of the murders by making statements to Detective DeLoatch about his innocence which the detective described as unsolicited "outbursts." [17] After returning from the bathroom with **[*885]** Riley and hearing his "outbursts" continue, DeLoatch correctly understood that Riley wished to speak further on the subject. Detective DeLoatch then read Riley his *Miranda* rights and gave him a waiver form listing these rights, asking if he waived them. After checking the "no" box next to the question, "Are you willing to make a statement at this time without a lawyer?", Riley, *without prompting*, orally clarified **[**37]** that he was willing to talk but did not want to make a *written* statement. [18] After Detective DeLoatch explained to Riley that answering "yes" would not result in a written statement but would simply allow him to talk about the murders, Riley changed his answer from "no" to "yes" and waived his rights. [19] During the ensuing conversation Riley told Detective DeLoatch that he had nothing to do with the murders for which he had been arrested.

16 The facts of the present case stand in stark contrast to the facts of *Stewart*, in which the defendant's right to remain silent was not "scrupulously honored" but was violated on four separate occasions. *See* 688 A.2d at 867. In addition, the defendant in *Stewart* never initiated the resumption of the discussion about the crimes for which he had been arrested, as Riley did in the instant case.

17 Although we cannot totally eliminate the possibility that Detective DeLoatch solicited these "outbursts" through his 10:45 a.m. comments to Riley, we are satisfied, as was the trial court, that any arguable taint was dissipated by the lengthy break -- almost three hours -- between the 10:45 comments and the 1:30 conversation.

18 At no time did Riley tell Detective **[**38]** DeLoatch that he had already filled out the same waiver of rights form earlier in the day.

19 At the suppression hearing, the trial court found that this waiver by Riley was knowing, intelligent, and voluntary. There is, moreover, nothing in the record to suggest that the waiver was coerced or involuntary.

After leaving Riley alone for another long stretch, Detective DeLoatch returned to complete the processing of Riley's arrest. While this was going on, Riley initiated a conversation with Detective DeLoatch by asking if he could speak with Muhammad. Detective DeLoatch arranged a meeting between the two of them at about 7:30 p.m., and during that meeting Riley learned from Muhammad that he had confessed. Riley then decided that he too wanted to confess, and told Detective DeLoatch that he wanted to tell his side of the story. Riley then gave a written statement, in the course of which he admitted his involvement in the murders. Although he was not read his *Miranda* rights again before writing that statement, which was completed at around 9:40 p.m., the evidence established that he had already heard his rights read several times that day. In addition, he testified at the suppression hearing **[**39]** that he understood his rights because of his prior arrest on August 22, only two and a half weeks earlier. Finally, Riley signed an addendum at the end of his written statement, indicating that he waived his rights and that at no time that day had he requested the aid of counsel.

The timing of Riley's confession persuades us that the key factor in prompting him to confess was his 7:30 p.m. meeting with Muhammad, which was arranged at Riley's behest. We hold that Riley's waiver of his

Miranda rights shortly after 1:30 p.m. was not tainted by Detective DeLoatch's serious, but ultimately inconsequential, misstep at 10:45 a.m., and that his written confession several hours later -- which he gave *after* his meeting with Muhammad -- was not subject to exclusion under *Mosley* and its progeny.

C. *Riley's Sixth Amendment Right of Confrontation*

At this court's request, all of the parties filed supplemental memoranda after oral argument discussing the effect on this case of the recent Supreme Court decision in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). In his memorandum, Riley asserts that *Crawford* represents "a course correction" and that, taken together with *Bruton*, [20] *Gray*, [21] and *Cruz*, [22] the **[**40]** *Crawford* opinion "demonstrates a significant shift in the Supreme Court's jurisprudence concerning **[*886]** the admissibility in joint trials of police obtained confessions." Although we agree that the *Crawford* case "dramatically transformed Confrontation Clause jurisprudence," *Thomas v. United States*, 914 A.2d 1, 5 (D.C. 2006), we think Riley reads the *Crawford* opinion too broadly.

20 *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

21 *Gray v. Maryland*, 523 U.S. 185, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998).

22 *Cruz v. New York*, 481 U.S. 186, 107 S. Ct. 1714, 95 L. Ed. 2d 162 (1987).

Initially, Riley relies on *Cruz* to argue that all three appellants' confessions in this case were not properly sanitized under *Gray* (and *Bruton*). He asserts that "[the] jurors only needed to insert the word 'we' for 'I' to conclude that Mr. Muhammad and Mr. Marks implicated Mr. Riley in their statements, and the interlocking nature of the statements was an open invitation to do so." *Cruz* does not support this argument.

In *Cruz* a co-defendant's confession was held to be inadmissible, even though the defendant against whom it was admitted had confessed as well, because it was unredacted. *Cruz*, 481 U.S. at 193. In the present case, by contrast, the confessions of Muhammad and Marks were redacted **[**41]** to eliminate any mention of Riley. Furthermore, in *Richardson v. Marsh*, 481 U.S. 200, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987), decided on the same day as *Cruz*, the Supreme Court clarified that if the prosecution in *Cruz* had redacted the confession to remove any mention of the co-defendant, there would have been no Confrontation Clause problem. *See Richardson*, 481 U.S. at 211. Because the co-defendants' confessions in this case were redacted to omit any mention of Riley, *Cruz* does not apply.

Riley also contends that the inferences that could be drawn from the "interlocking" nature of Marks' and Muhammad's statements violated his Sixth Amendment right of confrontation. This contention fails under established Supreme Court precedent. In *Richardson* the Court instructed that, [HN8] when determining whether a confession expressly implicates a co-defendant, courts should restrict their examination to determining whether the confession is "incriminating on its face" and should not consider whether it is incriminating "when linked with evidence introduced later at trial." *Richardson*, 481 U.S. at 208; *see Plater v. United States*, 745 A.2d 953, 960-962 nn.11 & 12 (D.C. 2000) (noting that the Supreme Court in *Gray* "ruled out the consideration **[**42]** of other evidence when determining whether a statement inferentially incriminates a defendant"). Inferences that are considered offensive to *Bruton*'s principles are those that allow the jury to infer *from the redactions themselves* that the co-defendant was a part of the criminal enterprise, "even were the confession the very first item introduced at

trial" -- such as using the word "deleted" instead of a specific individual's name, which "obviously refer[s] directly to someone." *Plater*, 745 A.2d at 961 n.11. Nothing like that happened in this case. An examination of Muhammad's and Marks' statements, as admitted into evidence, reveals that they were properly redacted and did not implicate Riley, standing alone; thus the statements, as admitted, did not violate the teachings of *Bruton* and its progeny.

Riley also relies on *Crawford* to argue that the introduction of his co-defendants' confessions violated the Confrontation Clause of the Sixth Amendment. In *Crawford* the Supreme Court held that the admission of an out-of-court "testimonial" statement by the defendant's wife which incriminated her husband infringed his Sixth Amendment rights because he did not have a prior opportunity to cross-examine **[**43]** her. *Crawford*, 541 U.S. at 68. [23] The wife's statement "was **[*887]** both facially incriminating and introduced against the defendant challenging the statement." *United States v. Cuong Gia Le*, 316 F. Supp. 2d 330, 338 (E.D. Va. 2004). Here, by contrast, the confessions of Riley's co-defendants were redacted to eliminate all references to the other defendants' participation in the murders; thus they could not facially incriminate Riley. Furthermore, those statements were not admitted as evidence against Riley.

> 23 The wife "did not testify because of the state marital privilege, which generally bars a spouse from testifying without the other spouse's consent." *Crawford*, 541 U.S. at 40 (citation omitted). Her statement had been tape-recorded, however, and that recording was played for the jury to hear.
>
> We note that the marital privilege in the District of Columbia is different. Here, one spouse is "competent but not compellable to testify for or against the other." D.C. Code § 14-306 (a) (2001). The privilege may be invoked only by the spouse who is called to testify, not by the defendant who wishes to keep his or her spouse off the witness stand. Thus a husband cannot prevent his wife from testifying **[**44]** against him (except as to "confidential communications made by one to the other," § 14-306 (b)) if she is willing to do so. *See generally Postom v. United States*, 116 U.S. App. D.C. 219, 322 F.2d 432 (1963).

Crawford, therefore, is not pertinent to Riley's appeal, because Marks' and Muhammad's confessions were properly redacted in accordance with *Bruton*, *Richardson*, *Gray*, and *Plater*. In addition, the court gave a proper limiting instruction to resolve any questions that the jurors might have had about how the statements could be used. *See Richardson*, 481 U.S. at 211. Thus Riley had no right based on the *Bruton* line of cases, or on *Crawford*, to confront his co-defendants through cross-examination because their statements did not implicate Riley's Confrontation Clause rights.

III. MARKS' CONTENTIONS

Marks argues that his right of cross-examination under the Confrontation Clause of the Sixth Amendment was violated by "the improper admission of statements by a non-testifying co-defendant," namely Muhammad. Specifically, Marks challenges the introduction of Muhammad's redacted confession, which contains references to Marks' house, and to Muhammad's presence at Marks' house, on the night of **[**45]** the shooting.

Muhammad's statement referred to two different persons named Tony -- "Tony" James Stroman, the driver of the car in which the defendants traveled to and from the scene of the shooting, and "Tony" Antonio Marks (appellant), to whose house Muhammad went after the shooting. The distinction between

these two "Tonys" was made clear to the jury after the statement was read. Muhammad's statement did not mention or describe any participant in the shootings other than himself and the driver of the car, "Tony" Stroman. No implication was made that the "Tony" who lived on Gaylord Street -- appellant Marks -- participated in the shooting. In fact, Muhammad's statement, on its face, seems to suggest that while Muhammad was shooting at the Littles brothers, Marks was at his home in Maryland. Muhammad's statement was therefore not incriminating on its face. It probably became incriminating when it was linked to other evidence presented at trial, but under established precedent from the Supreme Court and this court, such linkage does not violate the Confrontation Clause. *Richardson*, 481 U.S. at 208-209; *Gray*, 523 U.S. at 195-196; *Plater*, 745 A.2d at 960-961 & n.11.

In his supplemental **[**46]** memorandum, Marks argues that "the meaning and rationale of *Crawford* nullifies the *Richardson v. Marsh* edict that statements that are only incriminating through linkage to other evidence is not a violation of the Confrontation Clause." But *Crawford* does not even mention *Bruton* or any of **[*888]** the later cases which followed it and applied its teaching. Consequently, Marks' contention that this court should in effect overrule *Richardson* through its application of *Crawford* must be rejected because only the Supreme Court can overrule its own cases. *E.g.*, *Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997). [24] Marks cites no authority to support his assertion that *Crawford* overrules or supersedes *Richardson*, and the limited authority that does exist is to the contrary. *See, e.g., Cuong Gia Le*, 316 F. Supp. 2d at 338. Thus, as to Marks, we find no Sixth Amendment violation and no ground for reversal.

> 24 The Supreme Court held in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1985):
>
> > If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, **[**47]** leaving to this Court the prerogative of overruling its own decisions.
>
> *Id.* at 484, cited with approval in Agostini, 521 U.S. at 237.

IV. MUHAMMAD'S CONTENTIONS

A. *Muhammad's Claim of Coercion*

Muhammad contends that his waiver of rights was coerced because he was deprived of food for ten hours and was "unable to walk around for nearly nine hours." The flaw in this argument is that there was no evidence that Muhammad waived his rights as a result of any coercion.

After Muhammad was arrested at approximately 7:30 a.m., he was taken to the police station and placed in an interview room. Shortly after 9:00 a.m. two detectives entered the room, read Muhammad his rights, and gave him a waiver of rights form to fill out. Muhammad waived his rights and gave a statement denying knowledge of the events associated with the charges. He was then left alone in the interview room for several hours. During this lengthy break in Muhammad's interrogation, the police periodically checked on him. Muhammad never said he was hungry or in any kind of distress; he was also escorted to the bathroom at least once.

We are satisfied that this delay in Muhammad's interrogation did not, in itself,

give rise to a coercive **[**48]** atmosphere. In the first place, Muhammad waived his rights at the outset. *See United States v. Bell*, 740 A.2d 958, 964-966 (D.C. 1999); *Byrd v. United States*, 618 A.2d 596, 598-599 (D.C. 1992). There was no evidence that the police threatened Muhammad or used physical force on him; in fact, Muhammad confirmed that no such abuse occurred. Muhammad knew how to read and write, had attended school through the tenth grade, and stated that he understood his rights. In addition, he was not under the influence of drugs or alcohol at any time during the interrogation. Overall, Muhammad never gave any indication that he was unhappy with the way he was treated following his arrest.

Nor was there any evidence to suggest that, after the interrogation resumed later in the day, Muhammad's confessions were coerced. Detective Irwin entered the interview room at 3:00 p.m. to resume his earlier conversation with Muhammad. The detective told him that other persons had admitted their involvement in the murders and had given up their weapons; he simply asked Muhammad if he would do the same. Muhammad agreed, and on the way to his mother's house to retrieve the weapon, he reaffirmed that he knew his rights **[**49]** and that he had waived them. After the gun was recovered, Detective Irwin took Muhammad to a fast-food restaurant at 4:30 p.m. to get something to eat. Upon **[*889]** their return to the police station, Muhammad gave videotaped and written confessions. Before making these confessions, he was again read his rights, and again he confirmed that he understood and waived them. The evidence shows that Muhammad was not subjected to any coercion that might render his statements inadmissible. His interrogation cannot be characterized as coercive simply because it extended -- intermittently -- over a period of several hours. *See, e.g., Everetts v. United States*, 627 A.2d. 981, 986 (D.C. 1993) (sixteen-year-old defendant voluntarily, intelligently, and knowingly waived his rights, though he was detained for a lengthy period of time prior to questioning).

Taking all of the circumstances into account, we hold that the trial court properly determined that Muhammad's confessions were not coerced. *See Byrd*, 618 A.2d at 599.

B. *Muhammad's Motion to Sever*

Muhammad argues that the trial court erred in denying his motion to sever his case from those of Marks and Riley and that the supposedly "conflicting defenses" **[**50]** of the defendants and the disparity of proof as to his guilt, compared with the proof against Marks and Riley, resulted in manifest injustice. For three reasons, we hold that the trial court properly exercised its discretion in denying Muhammad's request for severance. First, the murders were jointly committed by all three co-defendants; second, the evidence was substantial against each defendant; and third, the record reveals no manifest prejudice to Muhammad (or either of the other defendants, for that matter) resulting from their joinder in a single trial.

[HN9] We review the denial of a motion to sever for abuse of discretion. *E.g., Ingram v. United States*, 592 A.2d 992, 996 (D.C. 1991). When multiple defendants are charged with jointly committing a criminal offense, "there is a strong presumption that they will be tried together." *Id.*; *see* Super. Ct. Crim. R. 8 (b). Properly joined defendants may request a severance at any time under Super. Ct. Crim. R. 14 if trying the defendants together "prejudices any party." *Ray v. United States* 472 A.2d 854, 856 (D.C. 1984); *accord*, *Ingram*, 592 A.2d at 996. Severance is not called for, however, when co-defendants simply blame each other and are **[**51]** mutually hostile to one another. "Rather, severance is required only when a defendant shows that (1) a clear and substantial contradiction between the respective defenses' causes inherent irreconcilability between them and (2) that the irreconcilability creates a

danger that the jury will unjustifiably infer that this conflict *alone* demonstrates that both are guilty." *Id*. (emphasis added; citations and internal quotation marks omitted). A court should grant a severance "only if there is a serious risk that a joint trial could compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro v. United States*, 506 U.S. 534, 539, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993).

Muhammad's argument is essentially that he was prejudiced because his co-defendants attempted to shift responsibility for the crimes to him. We find no merit in this argument. "Unfair prejudice does not arise merely because defendants are mutually hostile and attempt to blame each other." *Ingram*, 592 A.2d at 996. We find nothing in the record that would support Muhammad's claim that his co-defendants asserted defenses that were irreconcilable with his. Furthermore, none of the **[**52]** three appellants testified at trial. All of the evidence heard by the jury came from witnesses whose testimony would be admissible in separate trials. The court also limited the effectiveness of the **[*890]** blame-shifting theory of Muhammad's co-defendants by giving jury instructions to limit the impact of any suggestion by Riley's and Marks' counsel that Muhammad was the leader of the assault on the two Littles brothers. We are fully satisfied that the trial court did not abuse its discretion, or otherwise err, in denying the motion for severance. [25]

> 25 Muhammad's "disparity of the evidence" argument is wholly without merit. Severance may be warranted if there is a disparity in the evidence *and* if the evidence against one defendant is *de minimis* as compared with the evidence against his co-defendants. *Russell v. United States*, 586 A.2d 695, 699 (D.C. 1991). The evidence against Muhammad in this case plainly cannot be characterized as *de minimis*.

C. *Limiting the Scope of Cross-Examination*

Muhammad contends that the trial court improperly prevented his counsel from asking a series of questions during his cross-examination of Wayne Brown about whether Brown knew if anyone had been prosecuted for **[**53]** shooting two members of the Rushtown Crew. This claim was not raised in the trial court, however, and we find no plain error in the court's handling of the matter.

[HN10] "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); *see Springer v. United States*, 388 A.2d 846, 857 (D.C. 1978). If the trial court has permitted "enough cross-examination on an appropriate issue to satisfy the Sixth Amendment," any limitation on further cross-examination will be reviewed on appeal only for abuse of discretion. *Stack v. United States*, 519 A.2d 147, 151 (D.C. 1986). In exercising that discretion, the court must balance the "importance of the subject matter" and the credibility of the witness against the "degree of cross-examination permitted." *Id.*

In this case, Muhammad's counsel sought to demonstrate through cross-examining Brown that members of the Rushtown Crew shot at the Littles brothers to avenge the **[**54]** wounding of Russell Tyler and the murder of Lawrence Lynch. The trial court prohibited this line of questioning because it was irrelevant and did not suggest a justifiable motive for the killing. The court noted that the only inference to be drawn from such questions would be that the murder of the Littles brothers "was some sort of

justice," which of course could not excuse or justify a double homicide.

On appeal, Muhammad argues "that if the Rushtown Members knew that the attackers of their friends were being prosecuted, the government's evidence of motive would be greatly discredited." Because this argument was not raised below, Muhammad must demonstrate plain error in order to win reversal. [HN11] "Under the plain error standard of review, the appellant bears the burden of first establishing error, a deviation from the legal rule, and second, demonstrating that the error was so plain that the judge was derelict in countenancing it." *McCullough v. United States*, 827 A.2d 48, 55 (D.C. 2003); *see United States v. Olano*, 507 U.S. 725, 732-734, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993). We find no plain error -- indeed, we find no error at all -- because there was substantial evidence of Muhammad's guilt, including most obviously **[**55]** his own statement **[*891]** in which he confessed to the murders.

D. *Muhammad's Sixth Amendment Right of Confrontation*

In his supplemental memorandum, Muhammad argues that the redaction of Riley's and Marks' confessions was inadequate. "It is utter fantasy," he asserts, "to suggest that the jury in this case, having heard directly from witnesses . . . that the co-defendants were present together and acted together . . . failed to detect the fictional revision of each defendant's confession turning each 'we' to 'I.'" This is essentially the same argument made by Riley, which we have already held to be deficient. [HN12] Improper inferences from a confession are those which a jury can immediately draw "even were the confession the very first item introduced at trial." *Gray*, 523 U.S. at 196. Inferences of guilt that arise "when the statement is linked with other evidence presented at trial," however, are not the type of inferences with which *Bruton* and its progeny are concerned. *See Plater*, 745 A.2d at 960. In this case the record makes clear that the statements of Riley and Marks were properly redacted and, standing alone, did not implicate Muhammad; thus those statements as admitted did not violate Muhammad's **[**56]** Sixth Amendment rights. [26]

26 Muhammad also maintains that the prosecutor urged the jurors to "note how the confessions 'fit together.'" Had such a statement been made, it might have run afoul of the court's instructions to the jury that each defendant's statement could only come in against the defendant who made it. But that did not happen; Muhammad misreads the record when he suggests that it did.

The prosecutor did not argue that the *confessions* were interlocking; rather, in referring to "the witnesses on the scene," he said only that "*their versions of events* are corroborated by each other. They all saw some bit or piece of the whole thing. And you can trust what they say because it all fits together." Pointing out that the testimony of several witnesses about what happened "all fits together" -- a standard argument made in many cases by both prosecutors and defense attorneys -- is not the same as saying that the *defendants' statements* "fit together." Moreover, when discussing the appellants' several confessions, the prosecutor reminded the jury about the rule regarding those confessions: "what the defendants said in their statements to the police . . . comes in against each individual **[**57]** defendant only."

V. CONCLUSION

For the foregoing reasons, appellants' convictions are all

Affirmed.

§ 23-113. Limitations on actions for criminal violations

(a) Time limitations.

(1) A prosecution for the following crimes may be commenced at any time:

(A) murder in the first or second degree (§§ 22-2101 and [22-2102]);

(B) murder in the second degree (§ 22-2103);

(C) murder of a law enforcement officer or public safety employee (§ 22-2106);

(D) first degree murder that constitutes an act of terrorism (§ 22-3153(a));

(E) second degree murder that constitutes an act of terrorism (§ 22-3153(c)); and

(F) murder of a law enforcement officer or public safety employee that constitutes an act of terrorism (§ 22-3153(b)).

(2) A prosecution for the following crimes and any offense that is properly joinable with any of the following crimes is barred if not commenced within fifteen (15) years after it is committed:

(A) first degree sexual abuse (§ 22-3002);

(B) second degree sexual abuse (§ 22-3003);

(C) first degree child sexual abuse (§ 22-3008); and

(D) second degree child sexual abuse (§ 22-3009).

(3) A prosecution for the following crimes and any offense that is properly joinable with any of the following crimes is barred if not commenced within ten (10) years after it is committed:

(A) third degree sexual abuse (§ 22-3004)

(B) fourth degree sexual abuse (§ 22-3005);

(C) enticing a child for the purpose of committing felony sexual abuse (§ 22-3010);

(D) first degree sexual abuse of a ward (§ 22-3013);

(E) second degree sexual abuse of a ward (§ 22-3014);

(F) first degree sexual abuse of a patient or client (§ 22-3015);

(G) second degree sexual abuse of a patient or client (§ 22-3016);

(H) using a minor in a sexual performance or promoting a sexual performance by a minor (§ 22-3102); and

(I) incest (§ 22-1901).

(4) Except as provided in paragraph (6), a prosecution for a felony other than those crimes enumerated in paragraphs (1) through (3) is barred if not commenced within six (6) years after it is committed.

(5) Except as provided in paragraph (6), a prosecution for any other criminal offense is barred if not commenced within three (3) years after it is committed.

(6) A prosecution for a felony or a misdemeanor may be brought within three (3) years:

(A) after a public officer or employee has left office, for any completed offense based on official conduct; or

(B) after a fraud or breach of fiduciary trust has been, or reasonably should have been, discovered for any completed offense based on that fraud or breach of fiduciary trust; even if barred by the provisions of paragraphs (4) and (5):

Provided, that, in no case shall this provision extend the period of limitations to more than nine (9) years in the case of a felony nor more than six (6) years in the case of a misdemeanor.

(b) Time when offense committed. -- An offense is committed either when every element occurs, or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct, or the defendant's complicity therein, is terminated. Time starts to run on the day after the offense is committed or completed.

(c) Commencement of prosecution. -- A prosecution is commenced when:

(1) an indictment is entered;

(2) an information is filed; or

(3) a complaint is filed before a judicial

officer empowered to issue an arrest warrant; provided, that such warrant is issued without unreasonable delay. A prosecution for an offense necessarily included in the offense charged shall be considered to have been timely commenced, even though the period of limitation for such included offense has expired, if the period of limitation has not expired for the offense charged and if there was, after the close of the evidence at trial, sufficient evidence as a matter of law to sustain a conviction for the offense charged.

(d) Suspension of period of limitation.

(1) The period of limitation for an offense, and any necessarily included offense, does not run during any time when a prosecution against the defendant for that offense is pending in the courts of the District of Columbia.

(2) The period of limitation shall not begin to run until the victim reaches 21 years of age for the following offenses:

(A) first degree child sexual abuse (§ 22-3008);

(B) second degree child sexual abuse (§ 22-3009);

(C) enticing a child for the purpose of committing felony sexual abuse (§ 22-3010);

(D) using a minor in a sexual performance or promoting a sexual performance by a minor (§ 22-3102); and

(E) incest (§ 22-1901).

(3) The period of limitation shall not begin to run for first degree sexual abuse of a ward (§ 22-3013) or second degree sexual abuse of a ward (§ 22-3014) until the victim is no longer a ward.

(4) The period of limitation shall not begin to run for first degree sexual abuse of a patient or client (§ 22-3015) or second degree sexual abuse of a patient or client (§ 22-3016) until the victim is no longer a patient or client of the actor.

(e) Extended period for commencement of new prosecution. -- If a timely complaint, indictment, or information is dismissed for any error, defect, insufficiency, or irregularity, a new prosecution may be commenced within three (3) months after the dismissal becomes final even though the period of limitation has expired at the time of the dismissal or will expire within three (3) months thereafter.

(f) Fugitives from justice. -- No statute of limitations shall extend to any person fleeing from justice.

No. USW 1227-96

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

COMPLAINT

District of Columbia ss:

The undersigned, having made oath before me, declared that on or about the [illegible] 20th ___ day of AUGUST ________, 19 96, at the District aforesaid, one MARQUETT K. RILEY OF 2308 GAYLORD ROAD, SUITLAND MARYLAND

While armed with a dangerous or deadly weapon did then and there unlawfully and feloniously, with purpose, with premeditation and with malice aforethought, kill and murder one, [illegible] LARELL LITTLES

in violation of Title 22 Section 2401 /3202 of the District of Columbia Code.

____
Affiant's Name

Subscribed and sworn to before me this 7th day of SEPTEMBER, 19 96

____
(Judge) (Deputy Clerk)

WARRANT

To The United States Marshal or any other authorized federal officer or the Chief of Police of the District of Columbia:

WHEREAS the foregoing complaint and affidavit supporting the allegations thereof have been submitted, and there appearing probable cause and reasonable grounds for the issuance of an arrest warrant for MARQUETT K. RILEY

YOU ARE THEREFORE COMMANDED TO BRING THE DEFENDANT BEFORE SAID COURT OR OTHER PERSON ENUMERATED IN 18 U.S.C. 3041 forthwith to answer said charge.

Issued SEPTEMBER 7, 19 96.

SEX: male
DOB: 8/24/78
CCR: 472-117
ID:
Charge: Murder 1 (U-965) While armed

Date of Offense: on or about 8/20/96
Officer Det. J. Sauls
Badge No.:

____
Judge
Superior Court of the District of Columbia

OFFICER MUST EXECUTE RETURN:
Officer's Name
Time
Date

Form CD 1484 (Nov 88)

W00262540

Superior Court of the District of Columbia

CRIMINAL DIVISION

AFFIDAVIT IN SUPPORT OF AN ARREST WARRANT

U S W No: 127-96

DEFENDANT'S NAME:			CCR:			PDID:	
RILEY, MARQUETTE E			96-472117				
SEX:	RACE:	D.O.B.:	HEIGHT:	WEIGHT:	EYES:	HAIR:	COMPLEXION:
MALE	BLACK	08-24-78	5'6	130	BRN	BLK	MEDIUM

DEFENDANT'S HOME ADDRESS: 2308 GAYLORD RD SUITLAND, MD — TELEPHONE NUMBER:

DEFENDANT'S BUSINESS ADDRESS: — TELEPHONE NUMBER:

COMPLAINANT'S NAME: LARNELL H LITTLES AND LARELL LITTLES

LOCATION OF OFFENSE:	DATE OF OFFENSE:	TIME OF OFFENSE
3861 PENNSYLVANIA AVE SE	08-20-96	2130

GIVE BRIEF DESCRIPTION OF WHAT HAPPENED:

In this affidavit, the affiant is setting out information to support the arrest of four individuals: (1) ANTONIO TARAYA MARKS, (2) SAYID MUHAMMAD, (3) JAMES ANTONIO STROMAN, AND (4) MARQUETTE E. RILEY, in connection with the fatal shooting of two persons, 12 year old Larell Littles and his 19 year-old brother, Larnell Little. Both boys were shot and killed outside in the 3800 block of Pennsylvania Avenue, Southeast, Washington D.C. in the evening, at about 9:10 pm, of Tuesday August 20, 1996. Both suffered multiple gunshot wounds and based on the autopsies of both victims, the manner of death in each case has been ruled a homicide and the cause of death, multiple gunshot wounds.

The MPD Homicide investigators working on this case have obtained information, which will be set forth below, that shows this shooting stemmed from an ongoing feud between two rival gangs, or "crews." According to information from a wide variety of witnesses and confidential sources, MPD is aware of the existence of a gang known as the "Fairfax Village Crew, ("FVC")" whose members live and congregate in the area of the 3860 block of Pennsylvania Avenue, Southeast, which is where the Little brothers were killed. As later information will show, the FVC was "feuding" with a gang based in P.G. County, Maryland, the "Bushtown Crew" ("BC"), the members of whom essentially live and congregate in the 2300 block of Gaylord Drive in Suitland, Maryland.

AFFIANT'S SIGNATURE:
X Don D. Sachs

TO: WARRANT CLERK
PLEASE ISSUE A WARRANT FOR:
Marquette E. Riley

Charge With: Murder I w/ Armed

David S. Schertler 9-6-96
ASSISTANT UNITED STATES ATTORNEY

SUBSCRIBED AND SWORN TO BEFORE ME THIS
7 DAY OF Sept 19 96

Michael Rankin
JUDGE/DEPUTY CLERK, SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA

Superior Court of the District of Columbia

CRIMINAL DIVISION

AFFIDAVIT IN SUPPORT OF AN ARREST WARRANT

USW No.: 1227-96

DEFENDANT'S NAME:	C.C.N:	PDID:
RILEY, MARQUETTE E	96-472117	

SEX:	RACE:	D.O.B.:	HEIGHT:	WEIGHT:	EYES:	HAIR:	COMPLEXION:
MALE	BLACK	08-24-78	5'6	130	BRN	BLK	MEDIUM

DEFENDANT'S HOME ADDRESS: 2308 GAYLORD DR SUITLAND, MD — TELEPHONE NUMBER:

DEFENDANT'S BUSINESS ADDRESS: — TELEPHONE NUMBER:

COMPLAINANT'S NAME: LARRELL H LITTLES AND LARELL LITTLES

LOCATION OF OFFENSE:	DATE OF OFFENSE:	TIME OF OFFENSE:
3861 PENNSYLVANIA AVE SE	08-30-96	2130

GIVE BRIEF DESCRIPTION OF WHAT HAPPENED:

PAGE TWO

~~Investigators in D.C. and Maryland have talked to several sources who have provided information about the existence and membership of this gang. From all the information gathered so far, neither victim, Larell Littles or Larnell Littles, is known to be a member of either gang. The suspects in this case are alleged to be members of the Rushtown Crew.~~

~~Witness #1 was on the scene of the shooting in which the Little brothers were shot and killed. Witness 1 told police that on the night of August 30, just before the shooting, it saw a blue car pull into a parking lot in the 3800 block of Pennsylvania Avenue, Southeast. Witness 1 told police it heard a shot and turned around and saw three (3) black males, all of whom were firing guns. These three men were firing guns in the direction of where the two victims were standing. Larell was in a yard playing football and Larnell was standing outside the yard just prior to the shooting. Witness 1 stated that one of the shooters had a shotgun. After the shooting, the three gunman ran back to the blue car, in which there was a driver waiting, at the urging of the driver, and fled the area in that car.~~

~~Witness #2 knows all four suspects listed above and identified all four of them. Witness #2 told police that it had seen three of the defendants - (1) ANTONIO TABAVA ("TONY") MARKS, (2) JAMES ANTONIO STROMAN, and (3) MARQUETTE E. RILEY together shortly before the shooting. It observed the three leave a particular location, the home of ANTONIO TABAVA MARKS which is located 2316 Gaylord Drive approximately a half hour before the shooting.~~

TO: WARRANT CLERK
PLEASE ISSUE A WARRANT FOR:

Marquette E. Riley

Charge With: Murder I w/ Armed

David Schertler 9-6-96
ASSISTANT UNITED STATES ATTORNEY

AFFIANT'S SIGNATURE:
X [signature]

SUBSCRIBED AND SWORN TO BEFORE ME THIS
7 DAY OF Sept 19 96

Michael Rankin
(DEPUTY CLERK) SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA

Superior Court of the District of Columbia

CRIMINAL DIVISION

AFFIDAVIT IN SUPPORT OF AN ARREST WARRANT

USW No: 1227-96

DEFENDANT'S NAME:	CCN:	PDID:
RILEY, MARQUETTE E	96-472117	

SEX:	RACE:	D.O.B.:	HEIGHT:	WEIGHT:	EYES:	HAIR:	COMPLEXION:
MALE	BLACK	08-24-78	5'6	130	BRN	BLK	MEDIUM

DEFENDANT'S HOME ADDRESS: 2308 GAYLOR DR SUITLAND, MD — TELEPHONE NUMBER:

DEFENDANT'S BUSINESS ADDRESS: — TELEPHONE NUMBER:

COMPLAINANT'S NAME: LARNELL A LITTLES AND LARELL LITTLES

LOCATION OF OFFENSE:	DATE OF OFFENSE:	TIME OF OFFENSE:
3861 PENNSYLVANIA AVE SE	08-28-96	2130

GIVE BRIEF DESCRIPTION OF WHAT HAPPENED:

PAGE THREE

~~Witness #2 stated that it observed the same group of individuals return to that location at a time that coincides with a short period after the shooting occurred. Some time after the shooting occurred, Witness #2 overheard conversations among the three suspects listed above in which they discussed about how they had done the shooting over at Fairfax Village. While all three were present, several of them specifically discussed how TONY MARKS (ANTONIO TARAVA MARKS) shot the older boy. These comments were made while TONY MARKS was present and MARKS did not deny any of these statements. In addition, this witness stated that all three suspects, MARQUETTE E. RILEY, ANTONIO TARAVA MARKS, and JAMES ANTONIO STROMAN stated during this conversation that they had done this shooting because of what they (the PVC) had done to "L." This was an apparent reference to the murder of a member of the Rushtown Crew, Lawrence Lynch, which according to P.G. County police records, occurred in the 3300 block of Gaylord Drive on August 2, 1996, about three weeks before the murder of the Little brothers.~~

~~Witness #3 told police that after the shooting it overheard a conversation involving defendants SAYID MUHAMMAD and MARQUETTE E. RILEY in which SAYID MUHAMMAD made statements admitting that he had shot the younger boy and that he was not "tripping over it" because they [meaning the PVC] had shot L. MUHAMMAD also said that he had shot "too early."~~

~~Witness #4 is believed by police to have been involved in this shooting. Witness #4 has not been arrested yet, but was interviewed by police. In that interview, Witness #4 stated that prior to the shooting, but on the evening of the shooting, he saw defendants SAYID MUHAMMAD, JAMES ANTONIO STROMAN, and MARQUETTE E. RILEY.~~

AFFIANT'S SIGNATURE:
X [signature]

TO: WARRANT CLERK
PLEASE ISSUE A WARRANT FOR:
Marquette E. Riley

Charge With: Murder I w/ Armed

[signature] 9-6-96
ASSISTANT UNITED STATES ATTORNEY

SUBSCRIBED AND SWORN TO BEFORE ME THIS
7 DAY OF Sept 19 96

[signature]
(JUDGE) (DEPUTY CLERK) SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA

Superior Court of the District of Columbia

CRIMINAL DIVISION

AFFIDAVIT IN SUPPORT OF AN ARREST WARRANT

U S W No.: 1227-96

DEFENDANT'S NAME:							
RILEY, MARQUETTE E				C C R: 96-472117		PDID:	
SEX:	RACE:	D.O.B.:	HEIGHT:	WEIGHT:	EYES:	HAIR:	COMPLEXION:
MALE	BLACK	08-24-78	5'6	130	BRN	BLK	MEDIUM

DEFENDANT'S HOME ADDRESS: 2338 GAYLORD DR SUITLAND, MD — TELEPHONE NUMBER:

DEFENDANT'S BUSINESS ADDRESS: — TELEPHONE NUMBER:

COMPLAINANT'S NAME: LARNELL H LITTLES AND LARELL LITTLES

LOCATION OF OFFENSE:	DATE OF OFFENSE:	TIME OF OFFENSE:
3861 PENNSYLVANIA AVE SE	08-20-96	2130

GIVE BRIEF DESCRIPTION OF WHAT HAPPENED PAGE FOUR

Witness 4 stated that MUHAMMAD was armed with a .22 caliber firearm and that RILEY was armed with a .38 caliber handgun and STROMAN was armed with a shotgun just before the shooting. Witness 4 stated that all three suspects were talking about how "L" got shot, and that they were discussing going up to do a shooting at "Fairfax" in retaliation for what happened to "L". Witness 4 also stated that these three suspects then left Gaylord Drive in Maryland in a blue Nova or Spectrum just prior to the shooting. Witness 4 said that shortly after the shooting, the same group of suspects returned to Gaylord Drive and were talking about how they had done the shooting up in Fairfax village. According to Witness 4, JAMES ANTONIO STROMAN made comments about how they did the shooting and how they should burn the car in order to make sure it could not be connected to them and the crime.

In connection with these statements and as corroboration for them, two days after the murder of the Little brothers, police found a blue Spectrum which was completely burned up. It had been stolen prior to the murder. In addition, both the victims in our murder were shot with a .22 caliber weapon and .22 caliber shell casings were found on the scene of the crime. Furthermore, in a search of defendant TONY MARKS' home two days after the crime, which defendant MARKS and RILEY were present in the home, police found a .38 caliber handgun, and an AK-47 rifle. In MARKS' bedroom, police found a Remington 12 gauge shotgun shell that matched the make, color and appearance of shotgun shell casings found on the scene of the Little murder. Larnell Littles suffered wounds from a .22 caliber and from shotgun pellets.

Based on the totality of this evidence and the circumstances, the affiant believes that there is probable cause to charge this defendant with first degree (premeditated) murder while armed.

AFFIANT'S SIGNATURE: X [signature]

TO: WARRANT CLERK
PLEASE ISSUE A WARRANT FOR:

Marquette E. Riley

Charge With: Murder I w/ Armed

[signature] 9-6-96
ASSISTANT UNITED STATES ATTORNEY

SUBSCRIBED AND SWORN TO BEFORE ME THIS 7 DAY OF Sept 19 96

[signature]
(JUDGE) (DEPUTY CLERK) SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA

District of Columbia
Court of Appeals

No. 98-CF-1045

MARQUETTE E. RILEY,
Appellant,

FEI 2594-97

v.

UNITED STATES,
Appellee.

BEFORE: *Washington, Chief Judge; Farrell, Ruiz, Reid, Glickman, Kramer, **Fisher, Blackburne-Rigsby, and Thompson, Associate Judges; *Terry and *Schwelb, Senior Judges.

ORDER

On consideration of appellant's petition for rehearing or rehearing en banc, the opposition thereto, and appellant's motion for leave to file the lodged reply, it is

ORDERED that the motion is granted and the Clerk is directed to file the lodged reply to opposition to petition. It is

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

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

PER CURIAM

**Associate Judge Fisher has recused himself from this case.

Copies to:

Honorable Frederick H. Weisberg

Robert S. Becker, Esquire
5505 Connecticut Avenue, NW
PMB #155
Washington, DC 20015

Roy W. McLeese, III, Esquire
Assistant United States Attorney

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