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 BRIEF

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QUESTIONS PRESENTED

1. Whether, after formal charges were filed and Appellant asserted his Sixth Amendment right to counsel, police violated that right by reinitiating interrogation several times over a 12-hour period without counsel present, and eventually obtained a written confession which was placed in evidence at trial?
2. Whether the Trial Court violated Appellant's Fifth Amendment privilege against self-incrimination by admitting into evidence at trial a confession obtained in lengthy custodial interrogation, where police coerced Appellant to waive his right to counsel and right to remain silent?

TABLE OF CONTENTS

TABLE OF AUTHORITIES[†]

CASES

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

STATUTES

CONSTITUTIONAL PROVISIONS

RULES & REGULATIONS

DISTRICT OF COLUMBIA COURT OF APPEALS

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

APPELLANT'S BRIEF

In this case a Prince George's County Police investigator violated Appellant Marquette E. Riley's Sixth Amendment right to counsel and Fifth Amendment protection against self-incrimination after he unambiguously refused to waive those rights following his arrest for first-degree premeditated murder. Because the U.S. Attorney formally charged Riley before his arrest and interrogation, police were prohibited from attempting to question him once he requested a lawyer until after counsel talked to him. But Prince George's County police persisted, even after a lawyer called to say he represented Riley and ordered them not to talk to him, and subsequently obtained a written confession. The Trial Court's decision that the government could introduce Riley's statement obtained in violation of his Sixth Amendment right to counsel was a structural error in the trial, and this Court must vacate his conviction and order a new trial.

STATEMENT OF THE CASE

The U.S. Attorney filed a Complaint in the D.C. Superior Court September 7, 1996 charging Riley with first-degree premeditated murder while armed in violation of D.C. Code §§ 22-2401 and 22-3202. R. 3.[1] It filed similar complaints against Antonio "Tony" Marks, Sayid Muhammad and James Antonio "Tony" Stroman. Simultaneously, Metropolitan Police homicide investigators obtained warrants to arrest Riley and his codefendants. *Id.*

With assistance from the Prince George's County Police Criminal Investigations Division,

[1] References to the Record on Appeal will be designated "R." followed by the document number and, where necessary, the relevant page number, i.e. R. 3, 1. References to transcripts of proceedings will be designated "Tr." followed by the date of the proceeding and the relevant page number, i.e. Tr. 10/1/01, 3.

D.C. detectives arrested all four men early September 9, 1996 at their homes in Suitland, Maryland, 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, Appellant stated that he did not want to talk to them without first speaking with a lawyer. *Id.* at 153. Garvey and Sauls immediately left the interrogation room with the signed form, and turned the form over to Prince George's detectives. *Id*.

Prince George's Det. Dwight S. DeLoach, who had been assigned to look after Riley, entered the interrogation room at about 10:45 a.m. and talked to Riley, saying his codefendants were giving their versions of events, and DeLoach wanted to hear Riley's side of the story. *Id.* at 161 – 2. DeLoach left the room and returned at about 1:30 p.m. *Id.* at 168. Riley blurted out his denial of involvement in the crime when DeLoach re-entered the room, and the detective advised Appellant of his rights. Riley initially check a box on the rights waiver form asserting his right to counsel and to remain silent, but DeLoach convinced him to change his answer. Tr. 4/20/98, 170 – 1. At about 6:40 p.m., when DeLoach took Riley to be fingerprinted and processed, Riley asked if he could talk to Muhammad. When they returned to the interrogation room at about 7:30 p.m., DeLoach brought Muhammad in and he told Riley that the others had confessed. *Id.* at 77. Muhammad told Riley to talk to police, and after he was taken out of the room Appellant gave a written statement admitting for the first time that he was involved in the homicide and later in burning the vehicle used in the crime. *Id.* at 178.

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). R. 7. The Hon. Herbert B. Dixon arraigned Appellant November 18, 1997 and ordered that he be held without bond for trial. R. 2, 1, R. 9.

Defense counsel filed a motion January 29, 1998 to sever defendants under D.C. Crim. R. 14 on grounds that the defendants had conflicting, irreconcilable defenses and that there was a greater amount of evidence against Riley's codefendants. R. 13. He moved to suppress Riley's statements because police had interrogated him after he asserted his rights. R. 11. Counsel moved to suppress codefendants' statements implicating Riley because they would be inadmissible in a separate trial. R. 12. The government filed an opposition to all defendants' severance motions and Riley's motion to suppress codefendants' statements. R. 14. It filed a separate opposition to Riley's motion to suppress his own statement. R. 15.

The Trial Court began a motions hearing April 20, 1998 on Riley's motion to suppress statements. R. 2, 2. It concluded the hearing April 21 and denied the motion the next day. *Id.* It granted an oral motion made by Riley's counsel to sever the conspiracy count to avoid the need to try the defendants separately. *Id.*

Jury selection began April 22 and the trial, spanning six court days, ended April 29. *Id.* The Trial Court granted Riley's motion for judgment of acquittal on the unauthorized use of a vehicle and destruction of property counts (Counts C and G). Tr. 4/28/93, 345. The jury began deliberating at about 3:30 p.m. and returned guilty verdicts at about noon 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). R. 2, 2. The Trial Court sentenced Riley to 30 years to life on each murder count (Counts E and F), 5 to 15 years for possession of a firearm during a violent crime (Count B), and 10 to 30 years for assault with intent to kill while armed (Count E). The judge ordered that sentences on counts D, E and F should run consecutively with each other and that the sentence on Count B should run concurrently with them. All of the sentences were to run consecutively with any other sentence Riley was serving. R. 22. Riley's D.C. sentence totaled 70 years to life, and he would have to

serve mandatory terms totaling 65 years before becoming eligible for parole. *Id.* The court assessed a $400 payment to the crime victims' fund. R. 21

Appellant filed a timely Notice of Appeal on July 9, 1998. R. 23.

STATEMENT OF FACTS

THE TRIAL

According to testimony at trial, the homicides in this case were part of a long-running feud between rival gangs, the Fairfax Village Crew in Southeast Washington and the Rushtown Crew immediately across the city line in Suitland, Maryland. The government presented its case through testimony of eight civilian witnesses, five Metropolitan Police officers, seven Prince George's County police officers, the assistant medical examiner who performed autopsies on the victims and a firearms expert. Defense counsel called no witnesses to testify at the trial.

Wayne Brown, a drug dealer, testified that during the summer of 1996 Russell Tyler was shot, but not killed, and Lawrence Lynch was shot and killed. Tr. 4/23/98, 43, 48. Brown appeared as a government witness under a plea agreement in which he pleaded guilty to two counts of being an accessory after the fact of murder, and the government dismissed two counts of first-degree murder. *Id.* at 88 – 91. Tyler and Lynch were members of the Rushtown Crew, and surviving members believed Fairfax Village Crew members committed the crimes. *Id.* at 45, 49. Several of them, including Marks and Muhammad, the most vocal, subsequently discussed seeking revenge. *Id.* at 49 – 50. At Marks's request, shortly before August 20, 1996 Brown provided him a 12-guage shotgun. *Id.* at 50 – 51.

James Antonio "Tony" Stroman lived in Suitland and was a member of the Rushtown Crew who had been in prison from 1994 until April 1996 on an armed robbery conviction. Tr. 4/27/98, 53, 55 – 6. He testified as a government witness as part of a plea agreement under which he pleaded guilty to unarmed second-degree murder and conspiracy, and he had not yet been sentenced. *Id.* at 53 – 4. On cross-examination he admitted writing two letters to a prosecutor working on this case, in which he offered to help convict his codefendants because Muhammad got him involved in killing a 12-year-old boy. *Id.* at 81 – 3, 122. He admitted that at some point before this incident members of the Rushtown Crew had attacked him with firearms because they believed he would defect to the Fairfax Village Crew. *Id.* at 84 – 5.

Stroman testified that he learned from Muhammad that Lynch had been killed by

members of the Fairfax Village Crew. In mid-August, the witness said, he was attacked by people he identified as Fairfax Village Crew members. *Id.* at 59 – 61. That evening Muhammad vowed to retaliate against the Fairfax Village Crew, Stroman said. *Id.* at 63.

The victims, Larnell "Shawn" Littlies, 19, and Larell "Ike" Littles, 12, were playing nerf football outside their home in the 3800 block of Pennsylvania Avenue, S.E., with Robert Johnson, 13, in the evening of August 20, 1996. Tr. 4/23/98, 138 – 9, 142 – 3. Johnson saw a car drive into the parking lot next door to the Littles residence, and several people jumped out of the vehicle and started shooting. *Id.* at 143 – 4. He said Shawn, who was standing near the front gate, told the younger boys to get down on the ground and he started running toward the house. *Id.* at 144. Johnson hid behind some bushes and did not see Ike fall, but after the shooters left he saw Ike lying on the ground. *Id.* at 148 – 9.

On August 20, 1996 Stroman met Muhammad, Riley and another man called TJ on the street and they went to Marks's house in the blue four-door Spectrum Muhammad was driving. *Id.* at 63 – 64. Several other individuals were at the Marks house, and Muhammad said he knew where the Fairfax Village Crew would be that evening. *Id.* at 67 – 70. Stroman, armed with a 12-guage, sawed-off shotgun, drove the blue car with Muhammad, carrying a .22 caliber rifle, Marks carrying a pump-action shotgun, and Riley carrying a .38 caliber revolver. *Id.* Stroman testified that he thought they were heading for a nightclub to find the Fairfax Village Crew, but as they drove up Pennsylvania Avenue, S.E., Muhammad ordered Stroman to drive into the Fairfax Village Shopping Center and stop the car. *Id.* at 70. He said Muhammad jumped out of the car and ran toward the victims, pulling the rifle from his sweat pants. *Id.* at 71. After he shot Larnell Littles, according to Stroman, Muhammad started shooting at Larell Littles, who was crawling on the ground. *Id.* at 72. Then, according to Stroman, Muhammad turned and ordered the others to get out of the car and start shooting, and Marks and Riley complied. *Id.* at 72 – 3.

Stroman acknowledged that he told the Grand Jury Muhammad pointed the rifle at them, and that he, Marks and Riley were scared of Muhammad. *Id.* at 98 – 100. He also admitted testifying in the Grand Jury that he told Marks and Riley to get out of the car and do something.

Id. at 146. He said Riley and Marks returned to the car, but Muhammad stood for a long time over Larnell Littles. *Id.* at 73. At Muhammad's direction Stroman drove back to Marks's house and Muhammad threatened him with the rifle because he attempted to leave, rather than go in the house with the others. *Id.* at 75, 101 – 3.

Brown testified that he went to Marks's house August 20, 1996 shortly after the defendants returned from Fairfax Village and retrieved the shotgun he loaned to Marks earlier. Tr. 4/23/98, 55. The defendants and several other men were there talking about the shooting, and one of the men said they should burn the blue car used in the crime, he testified. *Id.* at 62. Brown suggested that two men who had not been involved in the shooting should burn the car, but Muhammad wanted to drive through Fairfax Village. *Id.* at 63. Brown bought gasoline to burn the blue car and then followed in another car as Muhammad and Riley drove to a place where they could burn the vehicle. *Id.* at 66 – 8. Muhammad set the car on fire, and then he and Riley got in the car with Brown and they returned to Marks's house. *Id.* at 68 – 9.

THE MOTIONS HEARING

The Trial Court held a two-day hearing immediately before trial on several motions filed by the prosecutor and defense counsel, including Riley's motion to suppress statements he made to police the day he was arrested. During the trial Riley's counsel proffered evidence that a lawyer had called Prince George's County police September 9, 1996 and told an investigator that he represented Appellant. According to a log notation made by one of the investigators, the lawyer told police to "cease and desist" from interrogating Riley. The Trial Court then conducted a *voir dire* of a Prince George's Police sergeant and a detective. Only testimony related to Appellant's motion to suppress is relevant to this appeal.

Metropolitan Police Det. Oliver Garvey's Testimony

At about 9 a.m. September 9, 1996 Metropolitan Police Homicide Det. Oliver Garvey told Riley that he had been charged with murdering two brothers in Washington August 20, 1996, and then advised Appellant of his *Miranda*[2] rights. Tr. 4/20/98, 146 – 7. He was the first investigator

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

to advise Appellant of his rights that day. *Id.* at 151. Riley checked the box on the Prince George's County rights waiver form indicating that he did not want to answer questions without a lawyer present, and then Garvey and Det. Don Sauls asked if "he was sure he did not want to talk to us? He said, yes." *Id.* at 148 – 50, 154. They ended the interview, and after leaving the interrogation room Garvey gave the rights waiver form to a Prince George's County detective, saying Riley had "invoked." *Id.* at 150, 154.

Garvey said he first met Riley about a week earlier when investigators executed a search warrant at Marks's house. *Id.* He did not take a written statement but recalled that Riley said he had been at home all day August 20, 1996 and that he went out to see a young lady, but he "just didn't admit to anything." *Id.* at 156 – 7.

Prince George's County Det. Dwight S. DeLoach's Testimony

At about 10:45 a.m. Prince George's County Police Sgt. Daniel Smart told DeLoach to interview Riley, but did not tell him whether Appellant had been advised of his rights. *Id.* at 161. When he entered the room Riley was in handcuffs, and according to DeLoach

> … I basically told him there is two sides to every story and that I wanted to hear his side of the story, and that I was familiar with the incident in reference to the shooting in Fairfax Village. And also that a couple of the people that was with him had already began to testify and said that he was involved.
>
> I told him I knew he was involved and that I really wanted to sit down and talk to him.
>
> At that point I just told him I was going to leave him and I was going to come back later. I just walked out of the room

Id. at 162. On cross-examination DeLoach agreed that he told Riley "how important it was for him to tell his side of the story." Tr. 4/21/98, 208. In response to a question from the Judge, DeLoach confirmed that he had been ordered to focus his inquiry on the Fairfax Village homicide, not one in Suitland for which Riley and his codefendants had not yet been charged. Tr. 4/20/98, 163. DeLoach said the session lasted about 30 minutes and if he asked Riley any questions during that time they sought personal history information, such as his name, address and date of birth. *Id.* at 166 – 7.

He did not advise Riley of his rights. Tr. 4/21/98, 208. "If he were to have said something, made a comment like that, then I would have stopped him and advised him of his rights," DeLoach claimed. *Id.* at 209. But later in the hearing DeLoach testified that during the 10:45 a.m. session Riley denied involvement in the Fairfax Village homicides, but the detective did not advise him of his rights. *Id.* at 210.

DeLoach testified that he and Det. Butler returned to the interrogation room at about noon and took Riley to the bathroom. Tr. 4/20/98, 168.

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." *Id.* Riley was denying involvement in the Littles homicides. Tr. 4/21/98. 217. The detective advised Riley of his rights from a form like the one Garvey had used, and Appellant again check the box indicating he did not want to answer questions without a lawyer present. Tr. 4/20/98, 170. The Judge then asked:

> THE COURT: [] Who is the first person that talks about that answer?
>
> THE WITNESS: No, he checks the "no." He said he wanted to talk to me but he didn't want to write anything that —
>
> THE COURT: No, no, no. You handed him the statement and asked him to answer the question?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: Did he answer the question?
>
> THE WITNESS: Do you want to make a statement at this time without a lawyer?
>
> THE COURT: Yes.
>
> THE WITNESS: He checked "no," then he talked.
>
> THE COURT: What's the very next thing that happened?
>
> THE WITNESS: Then he said I want to talk to you but I don't want to write no statement.
>
> THE COURT: He said that right after he checked the "no"?
>
> THE WITNESS: Yes, sir.

> THE COURT: And then you said the question doesn't ask anything about a written statement?
>
> THE WITNESS: Right.
>
> THE COURT: It asks about a lawyer?
>
> THE WITNESS: No.
>
> THE COURT: Tell me your words as best as you can.
>
> THE WITNESS: I said the question is not about a written statement, it's just about you want to talk to me, which it would be a statement.
>
> So he said, yes, he checked "yes," then put his initials.

Tr. 4/20/98, 171 – 2. On cross-examination 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 signed the waiver form DeLoach began questioning him about the D.C. homicide. Tr. 4/20/98. 173. Appellant said Marks, another person named Tony and others went to Fairfax Village, but they left him at Marks's house because he was too young. When they returned to the house he went home. *Id.* DeLoach responded that he knew Riley had gone to Fairfax Village and was not telling the truth. He informed Riley that his codefendants had begun to talk, Tr. 4/21/98, 194, and "I told him I was going to let him think about it and I was going to come back and talk to him later." Tr. 4/20/98, 174. DeLoach again left the interrogation room at about 3 p.m. and did not return until about 6:40 p.m., when he took Riley to be booked and presented before a commissioner for a bond hearing. *Id.*

Det. Sutton then talked to Riley for about 30 minutes, according to DeLoach, but he did not tell Sutton that Appellant had waived his rights and he did not know the subject of that interview. Tr. 4/21/98, 219.

According to DeLoach, while being fingerprinted Riley asked to talk to Muhammad and the detective said he could arrange a meeting. Tr. 4/20/98, 176 & Tr. 4/21/98, 190. DeLoach returned Riley to the interrogation room at about 7:30 p.m., and with assistance from an MPD sergeant 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. Riley looked at Muhammad the entire time and shook his head, but did not speak. Tr. 4/21/98, 194. After investigators took Muhammad away DeLoach asked if Riley was ready to talk, and over the next 15 minutes Appellant orally gave details first of the homicides in D.C. and then of the homicide in Prince George's County. *Id.* at 177 – 8 & Tr. 4/21/98, 195. DeLoach then worked with Riley from 8 p.m. to 9:41 p.m. on a written statement about both crimes. Tr. 4/21/98, 197. At the conclusion of the written statement, DeLoach testified, Riley wrote that the statement was the truth and that DeLoach had not threatened, abused or mistreated him. *Id.* at 199 – 200. Defendant stated that he gave the statement "because I wanted you to hear my side of the story," that DeLoach had not denied his request for a lawyer, and that he understood his rights as the detective read them. *Id.* at 200.

DeLoach said no one advised Riley of his rights between 1:45 p.m. and when they completed the written statement after 9:15 p.m. *Id.* at 202. He did not tell Riley that he could have a lawyer to represent him during questioning or that the bond hearing could have been postponed until a lawyer was appointed to represent him. *Id.* at 225. After Riley finished writing the statement, DeLoach brought him some food, the first Appellant had since his arrest at about 7 a.m., he testified. *Id.* at 212 – 13, 229.

DeLoach claimed that after the interview he learned that Riley had refused to waive his rights when Garvey interviewed him at 9 a.m. *Id.* at 226. In the mid-trial *voir dire*, DeLoach said he informed the lead officers and Smart during the afternoon that Riley had waived his rights. Tr. 4/27/98, 192. He claimed they did not tell him Riley had asserted his rights when Garvey interviewed him. Tr. 4/21/98, 227.

In the mid-trial *voir dire* DeLoach examined a log of events September 9, 1996 which included a notation that at 6 p.m. an attorney had called to say he represented Riley and that police should not question him.[3] Tr. 4/27/98, 193 – 4. The detective said the note was in Smart's handwriting, and that no one had told him about the call. *Id.* DeLoach said he saw the note for the

[3] 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.

first time in Court and he was surprised that no one informed him about it September 9, 1996. *Id.* at 197.

Defense counsel asked whether the Prince George's County Police Department had procedures for communicating among officers whether suspects have waived their rights. *Id.* at 195. DeLoach described an *ad hoc* system,

> we tell each other what is going on in there. The best procedure … if I am the main investigator in charge of the case and somebody is going to talk to somebody, I try to keep notes [of] basically what is happening, what is going on in the situation.
>
> BY [DEFENSE COUNSEL]
>
> Q. What steps do you take when somebody [has] invoked their rights?
> …
> How do you get the word out?
> …
> A. Most of the time … I will be the one that will go and talk to him. If somebody else interviews him, that investigator, it is his responsibility to go in and get a waiver to see if the guy will waive his rights.
>
> Q. My question: It is your responsibility to interview someone and they indicate they don't want to waive the rights and give a statement. What steps do you take to inform other officers that the person you are responsible for has invoked?
>
> A. They don't go in and talk to them?
>
> Q. How do they [know] not [to] go in and talk to them[,] make sure it doesn't happen. If they [don't] ... waive their rights nobody will go and talk to them.
> …
> Q. How does Detective Irvin know the person you are interviewing decided they didn't want to speak?
>
> A. From rights waiver for the investigator comes back and tells them.
>
> THE COURT: Apparently, it is informal, is the answer to the question.

Id. at 196 – 7.

Prince George's County Sgt. Daniel Smart's Testimony

Questioned during the mid-trial *voir dire*, Sgt. Smart said he was involved in the investigation in which Appellant was arrested and was DeLoach's supervisor. Tr. 4/28/98, 208. He was aware that Garvey and Sauls interviewed Riley, but could not recall when he learned that Appellant had refused to waive his rights. *Id.* at 210. When he ordered DeLoach at 10:45 a.m. to

interview Riley he "was aware … that … Garvey, had gone in and 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. Asked when he learned that Riley had refused to waive his rights for Garvey, Smart replied, "I can assume it would have been sometime that night after we had completed all of our tasks…." He said he told DeLoach then. *Id.* at 213.

Smart said he wrote the note on the log when the lawyer called at 6 p.m. but he did not communicate that information to DeLoach because "I don't know who Mr. Marc O'Bryan is. He was on the telephone. 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.

Marquette Riley's Testimony

Appellant was 17 years old when he was arrested. Tr. 4/21/98, 233 – 4. He had been arrested but released August 22, 1996 in connection with this investigation, and September 9 was the first time he had been arrested and held on charges. *Id.* Police woke him up and arrested him at about 7 a.m., and he did not eat anything that morning. *Id.* at 234.

He recalled that Garvey advised him of his rights and that he responded that he did not want to make a statement. *Id.* at 235. Riley said that in their first meeting DeLoach told him "it was really important for me to talk to him." *Id.* at 236. After showing Riley the rights waiver form he signed at 1:45 p.m. that day, counsel engaged in the following colloquy with Appellant:

> Q. I'd like to draw your attention to the questions that are at the bottom of the form. Do you see those questions?
>
> A. Yes.
>
> Q. Do you understand these rights? You checked, "yes."
> And that's your initial, isn't that correct?

A. Yes.

…

Q. What does the second question say?

A. Do you want to make a statement at this time without a lawyer.

Q. What was your response to Detective DeLoach with respect to that question?

A. No.

Q. And why did you say that?

A. Because I didn't want to talk without a lawyer.

THE COURT: Because — I'm sorry?

THE WITNESS: Because I didn't want to talk without a lawyer.

BY [DEFENSE COUNSEL]:

Q. Who crossed out that response?

A. I can't recall if I crossed it out or Detective DeLoach crossed it out.

Q. Why was it crossed out.

A. Because I changed my mind.

Q. And why was that?

A. Can't really say.

…

Q. … [H]ad you had anything to eat from the time you had been arrested in the morning until you went over that form with Detective DeLoach?

A. No.

Q. Were you hungry?

A. Yes.

Q. Were you scared?

A. Yes.

Q. Did you ask whether or not you could be provided with food?

A. Yes.

Q. What were you told?

A. I can't recall exactly what he said, but I know I didn't get any at the time.

Tr. 4/21/98, 237 – 9. He did not recall whether police advised him of his rights before he gave the written statement, and he said police never offered to have a lawyer assist him. *Id.* at 240.

Riley agreed that in the portion of the written statement in which he discussed the Prince George's County homicide, he said that "L"[4] was driving the car the shooters used, and that "L" had been killed before then. *Id.* at 241. Appellant said he was not confused when he told that to DeLoach, "I just didn't feel like talking. … Didn't feel like … telling the truth." *Id.* at 242.

During cross-examination Riley agreed that police had read him his rights when he was arrested August 22, 1996 and he understood them. *Id.* at 245.

When questioned by the prosecutor Riley said he first learned from DeLoach that the victims in Fairfax Village were 12 years old and 19 years old. *Id.* at 248. He agreed that DeLoach "tried to make [him] feel bad, or make you feel guilty about the fact that these innocent people had been shot," and that DeLoach "tried to make [him] feel bad about the fact that this older man had been killed" in the Prince George's County homicide. *Id.* Riley said DeLoach stressed the fact that the victims were innocent people. *Id.* at 250.

DeLoach told him that his codefendants had admitted involvement in the Littles homicides and implicated him as well. *Id.* at 251. He admitted thinking about that, but denied asking to speak to Muhammad. *Id.* at 251 – 2. When he learned that police were going to bring Muhammad into the room he wondered whether DeLoach had told him the truth, that Muhammad had admitted committing the crime. *Id.* at 252. The prosecutor then asked:

> Q. … [W]hen you heard from Sayid's own mouth that he had told the police what had happened, you thought at that point that what Detective DeLoach was saying was correct, about how people had given you up and given themselves up, correct?
>
> A. Yes.
>
> Q. And, that also made you want to tell your side of the story, correct?
>
> A. Yes.

Tr. 4/21/98, 253.

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[4] This apparently was a reference to Lawrence Lynch, a member of the Rushtown Crew who had been shot to death. See above at 5.

SUMMARY OF THE ARGUMENT

Appellant, who was 17 years old, was formally charged with first-degree murder before he was arrested and placed in an interrogation room early on September 9, 1996. The first officers to interview him advised him of his rights and he responded that he wanted a lawyer's assistance before answering questions. Those officers ended the interview and turned the form on which Appellant asserted his rights over to the primary investigators.

Another officer, who made no effort to determine whether Appellant had asserted his rights, twice initiated interrogation and eventually coerced Appellant to waive his rights over six hours after the arrest. Several hours later the officer brought a codefendant into the interrogation room to tell Appellant that he should confess to the crime, and Appellant, who had been given no food, subsequently gave a written statement 13 hours after his arrest.

Police violated Appellant's Sixth Amendment right to counsel by reinitiating interrogation without providing counsel, and the waiver obtained in counsel's absence was invalid. Over objection, the Trial Court admitted into evidence at trial portions of the statement obtained in violation of Appellant's Sixth Amendment rights. Therefore, his conviction must be vacated and a new trial ordered.

In addition, because police coerced Appellant to waive his right to remain silent, the Trial Court's decision to admit the confession violated his Fifth Amendment rights. In this case the government cannot demonstrate that the error was harmless beyond a reasonable doubt. Therefore, Appellant is entitled to a new trial

ARGUMENT

When police arrested Appellant Marquette E. Riley at about 7 a.m. September 9, 1996 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 Garvey and Sauls in an interrogation room at the Prince George's County Criminal Investigations Division, 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?"[5] Garvey confirmed that Riley was sure he did not want to talk to detectives, and then he and Sauls 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. He and Sauls turned the rights waiver form over to Prince George's County detectives working on the case and never re-entered the room where Riley sat for at least nine more hours.

At about 10:45 a.m. Prince George's Police Det. 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 Appellant of his rights.

When DeLoach re-entered the interrogation room at 1:30 p.m., six hours after Riley's arrest, he again violated Appellant'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 Appellant 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 checked the box indicating that

[5] 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?"

he did not want to talk without a lawyer present. DeLoach coerced him to change his response on the form. The Supreme Court has held that if police reinitiate interrogation there is an irrebuttable presumption that the waiver is invalid. In the 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.

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 Appellant's Fifth and Sixth Amendment rights by permitting the government to introduce his confession in its case-in-chief, and this Court must vacate the conviction and remand this case for a new trial.

STANDARD OF REVIEW

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 of a criminal defendant 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. 2d 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. 2d 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. It rejected a government argument that the conviction should stand if the defendant could have been convicted on other evidence without the conviction.[6] 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 Supreme Court recognized that

reliance on a coerced confession vitiates a conviction because such a confession combines

[6] 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.

> 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.

The Supreme 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. 2^{d} 703 (1967). In such cases the defendant is automatically entitled to a new trial.

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

The Supreme Court has taken a more elastic view in examining waivers of the protection against self-incrimination. In *Miranda, supra,* 384 U.S. at 491 – 500, 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. 2^{d} 202 (1991).

When a defendant challenges such trial errors the government has the burden of proof. In applying the harmless-error test this Court may review the entire record *de novo,* and must be able to say that "admission of the confession … did not contribute to … [the] conviction." *Id.* at 295 – 6. *See, also, Tindle v. United States*, 778 A.2d 1077, 1084 (D.C. 2001).

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 Larnell and Larell Littles. When police arrived at his residence at 7 a.m. September 9, 1996 Appellant 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) The MPD detectives who first interviewed him at 9 a.m. recognized that they could not talk to him once he refused to waive his right to have a lawyer present.

According to the U.S. Supreme Court,

> In a line of constitutional cases in this Court stemming back to the Court's landmark opinion in *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 [(1932)], 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* 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, 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.

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 at 10:45 a.m. he intended to elicit a statement from Riley about the Littles homicides. That is what his superior, Sgt. Smart, told him to do, and that is why he informed Appellant 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. 2^{d} 424 (1977); *Rhode Island v. Innis*, 446 U.S. 291, 299, 100 S. Ct. 1682, 64 L. Ed. 2^{d} 297 (1980)(applying the same principle in the context of a request under the Fifth Amendment for the assistance of counsel).

In *Brewer* the defendant, Williams, turned himself in to police in Davenport, Iowa, on a warrant issued in Des Moines charging him with murdering a young girl. He had talked to his lawyer and the lawyer had extracted a promise that detectives who transported Williams back to Des Moines would not question him about the case. *Supra* at 390 – 1. During the ride the detectives engaged in a discussion with Williams and eventually gave what has become known as the "Christian burial" speech about the impending snow storm and the detectives' concern that in the snow Williams would not be able to locate the body, and the child's parents would not be able to give her a Christian burial. *Id.* at 392. Eventually, Williams directed the detectives to the body. According to the Supreme Court,

> There can be no serious doubt …that [the detective] deliberately and designedly set out to elicit information from Williams just as surely as and perhaps more effectively than if he had formally interrogated him. [The detective] was fully aware before departing for Des Moines that Williams was being represented in Davenport by Kelly and in Des Moines by McKnight. Yet he purposely sought during Williams' isolation from his lawyers to obtain as much incriminating information as possible.

Id. at 399. It noted that 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

provided information only in response to the use of psychology with the specific intent to elicit incriminating information, the Court said. *Id.* at 402 – 3.

In *Innis* police arrested the defendant shortly after a taxi driver reported that he had been robbed by a man carrying a sawed-off shotgun. When advised of his rights Innis said he would not speak to the officers without a lawyer present, and officers who transported him to police headquarters were instructed not to question him en route. *Supra* at 294. The 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. The Supreme 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 Det. DeLoach clearly stated that he intended to obtain a statement from Riley when he entered the interrogation room at 10:45 a.m. and again at 1:30 p.m. He testified that he used tactics specifically designed to break down Appellant's resistance: telling him that his codefendants had given statements implicating him, and that the detective did not believe Riley's denials of involvement so he should reconsider what he wanted to say. DeLoach knew that if his ploys worked Riley would incriminate himself.

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. 2d 293 (1990). If the defendant initially asserts his or her 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 and n. 4, 108 S. Ct. 2389, 101 L. Ed. 2d 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*, 304 U.S. at 464, requiring the government to prove "an intentional relinquishment or abandonment of a known right or privilege."

> … [I]t is the State that has the burden of establishing a valid waiver. …Doubts must be resolved in favor of protecting the constitutional claim. This settled approach to questions of waiver requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel — we presume that the defendant requests the lawyer's services at every critical stage of the prosecution.

Michigan v. Jackson, supra, 475 U.S. at 633.

In *Michigan v. Jackson, Id.* at 636, the Court imported into the Sixth Amendment context the rule enunciated in *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), for police conduct in cases where a suspect asserted his Fifth Amendment right to counsel during interrogation. *See, also, Harvey, supra*, at 359. Therefore, 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 Appellant's Request for Counsel Does Not Remove the Taint

The government conceded that Det. 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. R. 15. But 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 when he learned that Appellant had asserted his rights.[7] It is irrelevant whether DeLoach actually knew Riley had asserted his right to counsel at 9 a.m. The Supreme 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).

Noting that the *Edwards* test focuses on the state of mind of the accused, not the police officer, the Supreme Court explained that,

> custodial 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. In this case respondent's request had been properly memorialized … but the officer who conducted the interrogation simply failed to examine that [document]. 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. 2^{d} 704 (1988). It is evident from DeLoach's testimony that the Prince George's County Police have no system to protect defendants from repeated interrogation after they have invoked their rights.

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[7] 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. Appellant has filed Judge Smith's Order as a Supplemental Record in this case.

In this case Riley clearly asserted his Sixth Amendment right to counsel when Garvey and Sauls attempted to interview him at 9 a.m. Investigators made no effort to provide counsel to him, and DeLoach violated Appellant's rights by attempting to elicit incriminating statements from him. It is noteworthy that in *Tindle, supra,* decided on Fifth Amendment grounds, the defendant asserted his right to counsel using the same form and Det. Garvey " 'told him if you answer that no, I can't talk to you any more.' Furthermore, the detective 'said[,] take some time to think about whether you want to answer, think about that question.' " *Id.* 778 A.2^{d} at 1080. This Court held that Garvey's statements, "although extremely brief and wholly without significant potential to overbear [Defendant's] will, nevertheless violated the *Edwards* rule because it was an effort to 'persuade' him to re-think his initial disinclination to speak with Detective Garvey without counsel present." *Id.* at 1083.

DeLoach's efforts to persuade Riley to waive his rights were far more forceful, and therefore Appellant's "subsequent statement … made without having had access to counsel … was inadmissible." *Id.* at 1084 (quotations omitted). 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 said 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. He said as well that as far as he was concerned a lawyer who wants to represent a person in custody must come to police headquarters, not merely call. *Id.*

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. See below at 29 – 31.

The facts of Riley's interrogation are readily distinguishable from those in *Moran*. In that case, Cranston, Rhode Island, police arrested Burbine and two other men in connection with a burglary, and a detective obtained information indicating that Burbine had committed a murder in Providence. *Id.* at 416 – 7. He summoned Providence detectives, who went to Cranston to interrogate the suspect. While this was going on Burbine's sister, unaware of the potential homicide charge, enlisted a public defender to represent him in connection with the burglary. The lawyer called Cranston police and said she would represent Burbine if they intended to put him in a line-up or question him. The person who answered the phone said police did not intend to do either, and said investigators were finished with Burbine for the night. He did not tell the lawyer about the homicide charge or that Providence police were there to interrogate Burbine. A short time later police brought Burbine to an interrogation room for a series of interviews about the homicide and on three occasions he signed waivers of his right to silence and his right to counsel. He did not know about his sister's efforts to secure counsel for him or of the call from the public defender. The Supreme Court noted that Burbine initiated the first and most damaging conversation about the homicide. *Id.* at 421 – 2.

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, police may not interfere with a lawyer's efforts to represent the defendant.

> It is clear, of course, that, absent a valid waiver, the defendant has the right to the presence of an attorney during any interrogation occurring after the first formal charging proceeding, the point at which the Sixth Amendment right to counsel initially attaches. … And we readily agree that once the right *has* attached, 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 omitted, emphasis in original).

Because at 9 a.m. Riley 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.

The actions of Prince George's County police to obtain Riley's confession violated his Sixth Amendment right to counsel, and introduction of the statement into evidence at trial was a structural error requiring reversal of his conviction.

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

In *Miranda*, the Supreme 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." *Supra* 384 U.S. at 444. 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.

The Court said as well, "[i]f 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 High 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*. For example, when a person in custody invokes his right to counsel under the Fifth Amendment, police may not question him about any crime until counsel is present. *McNeil v. Wisconsin*, 501 U.S. 171, 179, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991)(citing *Roberson, supra*). But when a person who has already been charged with a crime invokes his right to counsel under the Sixth Amendment, police may not question him about that offense but are not barred from interrogating him about other crimes if he is willing to discuss them. *Id.* In other words, the Fifth Amendment right is general and the Sixth Amendment right is "offense specific" because it can be invoked only in relation to crimes that have already been charged. *McNeil, supra*, at 174.

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*[8] 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. The Court held that permitting police to "produce the vital evidence in the form of a confession which is useful or necessary to obtain a conviction in the absence of counsel, after the right to counsel has attached, is to deny the accused effective representation by counsel at the only stage when legal aid and advice would help him." *Id.* at 171 (quoting *Spano, supra*, 360 U.S. at 325 – 6).

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

As discussed above at 18 – 20, the Supreme 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 Supreme 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. The rule has been interpreted as invalidating any waiver obtained after the defendant requests a lawyer, unless counsel is present when police reinitiate questioning. *See, e.g. 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, the Trial Court was required to suppress the statement Appellant gave later that day. See above at 25 – 27.

RILEY'S CONVICTION MUST BE VACATED BECAUSE ADMISSION OF HIS STATEMENT AT TRIAL VIOLATED HIS FIFTH AND SIXTH AMENDMENT RIGHTS

All of the Trial Court's errors in denying Riley's motion to suppress his statements flow from a single finding, that Appellant asserted his Fifth Amendment right to remain silent but not his right to counsel when Garvey and Sauls attempted to interview him at 9 a.m. Tr. 4/23/98, 9 – 10. The Judge said, "the form used to advise suspects of their rights and obtain waivers in Maryland … includes in the waiver portion a question which is inherently ambiguous, which asks the suspect … whether the suspect is willing to make a statement at this time without a lawyer." *Id.* at 10. The Judge never considered that Riley had a Sixth Amendment right to counsel because he had already been charged.

In *Tindle, supra*, 778 A.2^{d} at 1083, this Court interpreted a "No" answer to that question on the Prince George's County rights waiver as an unambiguous assertion of the right to counsel, noting that the government conceded the point. In a Prince George's County case, Maryland's highest court as well has held that the question is designed to determine whether a suspect wants to assert his right to counsel. *Lodowski v. State*, 490 A.2^{d} 1228, 1239 (Md. 1985)("Lodowski was given the *Miranda* warnings with respect to his right to a lawyer and waived … the right in writing by answering 'yes' to the question, 'Are you willing to answer questions without having a lawyer with you now?' ").

Furthermore, the Trial Court's finding makes little sense if the Prince George's County rights waiver is compared with the form used by the Metropolitan Police. The PD 47 form used in D.C. asks "Do you want to answer any questions?" and "Are you willing to answer questions without having an attorney present?" A negative answer to the first question is an assertion of the right to remain silent, and a negative answer to the second asserts the right to counsel.

The slight difference in wording between the second question on the PD 47 and the single question on the Maryland form does not render the question ambiguous or restrict its interpretation to an assertion of the right to remain silent. If that were the case the Prince George's County rights waiver form would be constitutionally defective because it does not satisfy the requirements established in *Miranda, supra*. Police must ask whether a suspect wants a

lawyer's assistance because "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Id.* at 384 U.S. 475. The Court said that "[t]he record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." *Id.* (quoting *Carnley v. Cochran*, 369 U.S. 506, 516, 82 S. Ct. 884, 8 L. Ed. 2d 70 (1962)).

To support his conclusion the Judge found that "in his written statement given later that evening, he was specifically asked whether he had requested a lawyer and he said no. And he was specifically asked whether they had denied him a lawyer at his request and he said no." Tr. 4/23/98, 11. He noted as well that at 1:30 p.m., when Riley again answered that he did not want to make a statement without a lawyer, DeLoach asked questions clarifying that Appellant meant that he did not want to make a written statement but would talk to police. *Id.* at 11 – 12.

Based on these findings the Trial Court concluded that "the extra prophylactic protections of *Edwards* … do not apply and the strict question of who initiated the next conversation is only a factor to be considered in determining whether or not Mr. Riley's fifth-amendment rights were scrupulously honored." *Id.* at 12. He added that "it is not a *per se* rule as it is in the context of invocation of the right to counsel under *Edwards.*" *Id.*

Relying on *Michigan v. Mosley*, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975), the Judge found that Garvey and Sauls were correct to terminate the 9 a.m. interview when Riley refused to waive his *Miranda* rights, and "unless there was some reason to think that Mr. Riley had had a change of heart, there should not have been new interrogation. And what Detective DeLoach did at 10:45 was certainly interrogation within the meaning of *Rhode Island v. Innis*." *Id.* at 14. Although the Judge specifically asked DeLoach whether he advised Riley of his right to counsel and to remain silent in that meeting, he did not note in his findings the detective's failure to advise Riley of his rights. Tr. 4/21/98, 201 – 10.

The Judge recognized that knowledge of Riley's refusal to waive his rights was "especially attributable to [all Prince George's County detectives] because [Garvey] expressly

stated that [he] told a Prince George's County detective that Mr. Riley had 'invoked.' " *Id.* at 14 – 15. The Judge reviewed, but then ignored, findings of Prince George's County Circuit Judge Thomas P. Smith that before DeLoach entered the interrogation room at 10:45 a.m. he "was informed that the Defendant declined to speak to the D.C. Detectives." Finding that DeLoach did not have actual knowledge of Riley's decision to invoke his rights, the Court in this case said that reduced the possibility that the detective was attempting to badger Appellant into giving up his rights, and that "it's certainly understandable why he would go in and say to Mr. Riley, you know, you really ought to get your side of the story out." *Id*. at 15.

This finding is irrelevant because the Supreme Court decisions clearly state that a reviewing court must assess the police actions based on the suspect's perceptions, as "the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices." *Innis, supra*, 446 U.S. at 301. Even if this Court accepts DeLoach's claim that he was unaware of Riley's prior decision, it must take note of the detective's testimony that when he entered the interrogation room at 10:45 a.m. and at 1:30 p.m. his intention was to get a statement from Appellant.

Next the Trial Court noted that when Riley blurted out his denial of involvement as DeLoach entered the interrogation room at 1:30 p.m., the detective acted correctly by advising him of his rights and executing a rights waiver. Tr. 4/23/98, 17. The Judge said:

> … Mr. Riley again checked, no, that he was not willing to make a statement at that time without a lawyer. Because he did, detective DeLoach did exactly what he should have done under the circumstances and said to Mr. Riley something like, well, you said you wanted to talk but you checked no, does [that] mean you don't want to make a statement. And Mr. Riley said in effect, no, it doesn't mean I don't want to make a statement, it means, no, I don't want to make a written statement but I am willing to talk.

Id. at 17 – 18. The Judge said "I find that to be a voluntary, knowing and intelligent [waiver] of Mr. Riley's *Miranda* rights." *Id.* at 18.

The Judge found that Riley made several false exculpatory statements after he signed the rights waiver and eventually admitted involvement in the crime after he talked to Muhammad after 7:30 p.m. He said, "the police did not obtain a new fresh waiver of *Miranda* rights at that

point. But the waiver that they obtained at 1:43 was still in effect and Mr. Riley had not given any indication … that he had invoked his right to remain silent or his right to a lawyer." *Id.* at 19 – 20.

The Judge concluded that

> the waiver obtained from Mr. Riley at 1:43 was a valid, voluntary, knowing, and intelligent waiver of his *Miranda* rights and the obtaining of that waiver did not itself violate the precepts of *Michigan vs. Mosley* because I believe that, with one failing which I find to be inadvertent, the police did scrupulously honor Mr. Riley's right to remain silent and his right to counsel, having invoked his right to remain silent at 9 a.m. that morning and having decided to waive his rights at … 1:43 that same afternoon.

Id. at 20 – 1.

The Trial Court compounded its error by misinterpreting the holding in *Mosley, supra*. In that case, when a detective attempted to question Mosely about an armed robbery, he refused to waive his right to remain silent and the detective terminated the interview and returned him to the cell block. *Id.* 423 U.S. at 97. Several hours later a different detective brought Mosley from the cell block to another interrogation room in the homicide bureau to be questioned about a fatal shooting unrelated to the robbery for which he had been arrested. *Id.* After the homicide detective advised Mosley of his rights, he denied involvement in the homicide. Mosley changed his story after the detective said a codefendant had implicated him as the shooter. *Id.* The robbery bureau detective had not attempted to question Mosley about the homicide and the homicide detective asked no questions about the robbery. *Id* at 98.

The Supreme Court stated that determination of whether police violated Mosley's rights under *Miranda* turned on interpretation of one passage:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.

Mosley, supra, at 100 – 1 (quoting *Miranda*, 384 U.S. at 473 – 4). The Court concluded that "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."[9] *Id.* at 104 (quotations omitted).

The Court held that the first detective terminated the interview without attempting to resume questioning or to convince Mosley to change his decision. *Id.* at 104 – 5. The homicide detective began the second interview over two hours later, in a different location, and asked about a different crime. Before doing so the homicide detective advised Mosley of his rights and obtained a valid waiver. "The subsequent questioning did not undercut Mosley's previous decision not to answer" the robbery detective's questions, the Court said. *Id.* at 105.

By contrast, Riley was arrested at 7:00 in the morning and tethered in the same interrogation room throughout all the interrogations in question. A single officer, DeLoach, repeatedly entered that room beginning at about 10:45 a.m. to question him about the same crime until he finally confessed nearly 11 hours later. Garvey ended the interview when Appellant asserted his right to counsel, and shortly after 9 a.m. turned the rights waiver form indicating that decision over to one of the Prince George's County detectives in charge of the operation. DeLoach, who either knew or should have determined that Riley asserted his rights, entered the interrogation room at 10:45 a.m. to obtain a statement. He employed various psychological ploys to induce Riley to confess, and Appellant stated at the end of the session that he was not involved. Riley again asserted his rights at 1:30 p.m. but the detective urged him to waive his rights and give an oral, if not a written, statement. He then expressed disbelief in Appellant's denials, applying additional coercion. At about 7:30 p.m. the detective arranged the meeting in which a codefendant he was afraid of told Appellant that he should confess. Appellant had been taken to the bathroom and may have been given water to drink but he had not been fed the entire time he was in custody, and he left the interrogation room only to go to the bathroom and to be processed for arrest.

Even accepting for purposes of argument the facts found by the Trial Court, this scenario is nothing like the circumstances in *Mosley.* Riley was continually in custody in the same room;

[9] The Supreme Court was careful to note that Mosley had not asserted his right to counsel and it was not deciding that issue. *Mosley*, *supra*, at 101 n. 7.

DeLoach twice entered the room in an unconstitutional effort to reinitiate questioning about the same crime; and eventually he employed Muhammad to convince Appellant to confess. *See, Moulton, supra*, 474 U.S. at 176; *Massiah v. United States*, 377 U.S. 201, 205, 84 S. Ct. 1199, 12 L. Ed. 2^{d} 246 (1964). Under these circumstances it is not possible to conclude that Riley knowingly, intelligently and voluntarily waived his right to remain silent, much less his right to counsel. Over the course of 11 hours DeLoach coerced Appellant until he relinquished his rights. It is irrelevant that Riley agreed at 9:48 p.m. that DeLoach had not threatened, mistreated him, or denied a request to speak with a lawyer, and that he said he signed the statement "because I wanted you to hear my side of the story."

As the Supreme Court stated:

> Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege.

Miranda, *supra*, 384 U.S. at 476.

Even if this Court agrees with the Trial Judge that Riley asserted his right to remain silent but not his right to counsel, all verbal statements Appellant made to DeLoach and the written statements must be suppressed because Appellant did not make a valid waiver of his rights under *Miranda*.

In this case, only one witness, a codefendant who testified in return for a plea to lesser charges, placed Riley at the scene of the homicide. He testified that Muhammad planned the crime, selected the targets, and eventually ordered Appellant out of the car to shoot at the victims. It is possible that, but for Riley's admissions that he took an active role in the crime, jurors would not have convicted Appellant of first-degree premeditated murder. Therefore, the government cannot prove beyond a reasonable doubt that the Trial Court's error in admitting the statement was harmless beyond a reasonable doubt.

CONCLUSION

For the reasons stated above 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 November 17, 2003 I served a true copy of the attached Appellant's Brief by first-class mail on counsel listed below.

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