APPELLEE'S OPPOSITION TO APPELLANT'S PETITION FOR REHEARING OR REHEARING *EN BANC*

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 98-CF-1045
(Cr. No. F-2594-97)

MARQUETTE E. RILEY, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

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APPELLEE'S OPPOSITION TO APPELLANT'S
PETITION FOR REHEARING OR REHEARING *EN BANC*

En banc rehearing is "not favored and ordinarily will not be ordered unless: (1) *en banc* consideration is necessary to secure or maintain uniformity of the [C]ourt's decisions; or (2) the proceeding involves a question of exceptional importance." D.C. App. R. 35(a). Rehearing by a Division is appropriate only in those rare cases in which a petitioner "state[s] with particularity" significant "point[s] of law or fact" that the Division "has overlooked or misapprehended." D.C. App. R. 40(a). No such circumstances are presented here. Therefore, rehearing and rehearing *en banc* Court are unwarranted.

I.

Appellant seeks *en banc* rehearing of his novel claim that the Sixth Amendment right to counsel attaches when "the government file[s] a criminal complaint," at least where, as was the case here, an arrest warrant is promptly issued (Petition at 5). The Division's unanimous rejection of this claim, however, is not inconsistent with any decision of the Court, nor does it involve a

question of "exceptional importance." Further, the decision rests upon a firm legal foundation. Finally, on the facts of this case, appellant is not adversely affected by this aspect of the decision. For these reasons, *en banc* rehearing is unwarranted.

Appellant is not adversely affected by the rejection of his Sixth Amendment claim because it paralleled an identical argument predicated upon his undoubted Fifth Amendment right to counsel during custodial interrogation. Thus, assuming for the sake of argument that appellant enjoyed a Sixth Amendment right to counsel when he spoke to police shortly after his arrest, the Division's unanimous conclusions that he did not invoke and in fact waived his Fifth Amendment right before making the subject statement would dispose of a Sixth Amendment argument, as well. *Patterson v. Illinois*, 487 U.S. 287, 298-300 (1988) (waiver following *Miranda*[1/] warnings sufficient to waive both Fifth and Sixth Amendment rights to counsel at post-indictment questioning). In other words, appellant's argument that he enjoyed a Sixth Amendment right to counsel as a consequence of "the government fil[ing] a criminal complaint" added nothing significant to his parallel Fifth Amendment argument. If, as is the case, the unanimous Division correctly rejected the Fifth Amendment argument, it necessarily would have rejected, upon precisely the same grounds, a parallel Sixth Amendment argument. *See id.* Conversely, if appellant's Fifth Amendment argument had been meritorious, his entitlement to relief

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[1/] *Miranda v. Arizona*, 384 U.S. 436 (1966).

would not have been enlarged by reliance upon the Sixth Amendment as an additional source of the underlying right. Therefore, the Division's rejection of appellant's Sixth Amendment claim did not adversely affect his interests in this case.

In addition, the Division's rejection of appellant's Sixth Amendment claim neither presents a question of "exceptional importance" or undermines the uniformity of the Court's pertinent jurisprudence. Generally, and in this case, the existence of a Sixth Amendment right to counsel at post-arrest custodial interrogation is an academic question without real consequences. If the right exists, it is waived in precisely the same manner as the undoubted Fifth Amendment right to counsel in the same circumstances. *Patterson*, 487 U.S. at 298-300. If it does not exist, as the Division unanimously concluded, the Fifth Amendment right nevertheless provides a defendant in custody with the same sorts of protections. *Id.*[2]

Furthermore, the Division's rejection of appellant's Sixth Amendment claim is not in conflict with any other decision of the

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[2] The only right appellant has claimed for the Sixth Amendment that is not protected by the Fifth Amendment is the right to be advised when a person representing himself to be potential counsel for appellant instructs police to cease interrogating appellant (Brief for Appellant 25-27). As the Division noted, however, the Sixth Amendment confers no such right. *See Riley v. United States*, 923 A.2d 868, 881 (D.C. 2007) (citing, *e.g.*, *Moran v. Burbine*, 475 U.S. 412, 422-423 (1986) (Sixth Amendment does not require police to inform suspect of attorney's pre-arraignment efforts to reach him)).

Court or of the Supreme Court.[3/] The cases upon which appellant principally relies in an attempt to support the contrary proposition -- *McNeil v. Wisconsin*, 501 U.S. 171 (1991) (invocation of Sixth Amendment right to counsel with respect to charged offense invokes neither Fifth nor Sixth Amendment right with respect to uncharged offenses); *Michigan v. Jackson*, 475 U.S. 625 (1986) (where defendant asserts Sixth Amendment right to counsel at arraignment, waiver of right during subsequent police-initiated interrogation invalid); and *Kirby v. Illinois*, 406 U.S. 682 (1972) (no right to counsel at post-arrest identification procedure because "*prosecution*," as distinguished from "routine police investigation," had not commenced; emphasis added)[4/] -- do not remotely establish an inconsistent rule.

Finally, the Division's rejection of appellant's Sixth Amendment claim is well reasoned and consistent with the overwhelming weight of authority. First, the record does not support appellant's central factual assertion that two days before he was arrested in this case, "the government file[d] a formal complaint" against him (Petition at ii; see also *id.* 1, 5, 7, 9). On the contrary, it shows only that the prosecutor endorsed an affidavit

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[3/] On the contrary, it is fully in accord with the only decision on this issue of which we are aware, *Green v. United States*, 592 A.2d 985, 986 & n.1 (D.C. 1991).

[4/] *See also* *Michigan v. Harvey*, 494 U.S. 344 (1990); *Gilbert v. California*, 388 U.S. 263 (1967); *Powell v. Alabama*, 287 U.S. 45 (1932).

written and executed by a police officer in support of the officer's application for an arrest warrant. The associated Complaint was executed only by the police officer, and it contained only the officer's sworn declaration that appellant had committed the offense described therein (see R. 3 at Complaint). Further, the officer, not the prosecutor, presented the Complaint and affidavit to a Superior Court judge, and the officer, not the prosecutor, sought issuance of a warrant. *See Riley*, 923 A.2d at 880-881. Moreover, the prosecutor's endorsement of the affidavit consisted only of a request, addressed to the Warrant Clerk, that a warrant, if applied for by the officer and approved by a judge, be issued for the offense specified by the prosecutor (see R. 3 at Affidavit). Thus, the unanimous Division was on firm ground when it held that the officer's "filing of a complaint to obtain an arrest warrant" did not involve the sort of "'formal' charges of which *Kirby* speaks" when it holds that "'[t]he Sixth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against [the defendant].'" *Riley*, 923 A.2d at 881 (quoting *Kirby*, 406 U.S. at 689).[5/]

[5/] Parenthetically, the Complaint sets forth only one murder, the murder of Larell Littles (R. 3 at Complaint). Because the Sixth Amendment is offense specific, *Texas v. Cobb*, 532 U.S. 162, 172-174 (2001), if Sixth Amendment rights attached with the filing of a Complaint, they would be limited to that offense and would not encompass any other offense, *e.g.*, the murder of Larell's brother or the assault on his friend. *See Williams v. United States*, 569 A.2d 97 (D.C. 1989) (murderous assault on each victim is a separate offense from assault on every other victim).

Second, appellant's attempted reliance upon D.C. Code § 23-113, which establishes time limitations on criminal actions in the District of Columbia, is unavailing. Appellant is correct that for purposes of tolling the statute of limitations, § 23-113 puts a "complaint" filed by a police officer on "the same footing" as an indictment or information filed by a prosecutor (Petition at 6). A complaint, however -- unlike an indictment or information -- does not bind the prosecutor and commit "the prosecutorial forces of organized society" against the named individual; therefore, it does not trigger the protections afforded by the Sixth Amendment. *Kirby*, 406 U.S. at 689-690 (Sixth Amendment protections triggered by "formal charge, preliminary hearing, indictment, information, or arraignment"). *See also Marrow v. United States*, 592 A.2d 1042, 1046 n.9 (D.C. 1991) (juvenile-offender-transfer statute that treats police-filed complaint accompanied by prosecutor-endorsed affidavit as "criminal charge" for transfer purposes is without Sixth Amendment implications because "the constitutional right to counsel at all critical stages of the prosecution reflects different policy goals"). Indeed, arrest itself does not trigger Sixth Amendment protections. *See, e.g., United States v. Gouveia*, 467 U.S. 180, 190 (1984); *Davis v. United States*, 623 A.2d 601, 606 n.15 (D.C. 1993). *A fortiori* an officer's mere application for a warrant cannot have such an effect. *See Martinez v. United States*, 566 A.2d 1049, 1051-1052 (D.C. 1989) (indictment "first formal

charge" in case notwithstanding previously issued arrest warrant).[6/] The overwhelming majority of courts, apparently including every federal circuit to have considered the issue, have held that an officer's application for a warrant does not trigger the Sixth Amendment. *United States v. Duvall*, 537 F.2d 15, 21-22 (2nd Cir. 1976); *United States v. Alvarado*, 440 F.3d 191, 200 (4th Cir. 2006); *Lomax v. Alabama*, 629 F.2d 413, 415 (5th Cir. 1980); *United States v. Reynolds*, 762 F.2d 489, 493 (6th Cir. 1985); *United States v. Moore*, 122 F.3d 1154, 1156 (8th Cir. 1997); *Anderson v. Alameida*, 397 F.3d 1175, 1180 (9th Cir. 2005) (interpreting California state law); *United States v. Pace*, 833 F.2d 1307, 1312 (9th Cir. 1987); *United States v. Langley*, 848 F.2d 152, 153 (11th Cir. 1988); *State v. Beck*, 687 S.W.2d 155, 160 (Mo. 1985) (*en banc*); *People v. Young*, 607 N.E.2d 123, 133 (Ill. 1992).[7/]

[6/] Here, as in *Martinez*, it appears the defendant was not arrested on the previously issued warrant (see R. 3 (return on warrant unexecuted; warrant later nolled by prosecutor), 4 (bench warrant issued upon return of indictment), 5 (indictment marked "GJO" (Grand Jury Original), indicating no prior arrest).

[7/] Appellant's attempt to distinguish these cases (see Petition at 7) is unavailing. The federal cases are not properly distinguished on the ground that they interpret the federal analogues to D.C. Superior Court Criminal Rules 3 & 4 where appellant identifies no differences, let alone material differences, between the local and federal rules. *Beck* is not distinguishable on the ground it is inconsistent with an earlier decision of a division of the same court, *Arnold v. State*, 484 S.W.2d 248, 250 (Mo. 1972), because, *inter alia*, *Arnold* was overruled by *Morris v. State*, 532 S.W.2d 455, 458 (Mo. 1976) (*en banc*). Finally, *United States ex rel. Robinson v. Zelker*, 468 F.2d 159, 163 (2nd Cir. 1972), does not provide appellant genuine support because, appellant's assertions

Lastly, the Division was undoubtedly correct that according Sixth Amendment protection to a defendant arrested on a warrant would potentially "discourag[e] the use of warrants in making arrests" and "swing[] the pendulum of criminal justice too far distant from society's interest in effective and meaningful criminal investigations." *Riley*, 923 A.2d at 881 (internal quotation marks and citations omitted). Appellant's assertion that D.C. Code § 23-581, by "defin[ing] the limited circumstances under which police may make arrests without first obtaining warrants," would prevent the former effect is unpersuasive in light of the statute's broad grant of authority to an officer to "arrest, without a warrant," anyone "who he has probable cause to believe has committed or is committing a felony." *Id.* (a)(1)(A). In addition, assuming the correctness of appellant's unsuppported assertion that in "most federal criminal cases," defendants are indicted before being arrested, it is of no relevance here because no similar assertion is possible. Grand jury investigations of most non-federal felonies follow rather than precede the defendant's arrest.

II.

En banc re-consideration of the Division's unanimous rejection of appellant's Fifth Amendment right-to-counsel argument is also unwarranted. In an attempt to support the contrary view, appellant

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notwithstanding, the subject New York statute is not "similar to § 23-113" (Petition at 7). *See id.* at 160 n.2 (under New York statutory scheme, court approval required for prosecutor to drop case if defendant was arrested on warrant issued after "information" seeking warrant presented to magistrate).

contends that the holding (1) is inconsistent with *Tindle v. United States*, 778 A.2d 1077 (D.C. 2001), and *Wantland v. State*, 435 A.2d 102 (Md. 1981), and (2) rests upon an improper interpretation of the Prince George's County waiver of rights form (Petition at 9). The former contention, however, is considered and persuasively rejected by the unanimous Division. *See Riley*, 923 A.2d at 883 n.15 (*Tindle* distinguishable facts, and *Wantland* pre-*Davis v. United States*, 512 U.S. 452, 459 (1994) (Fifth Amendment right to counsel invoked only by clear and unambiguous request)). Appellant's second contention is somewhat confused.

Appellant asserts general principles of contract law require interpretation of the Prince George's County waiver form "against the party that drafted it"; Prince George's County, however, is not a party to this case. More importantly, the form is not an invitation to contract; it seeks to elicit and document a waiver of constitutional rights. As such, the issue of whether a negative response to one question constitutes an invocation of rights is controlled by *Davis*, not by contract law. Further, contrary to appellant's suggestion, the Division did not remotely construe his "silence" as a waiver of rights (see Petition at 9). Rather, it held that what appellant *said* "failed to invoke his right to counsel under the Fifth Amendment" and, indeed, constituted a valid waiver of rights. *Riley*, 923 A.2d at 882-884. Finally, the ambiguity of the P.G. County form is hardly an invitation to MPD

officers to jettison the PD 47. By answering "no" to the PD 47 question, "Do you wish to answer any questions?" a suspect invokes his Fifth Amendment right to silence without even ambiguously referencing its corollary right to counsel. Having received such an answer, nothing requires an officer to ask the next question. Thus, from a law enforcement perspective, the PD 47 is the better form in every way.

III.

Rehearing by the Division is also unwarranted. Appellant does not contend and cannot show that the Division "overlooked or misapprehended" any "point of law or fact." D.C. App. R. 40(a)(2). Rather, he argues that for the reasons he asserted in his initial and reply briefs, the unanimous Division came to the wrong conclusion. Such an argument does not warrant reconsideration.

CONCLUSION

For these reasons, appellant's petition for rehearing or rehearing *en banc* should be denied.

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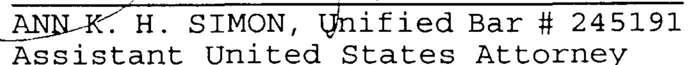

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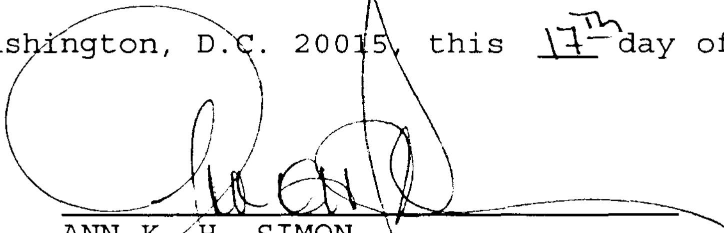
CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing opposition to petition for rehearing or rehearing *en banc* have been mailed to counsel for appellant, Robert S. Becker, Esquire, 5505 Connecticut Avenue, N.W. -- No. 155, Washington, D.C. 20015, this 17th day of September 2007.



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