IN THE

# DISTRICT OF COLUMBIA COURT OF APPEALS

**No. 98-CF-1045**

**Marquette E. Riley,**

*Appellant,*

VS.

**United States,**

*Appellee.*

**On Appeal from the**
**Superior Court of the District of Columbia**
**F 2594-97**

## APPELLANT'S REPLY BRIEF

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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES[†]

## CASES



## STATUTES



[†] Names of cases principally relied upon are preceded by an asterisk (*).

## CONSTITUTIONAL PROVISIONS

**IN THE**
**DISTRICT OF COLUMBIA COURT OF APPEALS**

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| **MARQUETTE E. RILEY,**<br>**APPELLANT,**<br>vs.<br>**UNITED STATES,**<br>**APPELLEE.** | No. 98-CF-1045<br>(F 2594-97) |

# APPELLANT'S REPLY BRIEF

## ARGUMENT

It is revealing that the government begins its Counterstatement of the Case on March 26, 1997, when the Grand Jury indicted Appellant Marquette E. Riley and Coappellants Antonio Marks and Sayid Muhammad, rather than in September 1996, when Appellants were arrested. Gov't Brief, 1. Then it argues that

> Appellant Riley was not indicted until March 26, 1997 (98-CF-1045 R. 1), and he has cited no authority to support his proposition that his arrest on September 9, 1996, based on a complaint noting probable cause (and its underlying arrest warrant issued on September 7, 1996)(id. at 3), constitutes an adversarial judicial criminal proceeding, or that a defendant has a constitutional right to counsel based on an arrest warrant.… No adversarial judicial criminal proceedings had yet been initiated against appellant Riley when he was arrested September 9, 1996, and, indeed, no such proceedings were initiated until November 18, 1997, when he was arraigned on the complaint charging him with murder (98-CF-1045 R. 1, 2).

Gov't Brief, 22.

The government apparently draws this conclusion because Riley was held for prosecution in Maryland in an unrelated case, and was not immediately extradited to Washington for arraignment on the Complaint filed September 7, 1996. That Complaint or "Information," as it is commonly called, charged that Riley, on August 20, 1996, "[w]hile 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 Larell Littles in violation of Title 22 Section 2401/3202 of the District of Columbia Code." R. 3.

As the U.S. Supreme Court very recently stated in reaffirming its holdings in *Brewer v. Williams*, 430 U.S. 387, 398, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1997), and *Massiah v. United States*, 377 U.S. 201, 206, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), the "Sixth Amendment right to counsel is triggered at or after the time that judicial proceedings have been initiated … whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Fellers v. United States*, No. 02-6320, *slip op.* at 4 (U.S. Jan. 26, 2004)(Westlaw 2004 WL 111410)(internal quotations omitted). When the government filed the Information charging Riley with first-degree murder while armed, it initiated adversary judicial proceedings against him, just as surely as if it had waited to make the arrest until after it obtained the indictment and Riley's Sixth Amendment right to counsel attached.

In *Fellers* the government first obtained an indictment and then police went to the defendant's house to arrest him. The officers told him about the indictment and arrest warrant and said they wanted to discuss his involvement in distributing methamphetamine. *Slip Op.* at 2. Fellers responded that he knew the individuals the officers asked about and that he had used the drug with them. *Id.* After about 15 minutes the officers took Fellers to the jail and then advised him of his rights under *Miranda v. Arizona* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Fellers signed a rights waiver and then made additional incriminating statements. *Id.* The Trial Court suppressed the statements Fellers made at his house, but not the statements made after he signed the rights waiver, and he was convicted. *Id.* at 3.

The Supreme Court unanimously held that,

> There is no question that the officers in this case "deliberately elicited" information from petitioner. Indeed the officers, upon arriving at petitioner's house, informed him that their purpose in coming was to discuss his involvement in the distribution of methamphetamine and his association with certain charged co-conspirators …. Because the ensuing discussion took place after petitioner had been indicted, outside the presence of counsel, and in the absence of any waiver of petitioner's Sixth Amendment rights, the Court of Appeals erred in holding that the officers' actions did not violate the Sixth Amendment standards established in *Massiah* [] and its progeny.[1]

[1] The Supreme Court remanded *Fellers* for the Court of Appeals to determine whether the rationale of *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985), applies when a defendant makes incriminating statements after a knowing, voluntary waiver of his Sixth Amendment right to counsel, notwithstanding earlier police

Continued on next page …

*Id.* at 5 (citation omitted).

In Riley's case, after Appellant asserted his right to counsel at 9 a.m. when questioned by D.C. detectives Oliver Garvey and Donald Sauls, Prince George's County Det. Dwight DeLoach entered the interrogation room. DeLoach stated that his purpose when he entered the room at 10:45 a.m. was to obtain Riley's confession to the D.C. homicides of Larnell and Larell Littles for use in prosecuting Appellant, Marks and Muhammad. Appellant's Brief, 21 – 2. He claimed that he was unaware that Riley had answered "no" when Garvey asked if he was willing to answer questions without a lawyer present. DeLoach did not advise Riley of his constitutional rights during this session, in which he told Appellant that the codefendants were telling their versions of events and implicating him in the crime, that there were two sides to every story, and that he needed to tell his story of what happened. DeLoach testified initially that Riley said nothing during this confrontation, but later said Appellant briefly denied involvement in the murders.

Like the officers in *Fellers*, DeLoach did not "interrogate" Riley in the first session, but like them, he "deliberately elicited" Appellant's subsequent inculpatory verbal and written statements. Police never provided Riley access to a lawyer that day, and as a result the written rights waivers DeLoach obtained at 1:43 that afternoon and again after taking the written statement at 9 p.m. were invalid. Therefore, the Trial Court violated Appellant's Sixth Amendment right to counsel by admitting the statements at trial.

Riley's assertion that he had a Sixth Amendment right to counsel upon his arrest September 9, 1996 is amply supported by the precedents cited in his main brief. It is supported as well by D.C. Code § 23-113, which states in relevant part that,

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

(1) an indictment is entered;

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questioning in violation of the Sixth Amendment. *Fellers, supra, Slip Op.* at 6. The government has not argued that that principles enunciated in *Elstad* apply in Riley's case, even though it claims he was protected only by the Fifth Amendment privilege against self-incrimination, not the Sixth Amendment right to counsel. Because Riley's eventual waiver of his right to counsel flowed directly from DeLoach's deliberate elicitation of incriminating statements, Appellant's verbal and written statements after he signed the waiver at 1:43 p.m. were fruits of the initial Sixth Amendment violation. As a result *Elstad* is inapplicable.

> (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.

Thus, the government commenced its prosecution of Riley on September 7, 1996, when it filed the complaint and attached affidavit in support of the arrest warrant.

The government erroneously relies on *United States v. Gouveia*, 467 U.S. 180, 104 S. Ct. 2292, 81 L. Ed. 2d 146 (1984), for the proposition that the Sixth Amendment right does not attach upon arrest. In *Gouveia*, a prison case, the inmates were placed in administrative segregation and subjected to disciplinary hearings following the murder of another inmate, and subsequently they were indicted for first-degree murder. The inmates claimed that failure to appoint counsel when prison officials placed them in administrative detention deprived them of their Sixth Amendment right. Justice Stevens, concurring in the judgment, placed the case in its proper perspective, saying, "there is no finding in either of these consolidated cases that respondents were placed in the ADU at the behest of prosecutorial authorities or in order to aid prosecutorial efforts, nor is there a finding that their detention facilitated the investigation of the two murders at issue." *Id.* at 198.

Equally unavailing is the government's reliance on *Davis (Angel) v. United States*, 623 A.2d 601 (D.C. 1993), involving testimony by a parole officer to identical incriminating statements the defendant made to him before and after arrest. This Court did not decide that Davis did not have a Sixth Amendment right to counsel when she met with the parole officer after her arrest. *Id.* at 606. It merely decided that admission of the post-arrest statement was cumulative and that if the Trial Court erred in admitting the later statement the error was harmless.

*Rogala v. District of Columbia*, 161 F.3d 44 (D.C. Cir. 1998), involved a federal civil rights action filed by two individuals involved in a traffic stop, the driver of a car stopped on suspicion that he was intoxicated, and his passenger, who was a lawyer. The driver claimed that

the police officer deprived him of his Sixth Amendment right to counsel by ordering the passenger to return to the car while the driver took a field sobriety test. *Id.* at 55. The Court ruled that when the driver took the test he had not yet been charged with any crime, so he did not have a right to counsel under the Sixth Amendment.

The government has cited no case for the proposition that if police arrest a person after formal charges have been filed, either by information or indictment, they may interrogate him at will until he unambiguously asserts his right to counsel under the Fifth or Sixth Amendment. Nor does it cite any precedent supporting its astounding assertion that no adversarial judicial criminal proceedings began against Riley until his arraignment November 18, 1997, 14 months after he was arrested on the first-degree murder charge, and nearly eight months after he was indicted. Gov't Brief, 22.

## THE SIXTH AMENDMENT RIGHT TO COUNSEL FUNCTIONS DIFFERENTLY THAN THE FIFTH AMENDMENT RIGHT

The Supreme Court has repeatedly distinguished the right to counsel it found under the Fifth Amendment in *Miranda, supra,* from the Sixth Amendment right to counsel.

### *Express Waiver v. Unambiguous Assertion*

The counsel guarantee of the Fifth Amendment must be invoked by the accused, and where the record is silent, the invocation is ambiguous, or the person vacillates and eventually makes an inculpatory statement, courts often conclude that the statement is admissible. *See, e.g. McNeil v. Wisconsin*, 501 U.S. 171, 178, 111 S. Ct. 2204, 115 L. Ed. 2$^{d}$ 158 (1991)(invocation of the *Miranda* right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney"). When a defendant moves to suppress a statement obtained in violation of his Fifth Amendment right, the judge must first determine whether he asserted the right to counsel and "may admit his responses to further questioning [] on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked." *Smith v. Illinois*, 469 U.S. 91, 95, 105 S. Ct. 490, 83 L. Ed. 2$^{d}$ 488 (1984)(citing *Edwards v. Arizona*, 451 U.S. 477, 484 – 5, 101 S. Ct. 1880, 68 L. Ed. 2$^{d}$ 378 (1981)).

Once the Sixth Amendment right to counsel attaches, the accused need not say anything; and a reviewing court must assume from a silent record that the defendant invoked his right to counsel. Any ambiguity must be resolved in favor of preserving the right and against a government claim of waiver. *Johnson v. Zerbst,* 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). In Riley's case, therefore, even if this Court finds that his initial negative answer to the question on the Prince George's County rights waiver form — "do you want to make a statement at this time without a lawyer?" — was ambiguous, it must conclude that he invoked the right to counsel.

Even if the Court were to find that the Sixth Amendment right to counsel had not attached in this case, the government's argument under the Fifth Amendment that Appellant's response was ambiguous flies in the face of this Court's holding in *Tindle v. United States*, 778 A.2$^{d}$ 1077 (D.C. 2001). *See* Appellant's Brief, 25. Furthermore, in a similar situation involving a Maryland rights waiver form the Maryland Court of Special Appeals held that,

> if there is any ambiguity in appellant's unequivocal and emphatic response, as contended by the State (and we do not believe that there is) because of the "multifaceted" nature of the sentences that compose the waiver of counsel provision, the ambiguity should arguably be interpreted against the author of that provision — the State. No discernable public interest is served by interpreting a purportedly ambiguous waiver of rights provision in favor of the party who, either intentionally or unintentionally, inserted the ambiguity in the provision in the first place.

*Billups v. Maryland*, 762 A.2$^{d}$ 609, 616 (Md. 2000).

***Distinctions Between the Rights***

The distinction drawn by the Supreme Court between the Fifth Amendment right to counsel and the Sixth Amendment right to counsel has several bases.

The most obvious is that the stated purpose of the Fifth Amendment privilege is protection of the defendant against compulsory self-incrimination, the right to counsel is nowhere expressed in it. In *Miranda, supra,* at 478 – 9, the Supreme Court held that

> when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his

> right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he … has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

*See, also, Rhode Island v. Innis*, 446 U.S. 291, 297, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980)(in *Miranda* "the Court concluded that in the context of 'custodial interrogation' certain procedural safeguards are necessary to protect a defendant's Fifth and Fourteenth Amendment privilege against compulsory self-incrimination").

A central focus of the Sixth Amendment is the guarantee of competent legal assistance when the defendant, an untrained layman, must confront the organized forces of government in an arena governed by complex procedural and substantive rules. *United States v. Ash*, 413 U.S. 300, 93 S. Ct. 2568, 37 L. Ed. 2d 619 (1973).

> [G]iven the plain language of the Amendment and its purpose of protecting the unaided layman at critical confrontations with his adversary, our conclusion that the right to counsel attaches at the initiation of adversary judicial criminal proceedings is far from a mere formalism….

*Michigan v. Jackson*, 475 U.S. 625, 631, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986)(citations and internal quotations omitted).

Another reason for the distinction is that 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." *Ash, supra.* at 310. 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 v. New York,* 360 U.S. 315, 323, 79 S. Ct. 1202, 3 L. Ed. 2d 1265 (1959)(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.

*Id.* at 326. The Supreme 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.

Riley had the right to counsel under the Sixth Amendment even though he had not yet been indicted or arraigned on the murder charge.

> In *Escobedo v. State of Illinois*, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, we drew upon the rationale of *Hamilton*[2] and *Massiah* in holding that the right to counsel was guaranteed at the point where the accused, prior to arraignment, was subjected to secret interrogation despite repeated requests to see his lawyer.

*United States. v. Wade*, 388 U.S. 218, 225, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

**RILEY DID NOT WAIVE THE RIGHT HE PREVIOUSLY ASSERTED**

The government maintains that Riley asserted his Fifth Amendment right to remain silent, but never effectively asserted his right to counsel. As evidence in support of this contention, it cites the Trial Court's findings, based on the suppression hearing record, that Riley twice demonstrated that he did not request counsel at 9 a.m., when the Metropolitan Police detectives interviewed him. Gov't Brief, 24 – 5. It noted that he signed the second waiver at 1:43 p.m., and under questioning by DeLoach stated that he was willing to talk to the detective, but he initially answered "no" on the second waiver form because he did not want to give a written statement. Then, after giving the written statement after 9 p.m., he answered no when asked whether he had ever requested a lawyer and again when asked if the police had denied him access to a lawyer, the government notes. *Id.*

But the Supreme Court unambiguously held that "[u]nder *Miranda* and *Edwards* … an accused's post request responses to further interrogation may not be used to cast doubt on the clarity of his initial request for counsel." *Smith, supra*, 469 U.S. at 91. It said,

[2] *Hamilton v. Alabama*, 368 U.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961).

> [t]he courts below were able to construe Smith's request for counsel as "ambiguous" *only* by looking to Smith's *subsequent* responses to continued police questioning and by concluding that, "considered in total," Smith's "*statements"* were equivocal…. This line of analysis is unprecedented and untenable…. Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease. In these circumstances, an accused's subsequent statements are relevant only to the question whether the accused waived the right he had invoked. Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together.

*Id.* at 97 – 8 (emphasis in original)(citations and footnote omitted).

Having concluded that Riley never invoked his Fifth Amendment right to counsel the government moves on to discuss his purported waiver of his right to remain silent. It never attempts to argue that Appellant waived his right to counsel, and such an argument would be untenable as well under the Fifth or Sixth Amendment. *See* Appellant's Brief, 22 – 3, 29.

The government's position becomes even more untenable regarding admission of the written statement obtained at 9 p.m. because Riley had been taken before a Commissioner who two hours earlier had ordered him held without bond. Clearly, adversary judicial proceedings had begun. *Elfadl v. Maryland*, 485 A.2$^{d}$ 275, 278 (Md. 1985). DeLoach testified that he did not read Riley the *Miranda* warnings before taking the written statement, but asked at its conclusion whether Appellant wanted a lawyer and whether the police had denied him access to a lawyer.

All of the statements Riley made before being taken before the Commissioner were denials of involvement in the Littles homicides. Assuming for the sake of argument that Riley's Sixth Amendment right did not attach until he appeared before the Commissioner, he had not waived his right to counsel before giving the inculpatory written statement.

## CONCLUSION

For the reasons stated above, in Appellant's main brief and any others that appear to the Court following oral argument Appellant Marquette E. Riley respectfully requests that the Court 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,

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## CERTIFICATE OF SERVICE

I, Robert S. Becker, counsel for Marquette E. Riley, certify that on February 4, 2004 I served a true copy of the attached Appellant's Reply Brief by first-class mail on counsel listed below.

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