BRIEF FOR APPELLEE

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DISTRICT OF COLUMBIA
COURT OF APPEALS

---

No. 98-CF-1045; 98-CF-1169; 98-CF-1218

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MARQUETTE E. RILEY,
SAYID MUHAMMAD,
ANTONIO MARKS, Appellants,

v.

UNITED STATES OF AMERICA, Appellee.

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

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ROSCOE C. HOWARD, JR.,
United States Attorney.

JOHN R. FISHER,
ELIZABETH TROSMAN,
J. PATRICK ROWAN,
* HEATHER R. PHILLIPS, CA BAR #191620,
Assistant United States Attorneys.

* Counsel for Oral Argument

555 Fourth Street, N.W., Room 8104
Washington, D.C. 20530
(202) 514-7088

Crim. No. F-594-97; F-2595-98; F-2596-97

# I N D E X

TABLE OF CASES



* Cases chiefly relied upon are marked by an asterisk.

## OTHER REFERENCES

## ISSUES PRESENTED

In the opinion of the appellee, the following issues are presented for review:

I. Whether the police questioning of appellants Riley and Muhammad after their arrests and the subsequent introduction of their statements at trial violated their Fifth or Sixth Amendment rights, where neither appellant Riley nor appellant Muhammad requested an attorney, both signed a valid waiver-of-rights form, and there is no evidence that their statements were coerced.

II. Whether the admission into evidence of appellant Muhammad's statement violated appellant Marks' Sixth Amendment right to confrontation, where the statement was properly determined to be a statement against appellant Muhammad's penal interest, the statement was redacted to eliminate incriminating references to co-defendants, and the jury was instructed that it could only use the statement in assessing the charges against appellant Muhammad, and not against appellant Marks or appellant Riley.

III. Whether the trial court abused its discretion in denying appellant Muhammad's motion to sever, where appellants were charged with jointly committing a crime, there was significant common evidence against all three appellants, and appellant Muhammad has failed to show that the denial caused him manifest prejudice.

IV. Whether the trial court abused its discretion in limiting the scope of appellant Muhammad's cross-examination of a witness where appellant Muhammad failed to articulate why the cross-examination was legally relevant, and his current theory of relevance was not raised below.

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# BRIEF FOR APPELLEE

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## COUNTERSTATEMENT OF THE CASE

On March 26, 1997, a seven-count indictment was filed charging appellants with: (1) conspiracy to commit assault and murder (D.C. Code § 22-105(a)); (2) possession of a firearm during a crime of violence or dangerous offense (D.C. Code § 22-3204(b)); (3) unauthorized use of a vehicle (D.C. Code § 22-3815); (4) assault with intent to kill Robert Johnson, Jr., while armed (D.C. Code §§ 22-501, -3202); (5) first-degree murder while armed of Larell Littles (D.C. Code §§ 22-2401, -3202); (6) first-degree murder while armed of Larnell Littles (D.C. Code §§ 22-2401, -3202); and

(7) destruction of property (D.C. Code § 22-403) (98-CF-1045 R. 1, 5; 98-CF-1169 R. 1, 3; 98-CF-1218 R. 1, 5).[1/] Trial began on April 22, 1998, before the Honorable Frederick Weisberg, and continued through April 29, 1998 (98-CF-1045 R. 1; 98-CF-1169 R. 1; 98-CF-1218 R. 1).[2/] On May 4, 1998, the jury found appellants Riley and Marks guilty of the crimes of possession of a firearm during a crime of violence, assault with intent to kill while armed, and the first-degree murders of Larell and Larnell Littles (98-CF-1045 R. 1, 18; 98-CF-1218 R. 1).[3/] Also on May 4, 1998, the jury found appellant Muhammad guilty of the crimes of first-degree murder (of both Larell and Larnell Littles), assault with intent to kill while armed, possession of a firearm during a crime of violence,

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[1/] Unless otherwise noted, all references to provisions of the District of Columbia Code are to the 1981 edition and its supplements. "98-CF-XXXX R." refers to the record on appeal for each appellant. "MM/DD/YY Tr." refers to transcripts of the trial proceedings on the dates indicated.

[2/] Prior to trial, appellants' motions to sever their cases were denied (98-CF-1045 R. 1; 98-CF-1169 R. 1; 98-CF-1218 R. 1). The trial court did, however, sever the conspiracy count from the remaining charges (4/21/98 Tr. 311). Appellants' motions to suppress statements were also denied by the trial court (98-CF-1045 R. 1; 98-CF-1169 R. 1; 98-CF-1218 R. 1).

[3/] At the close of all the evidence, the trial court granted appellant Riley and appellant Mark's motions for judgment of acquittal on the counts of unauthorized use of a vehicle and destruction of property (98-CF-1045 R. 1; 98-CF-1218 R. 1).

unauthorized use of a vehicle, and destruction of property (98-CF-1169 R. 1, 17).

On July 1, 1998, appellants Riley and Marks were each sentenced to consecutive terms of ten to thirty years for assault with intent to kill while armed, thirty years to life for the murder of Larell Littles, and thirty years to life for the murder of Larnell Littles; and to a concurrent term of five to fifteen years in jail for possession of a firearm during a crime of violence (98-CF-1045 R. 1, 22; 98-CF-1218 R. 1, 30). Appellant Riley filed a timely notice of appeal on July 9, 1998 (98-CF-1045 R. 1, 23), and appellant Marks timely appealed on July 29, 1998 (98-CF-1218 R. 1, 31).

Also on July 1, 1998, appellant Muhammad was sentenced to consecutive terms of fifteen years to life in jail for assault with intent to kill while armed, life in prison without possibility of parole for the murder of Larell Littles, and life in prison without possibility of parole for the murder of Larnell Littles; and to concurrent terms of five to fifteen years for possession of a firearm during a crime of violence, twenty months to five years for unauthorized use of a vehicle, and 180 days for destruction of property (98-CF-1169 R. 1, 23). Appellant Muhammad filed a timely appeal on July 29, 1998 (id.; id. at 24).

## THE TRIAL

### The Government's Evidence[4/]

#### A. A Growing Rivalry Between Two Gangs

In the early nineteen-nineties, a group of high school-aged youths from Suitland, Maryland, formed a group called the Rushtown Crew (4/23/98 Tr. 37, 74). The Rushtown Crew began feuding with another group of youths from an area in Washington, D.C., called Fairfax Village, who were known as the Fairfax Village Crew (id. at 37-38). In approximately July of 1996, a member of the Rushtown Crew was shot by members of the Fairfax Village Crew (id. at 44-45). After the shooting, appellants - who were associated with the Rushtown Crew - discussed going to Fairfax Village and shooting at the people in that area (id. at 45, 80). Appellant Muhammad did most of the talking, but everyone agreed with him that something should be done about the Fairfax Crew's actions (id. at 80).

A couple of weeks after the July 1996 shooting, another member of the Rushtown Crew, a man named Lawrence, or "El" was shot and killed (4/23/98 Tr. 47). Appellant Muhammad believed that the Fairfax Village Crew was responsible for the death of El, and indicated to two acquaintances, Wayne Brown and James Stroman, that there should be some sort of retaliation (id. at 49-50; 4/24/98 Tr.

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[4/] Appellants did not present any evidence at trial (4/27/98 Tr. 318).

390; 4/28/98 Tr. 60).[5/] Appellant Marks borrowed a gun from Mr. Brown purportedly "to have it around his house just in case Fairfax Village came back through shooting again" (4/23/98 Tr. 51-52). Mr. Brown knew, however, that appellant Marks borrowed the gun to use it in a planned shooting over in Fairfax Village (id. at 87).

Mr. Stroman saw appellant Muhammad the evening of August 20, 1996, and appellant Muhammad told Mr. Stroman that he knew where the Fairfax Village Crew was going to be that night (4/27/98 Tr. 64). Mr. Stroman and appellants Muhammad and Riley drove to appellant Marks' house and picked him up (id. at 64-70). Appellant Muhammad told Mr. Stroman that they were "going to deal with them," and the four of them - Mr. Stroman and appellants - left appellant Marks' house, and headed toward the Fairfax Village area of Washington, D.C. (id. at 69). When they left the house, appellant Muhammad had a rifle, appellant Riley had a .38 revolver, appellant Marks had a pump shotgun (that belonged to Mr. Brown), and Mr. Stroman had a sawed-off shotgun (id. at 66-68; 4/23/98 Tr. 58-59; 4/24/98 Tr. 384, 396-97).

That same night, just after appellants and Mr. Stroman had left, Mr. Brown dropped by appellant Marks' house to retrieve his

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[5/] Mr. Brown and Mr. Stroman, who were initially charged with the murders of Larell and Larnell Littles, pled to lesser included offenses prior to appellants' trial, and testified on behalf of the government at trial.

gun so he could sell it to someone else (4/23/98 Tr. 52). When he got there, Mr. Brown was told that appellant Marks had gone to Fairfax Village (id. at 54). Mr. Brown left appellant Marks' house to inform his potential buyer that he would get him the gun later (id. at 54-55).

B. The Murder of the Littles Brothers

In August of 1996, Ms. Annabelle Littles lived at 3861 Pennsylvania Ave., S.E., with her two sons, Larnell (nicknamed Shawn) and Larell (nicknamed Ike) (4/22/98 Tr. 5, 9). Larnell Littles was nineteen and Larell Littles was twelve (id. at 5). Ms. Littles' house was located next door to a bank, and connected on the other side to another townhouse (4/23/98 Tr. 143).

At around 9:00 p.m. on August 20, 1996, Ms. Littles was at home with her two sons (4/22/98 Tr. 8; 4/23/98 Tr. 142). Ms. Littles was inside, while the Littles brothers were on the front lawn playing football with Larell Little's friend, Robert Johnson, Jr. (4/22/98 Tr. 9-10; 4/23/98 Tr. 142). A blue, four-door car pulled up in front of the bank next door, and three young men - appellants - jumped out of the car and started shooting in the direction of the Littles' yard (4/23/98 Tr. 143-44, 151, 175; 4/24/98 Tr. 385, 396; 4/27/98 Tr. 71). Appellant Muhammad was the first to shoot, and he fired first at Larnell Littles, and then at Larell Littles (4/27/98 Tr. 71-71). While Larell was crawling on

the ground trying to get away, appellant Muhammad told the others to get out of the car and shoot him, and appellants Marks and Riley got out of the car and started shooting (id. at 72). Mr. Stroman, who was the driver, waited in the car (4/23/98 Tr. 177; 4/24/98 Tr. 398; 4/27/98 Tr. 72).

After Larnell Littles was shot, he fell to the ground, and then got back up and ran to the front door (4/23/98 Tr. 144). Ms. Littles, who had heard a series of popping sounds, ran to open the door (4/22/98 Tr. 10-11). When she opened the door, Larnell Littles was standing there (4/22/98 Tr. 11). He came inside, said, "ma, I been shot," and fell to the ground (id. at 12). Larell's friend, Robert Johnson, Jr., came running into the house and told Ms. Littles that something was wrong with Larell, and that he would not get up (id.). Ms. Littles went outside and found Larell lying on the grass, unable to speak (id. at 13). Meanwhile, appellants had gotten back in the car and taken off towards Maryland (4/23/98 Tr. 149).

The police arrived on the scene about a minute after Ms. Littles discovered Larell's body on the lawn (4/22/98 Tr. 14). An ambulance transported Larnell Littles to D.C. General Hospital, where he was pronounced dead, and Larell Littles to Children's Hospital, where he was placed on a respirator until he died a day or two later (id. at 15).

Crime scene search officers ("CSSOs") recovered .22 caliber and 12- gauge shotgun casings from the scene of the murders (4/24/98 Tr. 211). The CSSO noted that after being fired, a revolver does not leave behind shell casings (id. at 246). Larnell Littles' body had shotgun wounds as well as gunshot wounds (id. at 314). His back was covered with superficial shotgun pellet injuries (id. at 320). Larell Littles' body had two gunshot wounds (id. at 323). Ballistics evidence linked the shell casings and bullets to weapons used by appellants to commit the murders (id. at 211-323; 4/27/98 Tr. 289-292). The .22 shell casings had been fired from the Ruger .22 caliber semiautomatic rifle (which was later recovered at appellant Muhammad's house) (4/27/98 Tr. 289). Additional shell casings had been fired from the twelve-gauge Mosberg shotgun (later recovered at the home of Mr. Brown's friend) (id. at 292).

C. The Aftermath of the Murders

When Mr. Brown returned to appellant Marks' home later that evening, all three appellants were there, along with other members of the Rushtown Crew (4/23/98 Tr. 55). Appellants Marks and Muhammad were standing in the middle of the living room bragging about how they had run up to two boys over in Fairfax Village on Pennsylvania Avenue and started shooting at them (id. at 56-58; 4/27/98 Tr. 78). Mr. Stroman mentioned that he had driven the car

(4/23/98 Tr. 60; 4/27/98 Tr. 70-78), and appellant Riley, who was sitting on the couch, described how when he tried to shoot at the "older boy" (Larnell Littles), his gun had jammed (4/23/98 Tr. 59-60). Appellant Muhammad told everyone in the room that he had shot at the older-looking boy first, and then the younger one (4/23/98 Tr. 60). Appellant Muhammad also told the group that he shot the younger one "because he was making a lot of noise" and might have drawn attention to what was going on (id.). All three appellants indicated that they had shot at the two boys - the Littles brothers - because they thought they were with the Fairfax Village Crew (id. at 61). Sometime that evening, appellant Marks returned Mr. Brown's shotgun to him (4/24/98 Tr. 397; 4/27/98 Tr. 78).

As the conversation continued, Mr. Brown told appellants that the car they had used during the shooting (which had been stolen by appellant Muhammad) should be burned to destroy any fingerprints (4/23/98 Tr. 62, 67; 4/24/98 Tr. 387). Mr. Brown went and got some gasoline, and appellants Riley and Muhammad drove the stolen car into Washington, D.C., and parked it near some abandoned buildings (4/23/98 Tr. 68). Mr. Brown followed them in a second car, driven by a female friend named Robin Milbourne (4/24/98 Tr. 352-33). Appellant Muhammad set the stolen car on fire while appellant Riley watched (4/23/98 Tr. 68; 4/24/98 Tr. 388). Afterwards, appellants Riley and Muhammad got in the car with Mr. Brown and Ms. Milbourne

(4/24/98 Tr. 352-53). While on their way home, appellants Riley and Muhammad began discussing the shootings, describing how the Littles boys had run and how they had shot them, and claiming that, "that's what they got for killing Lawrence" (id. at 354).

On August 22, 1996, a search warrant was executed and a .38 revolver was recovered from appellant Marks' home at 2136 Gaylord Drive in Suitland, Maryland (4/24/98 Tr. 254, 398; 98-CF-1218 R. 4; 4/27/98 Tr. 35). Appellant Riley was in appellant Marks' home when the search warrant was executed (4/29/98 Tr. 107). On September 9, 1996, a Ruger 1022 sawed-off rifle was recovered in an alley at the rear of appellant Muhammad's house at 2225 Wingate Road (4/24/98 Tr. 303-08, 4/27/98 Tr. 15, 27). Also on September 9, 1996, the police recovered a sawed-off twelve-gauge shotgun at appellant Riley's home (4/27/98 Tr. 12; 98-CF-1045 R. 3). Finally, the police recovered a Mosberg twelve-gauge shotgun at 4602 Chelsea Way in Suitland, Maryland (4/28/98 Tr. 229). This was Mr. Brown's gun, the one he had loaned to appellant Marks for the Fairfax Village shootings, and then sold to a friend.

### D. Appellants' Arrest and Questioning by the Police

In the early morning hours of September 9, 1996, police officers arrested appellants Marks, Muhammad, and Riley for the murder of the Littles brothers (4/21/98 Tr. 230). Due to the

gravity of the case, numerous officers from both Prince George's ("PG") County and Washington, D.C., were involved in the investigation, arrest, and questioning of appellants. All three appellants gave statements to the police confessing their parts in the murders (4/20/98 Tr. 63-68, 93-101, 147-150; 4/21/98 Tr. 196-200).[6/]

ARGUMENT

I. The Trial Court Properly Denied Appellant Riley and Appellant Muhammad's Motions to Suppress Statements.

Appellant Riley argues on appeal that following his arrest the morning of September 9th, 1996, "[t]he first officers to interview him advised him of his rights [under Miranda v. Arizona, 384 U.S. 436 (1996)] and he responded that he wanted a lawyer's assistance before answering questions" (Brief for Appellant Riley at 16). Thereafter, the police "violated [his] Sixth Amendment right to counsel by reinitiating interrogation without providing counsel, and the waiver obtained in counsel's absence was invalid[,]" and consequently the introduction of his written confession at trial "violated his Fifth Amendment rights" (id.). Appellant Riley's arguments are without merit. Appellant Riley never requested an

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[6/] On appeal, appellants Riley and Muhammad contest the trial court's denial of their motions to suppress their statements. Pertinent evidence adduced at the suppression hearing and the trial court's ruling are summarized infra, pp. 13-19, 37-40.

attorney on September 9, 1996. Although he initially asserted his right to remain silent, appellant Riley subsequently re-initiated conversation with police officers about his case, signed a valid waiver form, and then made an uncoerced written statement confirming that he had waived his rights and had not requested a lawyer, and admitting his involvement in the murder of the Littles brothers. Therefore, the trial court properly determined that appellant Riley's written confession could be introduced at trial as evidence against him.

Appellant Muhammad argues that his confession was coerced because "the circumstances surrounding [his] interrogation were extremely uncomfortable and stressful, and would be likely to frighten an ordinary person" (Brief for Appellant Muhammad at 21). Therefore, his "statement was not voluntary and should have been suppressed" (id.) (emphasis omitted). Appellant Muhammad's arguments are equally unavailing. The circumstances surrounding his arrest and interrogation were in no way coercive. Appellant Muhammad never appeared to be in any distress and never made any complaints to the police. Therefore, the trial court properly denied appellant Muhammad's motion to suppress statements.

A. Standard of Review

"On appeal from the denial of a motion to suppress, the scope of [the Court's] review is limited." Womack v. United States, 673

A.2d 603, 607 (D.C. 1996), cert. denied, 519 U.S. 1156 (1997). The Court's role is to "ensure that the trial court had a substantial basis for concluding that no constitutional violation occurred." Hood v. United States, 661 A.2d 1081, 1083-1084 (D.C. 1995) (quoting Brown v. United States, 590 A.2d 1008, 1020 (D.C. 1991)). The Court is to "defer to the trial judge's finding of evidentiary fact." Womack, 673 A.2d at 607. Moreover, the evidence presented at the suppression hearing must be viewed "in the light most favorable to the party prevailing below," and this Court must draw "all reasonable inferences in that party's favor." Id.; Anderson v. United States, 658 A.2d 1036, 1038 (D.C. 1995). The trial court's legal conclusions are reviewed de novo. Lewis v. United States, 632 A.2d 383, 385 (D.C. 1993).

### B. Appellant Riley's Interrogation and the Introduction of his Statement at Trial did not Violate his Sixth or Fifth Amendment Rights.

#### 1. Pertinent Suppression Hearing Evidence and the Trial Court's Ruling.

The government called Metropolitan Police Department ("MPD") Detective Oliver Garvey and PG County Detective Dwight DeLoatch to testify at the suppression hearing. Their testimony established that after his arrest the morning of September 9, 1996, appellant Riley was transported to the PG County police station and placed in

an interview room by himself (4/20/98 Tr. 146). At about 9:00 a.m., Detective Garvey read appellant Riley his rights using a PG County rights waiver form (id. at 147).[7/] Detective Garvey testified that he then had appellant Riley read over the PG County rights form to himself, and answer its four questions by checking either the "yes" or "no" box next to each of the questions. In response to the question, "Do you want to make a statement at this time without a lawyer," appellant Riley checked the box marked "no" (id. at 148). Detective Garvey asked appellant Riley if he was sure he did not want to talk to the officers, and appellant Riley said he was sure (id. at 154). Detective Garvey then told appellant Riley that he could no longer talk to him, and left the room (id. at 150).

At about 10:45 a.m., at the request of his boss, Sergeant Daniel Smart, Detective DeLoatch went into appellant Riley's interview room to talk to him about the Littles' murders (4/20/98 Tr. 161). When he entered the room, Detective DeLoatch testified that did not know whether appellant Riley had previously been

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[7/] The PG County rights waiver form differs from the rights waiver form used by MPD. The MPD form asks two separate questions: "Do you want to answer any questions?" and "Are you willing to answer questions without having an attorney present?" The PG County forms combines the two questions into one, somewhat ambiguous, formulation: "Do you want to make a statement at this time without a lawyer?" (98-CF-1045 R. 14 at 65-66).

advised of his rights (id.). Detective DeLoatch had neither seen nor talked to MPD Detective Garvey, and was unaware that Detective Garvey had read appellant Riley his rights earlier that morning, and that appellant Riley had indicated, by marking "no" on the PG County rights waiver form, that he did not "want to talk at this time without a lawyer" (4/21/98 Tr. 206).[8/] Detective DeLoatch told appellant Riley that there were "two sides to every story," and that he "wanted to hear [appellant Riley's] side of the story" (4/20/98 Tr. 162). Detective DeLoatch also mentioned that he was familiar with the Fairfax Village shooting, and that other suspects had started talking and had said that appellant Riley was involved (id.). Detective DeLoatch then told appellant Riley that he would come back later and walked out of the room (id.).[9/]

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[8/] On his way out of the interview room, Detective Garvey testified that he had handed appellant Riley's PG rights waiver form to someone in the PG County office, and had mentioned that appellant Riley had "invoked" (4/20/98 Tr. 154). Detective Garvey did not recall to whom he had handed the rights form (id.), and the trial court credited Detective DeLoatch's testimony that he was unaware when he entered the interview room at 10:45 that morning that appellant Riley had previously been read his rights (4/23/98 Tr. 14).

[9/] Initially Detective DeLoatch told the trial court that he believed that appellant Riley had not said anything in response to his comments. After reviewing his notes, however, Detective DeLoatch recalled that appellant Riley had stated at the time that he had not been in Fairfax Village, D.C., at the time of the murders (4/21/98 Tr. 210).

Detective DeLoatch testified that he returned to appellant Riley's interview room briefly at about noon to take appellant Riley to the bathroom, and then again at about 1:30 p.m. (4/20/98 Tr. 165, 158). By that time, appellant Riley appeared anxious to talk, and kept "blurting out his denial" of any involvement in the Littles' murders (4/28/98 Tr. 233). In response to these overtures, Detective DeLoatch informed appellant Riley that he could not talk to him unless and until appellant Riley was advised of his rights and had waived those rights by signing a waiver form (4/20/98 Tr. 168; 4/28/98 Tr. 234). Detective DeLoatch produced a PG County waiver form, and appellant Riley gave no indication that he had already filled out a similar form earlier in the day with Detective Garvey (4/20/98 Tr. 169; 4/28/98 Tr. 234-35).

Detective DeLoatch went over each question on the form with appellant Riley, and had appellant Riley mark his response to the four questions (4/20/98 Tr. 170). Initially, appellant Riley checked "no" in response to the question regarding "making a statement at that time without a lawyer" (id.). Immediately after he checked the "no" box, without prompting, appellant Riley clarified to Detective DeLoatch, "I want to talk to you but I don't want to write no statement" (id. at 171-72; 4/28/98 Tr. 235). Detective DeLoatch informed appellant Riley that the question was not concerned with written statements but rather whether appellant

Riley wished to talk (4/20/98 Tr. 172). According to Detective DeLoatch, appellant Riley then checked "yes" - that he did want to talk at that time without a lawyer, scratched out his "no" answer, and initialed the change (id. at 170, 172; 4/28/98 Tr. 235).

After signing the PG County waiver form, appellant Riley told Detective DeLoatch that he had had no involvement with the murder of the Littles brothers, and that he had not even gone into Washington, D.C., on the day of the murder (4/20/98 Tr. 174; 4/28/98 Tr. 237). Detective DeLoatch told appellant Riley that he knew he wasn't telling the whole truth, and left appellant Riley alone in the interview room from about 3:00 p.m. until around 6:40 p.m. (4/20/98 Tr. 174).

At about 6:00 p.m., Sergeant Smart noted a telephone message from a man named Marc O'Bryan, who said he was appellant Riley's attorney and that the police should "desist" (4/28/98 Tr. 214). Sergeant Smart did not tell Detective DeLoatch about the message because he had no idea who Mr. O'Bryan was, and he "was aware that [appellant] Riley had waived his rights to an attorney and it [was his] understanding that an attorney can't call someone and say I am representing this individual without that person requesting an attorney" (id. at 215). Appellant Riley was not given Mr. O'Bryan's telephone message.

Detective DeLoatch took appellant Riley to be processed and taken before the commissioner at about 6:40 p.m. that evening (4/20/98 Tr. 174). Detective DeLoatch testified that as appellant Riley's fingerprints were being taken, appellant Riley asked if he could talk to appellant Muhammad (id. at 176; 4/21/87 Tr. 190; 4/28/98 Tr. 238). Detective DeLoatch told him that he could, and arranged for appellants Riley and Muhammad to talk to one another in an interview room at about 7:30 p.m. (4/20/98 Tr. 177; 4/21/98 Tr. 190; 4/28/98 Tr. 238). At that time, appellant Muhammad told appellant Riley to "cooperate" because "the police know[] everything that went on" (4/20/98 Tr. 177; 4/28/98 Tr. 238). When appellant Riley learned that appellant Muhammad had told the police everything, it made him want to talk to the police and tell them his side of the story (4/21/98 Tr. 253).

Detective DeLoatch then spoke some more with appellant Riley about the shootings (4/20/98 Tr. 177). Appellant Riley detailed what had happened and made a written statement about the murder of the Littles brothers (id. at 178). The written statement, which expressly confirmed that appellant Riley was aware of his rights, did not want an attorney present, and had never asked for an attorney, was completed at around 9:40 p.m. (4/21/98 Tr. 201). At no time during the course of the entire day had appellant Riley ever mentioned to Detective DeLoatch that he wished to speak to a

lawyer (id.). Appellant Riley was given something to eat at around 9:00 p.m. after he told Detective DeLoatch that he was hungry (id. at 212). Detective DeLoatch did not recall appellant Riley ever asking for something to eat earlier that day (id.). Appellant Riley claimed that he did ask for food early on, but he could not recall what the response was, he just knew he did not get anything to eat at the time (id. at 239).

Appellant Riley's testimony directly contradicted that of Detective DeLoatch - first he testified that he never made any effort to initiate conversation with Detective DeLoatch (4/21/98 Tr. 239). He also claimed that when he checked "no" on the PG County waiver form at 1:30 p.m. he meant that he "didn't want to talk without a lawyer" (id. at 237). Appellant Riley admitted, however, that when he had previously been arrested on August 22, 1996, he had been read his rights and he had understood his rights at that time (id. at 244-45). Appellant Riley denied that he had asked to talk to appellant Muhammad, but admitted that he did talk to him, and that appellant Muhammad told him that he had told the police everything (id. at 251-52).

The trial court ruled that appellant Riley's statement was admissible. Although the Maryland rights waiver form was ambiguous, "[appellant] Riley at no time requested the assistance of an attorney during the period of custodial interrogation"

(4/22/98 Tr. 169; 4/23/98 Tr. 10). In fact, while making his written statement, appellant Riley was expressly asked whether he had ever requested a lawyer, and he responded "no" (4/23/98 Tr. 11). Further, although appellant Riley invoked his right to remain silent early in the morning of September 9, 1996, later that day, at approximately 1:43 p.m., he made a voluntary, knowing, and intelligent waiver of his Miranda rights (id. at 18-20).

The trial court also specifically discredited appellant Riley's testimony that, when he checked "no" at approximately 1:43 p.m., he meant he wanted a lawyer (4/23/98 Tr. 11), and instead credited Detective DeLoatch's testimony that immediately clarified after appellant Riley checked "no,", he told DeLoatch, "it means I don't want to make a written statement but I'm willing to talk to you" (id. at 12). Likewise, the trial court credited Detective DeLoatch's testimony that appellant Riley asked to speak to appellant Muhammad, and discredited appellant Riley's testimony to the contrary (id. at 19).

2. Appellant Riley's Sixth Amendment Right to Counsel had not Attached at the time of his Questioning on September 9, 1996.

Appellant Riley first claims that "[w]hen police arrested [him] 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" (Brief for Appellant Riley at 17). Based on this erroneous premise, appellant Riley further argues that he should have been informed that a lawyer called on his behalf at around 6 p.m. on September 9, 1996, and that because he had "asserted his Sixth Amendment right to counsel, police were required . . . to provide access to his lawyer before they made any further attempts to question him" (Brief for Appellant at 26-27). These arguments are without merit.

It is firmly established that a person's Sixth Amendment right to counsel attaches only at or after the time that formal adversarial judicial proceedings have been initiated against the person by way of formal charge, indictment, information, arraignment, or preliminary hearing. See United States v. Gouveia, 467 U.S. 180, 187 (1984); Kirby v. Illinois, 406 U.S. 682, 688-689 (1972). See also United States v. Wade, 388 U.S. 218, 224 (1967) (the Sixth Amendment right attaches at "critical" stages of the criminal justice process "where the results might well settle the accused's fate and reduce the trial itself to a mere formality"). See also (Robert L.) Davis v. United States, 512 U.S. 452, 456-457 (1994) (Sixth Amendment right to counsel attaches only at the initiation of adversary judicial criminal proceedings, and before proceedings are initiated, there is no constitutional right to the

assistance of counsel); McNeil v. Wisconsin, 501 U.S. 171, 175 (1991); United States v. Rorie, 518 A.2d 409, 412-413 (D.C. 1986).

Appellant Riley was not indicted until March 26, 1997 (98-CF-1045 R. 1), and he has cited no authority to support his proposition that his arrest on September 9, 1996, based on a complaint noting probable cause (and its underlying arrest warrant issued on September 7, 1996) (id. at 3), constitutes an adversarial judicial criminal proceeding, or that a defendant has a constitutional right to counsel based on an arrest warrant. To the contrary, as the Supreme Court stated in Gouveia, "we have never held that the right to counsel attaches at the time of arrest." Gouveia, 467 U.S. at 190. See also (Angel) Davis v. United States, 623 A.2d 601, 606 n.15 (D.C. 1993) (noting that the Supreme Court has never held that the right to counsel attaches at the time of arrest); Rogala v. District of Columbia, 333 U.S. App. D.C. 145, 155, 161 F.3d 44, 55 (1998) (Sixth Amendment right to counsel attaches only upon the initiation of adversarial judicial criminal proceedings and not at time of arrest). No adversarial judicial criminal proceedings had yet been initiated against appellant Riley when he was arrested on September 9, 1996, and, indeed, no such proceedings were initiated until November 18, 1997, when he was arraigned on the complaint charging him with murder (98-CF-1045 R. 1, 2).

Because appellant Riley's Sixth Amendment right to counsel had not attached, the trial court correctly found that the police had no obligation to advise the suspect that they received a call from somebody who claimed to be his attorney or to stop their interrogation at that time. See Moran v. Burbine, 475 U.S. 412, 422-23 (1986) (police are not required, as part of suspect's Miranda rights, to inform suspect of attorney's efforts to reach him or to keep suspect abreast of status of his legal representation). As such, the trial court correctly found that the police had no obligation to stop their interrogation or advise the suspect that they received a call from somebody who claimed to be his attorney (4/28/98 Tr. 226).

### 3. Appellant Riley Never Invoked his Fifth Amendment Right to Counsel.

Under the Fifth Amendment, the police may not continue to conduct custodial interrogation of a suspect if, at any time during the questioning, the suspect requests an attorney. Edwards v. Arizona, 451 U.S. 477, 484-85 (1981). At that time, interrogation must cease and may not be resumed unless initiated by the accused. Id. at 484-85. The request for an attorney, however, must be clear and unequivocal before the police must stop their questioning. See (Robert L.) Davis, 512 U.S. at 459 ("if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable

officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning") (emphasis in original).

There is no evidence that appellant Riley made a clear and unequivocal request for counsel at any time on September 9, 1996 (4/23/98 Tr. 11-12). Although, when questioned by MPD police officers at 9:00 a.m that morning, appellant Riley answered "no" in response to the question on the PG County waiver form, "Do you want to make a statement at this time without an attorney," as the trial court noted, [w]hen a person answers no to that question, it is impossible to know whether the person [] is not willing to make statement without a lawyer but is willing to make a statement with a lawyer or whether the person is simply not willing to make a statement" (id. at 10). Therefore, the PG County waiver form is "inherently ambiguous" (id.).

Indeed, as the trial court found, it is clear from the suppression hearing record as a whole that appellant Riley's response to the PG County rights waiver question at 9:00 a.m. on September 9, 1996, "was not a request for a lawyer, an ambiguous request or otherwise" (4/23/98 Tr. 11). First, he did not expressly request a lawyer at that time (id.). Moreover, in his written statement given later that evening, he was specifically

asked whether he had ever requested a lawyer and he said "no" (id.; 4/27/98 Tr. 247-48). In addition, appellant Riley was also specifically asked whether the police had denied him a lawyer at his request, and he again responded "no" (4/23/98 Tr. 11; 4/27/98 Tr. 248).[10/]

Therefore, appellant Riley's Fifth Amendment right to counsel was never invoked, "either explicitly or implicitly" (4/23/98 Tr. 12). See Gresham v. United States, 654 A.2d 871 (D.C. 1995) (defendant did not clearly request counsel so as to preclude further questioning when, after arrest but before Miranda warnings or questioning, he asked girlfriend in presence of police to call his mother and tell her to get him a lawyer, even assuming the police heard the request); United States v. Hsin-Yung, 97 F. Supp. 2d 24, 32 n.15 (D.D.C. 2000) (defendant's remarks that "if his statements were going to be used against him, he wanted a lawyer" were insufficient to invoke his Miranda right to counsel).

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[10/] Given the circumstances of appellant Riley's case, his reliance on Tindle v. United States, 778 A.2d 1077, 1080 (D.C. 2001), is misplaced. In Tindle, which involved the same PG County rights waiver form, the defendant checked "no" when asked whether he wanted to make a statement without an attorney. Id. at 1080. The Court assumed by this response that defendant made a request for an attorney, and there was no evidence to the contrary. In appellant Riley's case, the evidence demonstrated that at no time during the day did appellant Riley ever request an attorney, and that in his mind, he had not requested an attorney when he first checked "no" at 9:00 a.m (4/21/98 Tr. 201).

Instead, at 9:00 a.m. on September 9, 1996, appellant Riley invoked his Fifth Amendment right to remain silent. At that time, the MPD Detectives involved properly ceased interrogation (4/23/98 Tr. 13).

4. Under the Totality of the Circumstances, the Police Scrupulously Honored Appellant Riley's Right to Remain Silent and his Waiver at 1:43 p.m. was Valid.

The trial court properly determined that because appellant Riley never invoked his Fifth Amendment right to counsel, "the extra prophylactic protections of Edwards v. Arizona 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 [appellant Riley's Fifth-Amendment] rights were scrupulously honored" (4/23/98 Tr. 12).

When and under what circumstances an interrogation may resume after the suspect has invoked his right to remain silent was addressed by the Supreme Court in Michigan v. Mosley, 423 U.S. 96 (1975). The Court in that case stated that the admissibility of statements made in response to interrogation subsequent to invocation of the right to remain silent "depends under Miranda on whether [the suspect's] 'right to cut off questioning' was 'scrupulously honored.'" Id. at 104 (quoting Miranda, 384 U.S. at 474, 479). In McKeamer v. United States, 452 A.2d 348 (D.C. 1982),

this Court noted four factors identified in Mosley that need to be considered in determining whether the suspect's rights have been "scrupulously honored": 1) was the suspect orally advised of his rights and did he orally acknowledge them; 2) did the police immediately cease questioning and make no attempts to resume or ask him to reconsider; 3) was there a sufficient break (in Mosley, two hours) between the first and second interrogations and was the second performed at a different location by a different officer about a different crime; and 4) were Miranda warnings given before the second questioning session. Id. at 351. "The Mosley Court envisioned a case-by-case approach involving an inquiry into all of the relevant facts to determine whether the suspect's rights have been respected." United States v. Dell'Aria, 811 F. Supp. 837, 842 (E.D.N.Y. 1993).

Given the Mosely factors, the trial court properly determined that "with one failing, which I find to be inadvertent, the police did scrupulously honor [appellant Riley's] right to remain silent . . . having invoked his right to remain silent at 9:00 a.m. that morning and having decided to waive his rights at 1:30 or 1:43 that same afternoon" (4/23/98 Tr. 20-21. First, the police immediately, and properly under Mosely, cut off questioning when appellant Riley invoked at 9:00 a.m. (id. at 13). Although Detective DeLoatch's statement to appellant Riley at 10:30 a.m. that "there [are] two

sides to every story and [he] wanted to hear [appellant Riley's] side of the story" (4/20/98 Tr. 162), was not a proper restart of questioning under the Mosley factors, under the totality of the circumstances, this isolated improper remark did not render appellant Riley's subsequent waiver of rights at 1:30 p.m. invalid, nor taint his subsequent confession at 9:40 p.m. See Peoples v. United States, 395 A.2d 41 (D.C. 1978).

In Peoples, the defendant was arrested at about 9:00 a.m. The defendant invoked his rights and improper questioning ensued, and the defendant admitted involvement in crimes committed in Washington, D.C., and made a written confession Id. at 43. Six hours after making the written confession, the defendant was brought before the Commissioner of the District Court of Maryland, informed of his rights, and indicated he understood them. Id. The defendant then met with an MPD officer, at the defendant's request. Id. The MPD officer read the defendant his rights, and the defendant waived them, and proceeded to give a four-page statement on the District of Columbia crimes, signing each page and initialing a further waiver of his Miranda rights. Id. The Court held that although statements made earlier in the day were inadmissible, the four-page statement given to the MPD officer at approximately 7:00 p.m. was not tainted by any impropriety that infected the earlier statements. Id. at 44. In sum, the Court

found that appellant was interviewed by the MPD officer: (1) only after he had been taken before a judicial officer and given a fresh set of Miranda warnings; (2) at his own request; (3) six hours after his previous interrogation session; and (4) after the MPD officer had reread him his Miranda rights. Id. Although the defendant was interviewed about the same crime, the Court found nonetheless that under the totality of the circumstances, the Mosely requirements were satisfied, and the defendant's statements admissible. Id.

Likewise here, under the totality of the circumstances, appellant Riley's Mosely rights were satisfied. Appellant Riley invoked his rights at 9:00 a.m., and the MPD officers immediately terminated questioning. For approximately three hour after the improper remark by Detective DeLoatch at 10:30 a.m., appellant Riley was left alone. Thereafter, appellant Riley initiated conversation with Detective DeLoatch at 1:30 p.m. when Detective DeLoatch entered the interview room to take appellant Riley to the bathroom (4/23/98 Tr. 17). Compare Stewart v. United States, 668 A.2d 857, 867 (D.C. 1995) (noting that subsequent interrogation improper "in the absence of an *independent* request" by suspect). Detective DeLoatch then read appellant Riley his rights, appellant Riley acknowledged that he understood them, and the police obtained a valid waiver at 1:43 p.m.

Importantly, "there were substantial lapses of time [approximately eleven hours] between the improper [contact]" and "the interrogation that elicited the incriminating statement." Stewart, 668 A.2d at 868 n.10. It is notable that after appellant Riley voluntarily waived his Miranda rights at 1:30 p.m., he proceeded to tell Detective DeLoatch that he had had nothing to do with the murders and had not even been in D.C. on the day they occurred. Appellant Riley only made statements confessing to the murders after he was processed and brought before a commissioner, and after the police acceded to his request to speak to appellant Muhammad and appellant Muhammad told him to cooperate because the police already knew everything (4/20/98 Tr. 174-76). That these confessional statements were not made until approximately 9:40 p.m. at night (4/21/98 Tr. 201) demonstrates that they were not the fruit of improper police contact at 10:30 a.m., but instead the result of appellant Riley's decision to talk to the police at 1:43 p.m., and his conversation that evening with appellant Muhammad. See Peoples, 395 A.2d at 41. See also Stewart, 668 A.2d at 868 n.10 (distinguishing Peoples because of the substantial lapse of time in that case between the improper interrogations and the subsequent interrogation in which the incriminating statement was obtained).

### 5. Appellant Riley's 1:43 p.m. Waiver of Rights was Knowing, Intelligent, and Voluntary.

Appellant Riley's claim that his waiver of his Fifth Amendment rights at 1:30 p.m. was invalid is equally unavailing. The evidence establishes that appellant Riley initiated a conversation with Detective DeLoatch at approximately 1:30 p.m. on September 9, 1996 (4/28/98 Tr. 233). When Detective DeLoatch entered the interview room, appellant Riley "started to blurt out statements about the offense" (4/23/98 Tr. 17). Appellant Riley's statements at that time were not in response to any interrogation (or its functional equivalent) but, as the trial court found, spontaneous remarks made after Detective DeLoatch entered the interview room (id.). At that point, after he had initiated conversation with Detective DeLoatch, appellant Riley made a "voluntary, knowing and intelligent" waiver of his Miranda rights (4/23/98 Tr. 18).

In response to appellant Riley's attempts to converse, Detective DeLoatch informed appellant Riley that he could not talk to him unless and until appellant Riley was advised of his rights and had waived those rights by signing the waiver form (4/20/98 Tr. 168; 4/28/98 Tr. 234). Detective DeLoatch produced the PG County waiver form, and appellant Riley gave no indication that he had already filled out a similar form earlier in the day (4/20/98 Tr. 169; 4/28/98 Tr. 234-45).

Detective DeLoatch testified that when appellant Riley initially checked "no" at approximately 1:43 p.m. on the PG County rights waiver form, appellant Riley immediately, and without prompting, clarified that his response meant only that he didn't want to make a written statement, but that he was willing to talk to Detective DeLoatch (4/23/98 Tr. 12).[11/] After changing his answer to "yes" and initialing the change, and then signing the waiver form at 1:43 p.m., appellant Riley made a statement denying his involvement in the murders (4/20/98 Tr. 174; 4/28/98 Tr. 237).

Later that evening, as he was being processed, appellant Riley asked if he could talk to appellant Muhammad (4/20/98 Tr. 176; 4/21/98 Tr. 190; 4/28/98 Tr. 238). Detective DeLoatch arranged for the two to speak to one another, and after learning that appellant Muhammad had told the police everything, appellant Riley decided to make further statements (4/21/98 Tr. 253). As the trial court noted, the police did not obtain a "new fresh waiver of Miranda

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[11/] Appellant Riley claims that by checking "no" he meant he wanted a lawyer, but the trial court specifically credited the testimony of Detective DeLoatch on this point, and discredited the testimony of appellant Riley (4/23/98 Tr. 11). The Court must defer to these findings of fact, Womack, 673 A.2d at 607, and they are supported by substantial evidence, including appellant Riley's subsequent written statement where he confirmed that he had never requested a lawyer at any point during the day. His claim that he did not want to talk without a lawyer is further undermined by the fact that his intention at 1:30 p.m. was to make a statement denying his involvement in the murders, as evidenced by his "blurting" out his lack of involvement as soon as Detective DeLoatch entered the room.

rights at that point," "but the waiver that they had obtained at 1:43 was still in effect and [appellant Riley] had not given any indication between 1:43 and around 7:30, when he started to talk again that he had invoked his right to remain silent or his right to a lawyer" (4/23/98 Tr. 19-20).

Finally, in his written statement, made after he had spoken to appellant Muhammad, appellant Riley confirmed that he had been read his rights and had waived them (4/21/98 Tr. 201). Furthermore, there is nothing in the record to indicate that appellant Riley did not understand the rights as read to him by Detective DeLoatch: appellant Riley was in the twelfth grade, knew how to read and write, had been arrested before and read his rights, and admitted to having understood them (id. at 245).

### 6. Appellant Riley's Waiver of his Fifth Amendment Rights was not Coerced.

Appellant also argues that the "police coerced [appellant Riley] to waive his right to remain silent" (Brief for Appellant Riley at 16). The record, however, clearly supports the trial court's finding that appellant's statement was voluntary and followed his voluntary waiver of rights. In considering a claim that a defendant's statements were involuntarily elicited, courts look to the totality of the circumstances to determine whether the will of the defendant was overborne in such a way as to render his

confession the product of coercion. United States v. Bradshaw, 290 U.S. App. D.C. 129, 133, 935 F.2d 295, 299 (1991). Factors to be considered in assessing the totality of the circumstances include the age, education, and intelligence of the accused; whether the accused has been informed of his constitutional rights; the length of the questioning; the repeated and prolonged nature of the questioning; whether the police or the accused initiated the dialogue; and the use of physical punishment, such as the deprivation of food or sleep. See Schnekloth v. Bustamente, 412 U.S. 218, 226 (1973).

The record in this case is devoid of any suggestion of physical or psychological pressure, coercive environment, or improper trickery or deceit. Appellant Riley expressly wrote in his statement that he had not been mistreated in any way (4/23/98 Tr. 20). Detective DeLoatch testified that the first time appellant Riley indicated that he wanted something to eat was at around 9:00 p.m., and Detective DeLoatch promptly got appellant Riley some food (4/21/98 Tr. 212). Although Detective DeLoatch may have "tricked" appellant Riley by leading him to believe there were witnesses who had implicated him in the murders, there was nothing improper in his resort to this tactic. "Confessions generally are not vitiated when they are obtained by deception or trickery, as long as the means employed are not calculated to produce an untrue

statement." (Robert V.) Davis v. United States, 724 A.2d 1163, 1168 (D.C. 1998) (quoting In Re D.A.S., 391 A.2d 255, 258 (D.C. 1978)), cert. denied, 528 U.S. 1082 (2000); accord Beasley v. United States, 512 A.2d 1007, 1015-1016 (D.C. 1986), cert. denied, 482 U.S. 907 (1987).

Nor is there any evidence that at 1:43 p.m. Detective DeLoatch coerced appellant Riley to change his initial "no" answer to a "yes." After appellant Riley checked "no," it was entirely proper for Detective DeLoatch to clarify appellant Riley's intentions, given that he had indicated a willingness to speak with Detective DeLoatch. Cf. Ruffin v. United States, 524 A.2d 685, 701 (D.C. 1987). ("the appropriate response to an ambiguous or equivocal assertion of the right to counsel by an accused . . . is a request by police interrogators for clarification").

Moreover, in the absence of any evidence that the police were coercive or overbearing during appellant Riley's interview, the length of appellant Riley's stay at the PG County Police Station does not, by itself, render any resulting statements involuntary. United States v. Bell, 740 A.2d 958 (D.C. 1999) (where defendant waived Miranda rights six hours after arrest, subsequent statement made 16 hours after arrest admissible where no evidence of coercion); Byrd v. United States, 618 A.2d 596, 598-99 (D.C. 1992) (confession taken at least nine hours after arrest admissible

despite pre-presentment delay of more than a day where defendant validly waived Miranda rights).

Appellant Riley was not under the influence of any drugs or alcohol that would have rendered him unable to comprehend his rights (4/27/98 Tr. 236). He was in the twelfth grade, knew how to read and write, had been arrested before and read his rights, and admitted to having understood them (4/21/98 Tr. 245). In addition, the interviewing detectives did not threaten appellant Riley or make him any promises, they provided him something to eat, and they acceded to his desire to speak with appellant Muhammad (4/27/98 Tr. 236-237). This evidence supports the trial court's conclusion that appellant Riley's statement was uncoerced and voluntary and, therefore, admissible.

### 7. Even Assuming a Violation of Appellant Riley's Miranda Rights, the Admission of his Statement was Harmless Beyond a Reasonable Doubt.

Even if the Court were to find a violation of Appellant Riley's Miranda rights, given the overwhelming evidence of appellant Riley's guilt, the admission of his written statement was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18 (1967).[12/] Mr. Stroman testified that he drove appellant

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[12/] The Chapman standard of review applies to Fifth Amendment (continued...)

Riley, along with the other appellants, to Fairfax Village, and that he saw appellant Riley shooting towards the victims (4/27/98 Tr. 72). Mr. Brown testified that after the murders, while he was back at appellant Marks' house, he overheard appellant Riley claim that he had tried to shoot at the Littles brothers, but that his gun had jammed (4/23/98 Tr. 59-60). Mr. Brown then drove with appellants Riley and Muhammad to burn the stolen car they had used in the shooting (id. at 68). After the car was burned, Ms. Milbourne drove appellant Riley back to appellant Marks' house, and she testified that on the way back, appellant Riley discussed his participation in the murders (4/24/98 Tr. 354). Not only did the police recover a sawed-off twelve-gauge shotgun from appellant Riley's home, but appellant Riley was also present at appellant Marks' house when the police retrieved the .38 revolver used in the shootings (4/29/98 Tr. 107). Finally, ballistics evidence linked the shell casings and bullets to weapons used by appellants to commit the murders (4/24/98 Tr. 211-323; 4/27/98 Tr. 289-292).

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[12/] (...continued)
violations under Edwards and Mosely, and to violations of the Sixth Amendment right to counsel. Tindle, 778 A.2d at 1083 (applying Chapman standard to right to counsel violation under Edwards); Dorman v. United States, 491 A.2d 455, 461 (D.C. 1985) (violation of right to remain silent tested for harmless constitutional error under Chapman). See also Milton v. Wainwright, 407 U.S. 371 (1972) (harmless beyond a reasonable doubt to admit statements deliberately elicited after Sixth Amendment right to counsel had attached).

Therefore, "once the tainted evidence is excluded from consideration, there remains overwhelming evidence to support the jury's verdict [of appellant Riley's guilt]. Derrington v. United States, 488 A.2d 1314, 1331 n.25 (D.C. 1985).

### B. The Totality of the Circumstances Evidences Appellant Muhammad's Voluntary Waiver of his Miranda Rights.

#### 1. Pertinent Suppression Hearing Evidence and the Trial Court's Ruling.

The government's evidence at the suppression hearing established that appellant Muhammad was arrested in his home in Maryland by PG County Detective Troy Harding in the early morning hours of September 9, 1996 (4/20/98 Tr. 32).[13/] Detective Harding transported appellant Muhammad to the PG County police station at approximately 8:00 a.m. (id. at 40). Appellant Muhammad, shackled at the ankles, was seated alone in an interview room (id. at 35). At about 9:05 a.m., Detective Harding testified that he advised appellant Muhammad of his rights (id., id. at 38; 4/27/98 Tr. 16). At that time, appellant Muhammad indicated that he was willing to make a statement without his lawyer present, and told Detective Harding that he did not know anything about the murder of Larell and Larnell Littles (4/20/98 Tr. 37). Appellant Muhammad was then

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[13/] Appellant Muhammad presented no evidence at the suppression hearing.

left by himself in the interview room while the police questioned other suspects (id. at 38). Appellant Muhammad did not appear to be in any distress, did not make any complaints, and was given at least one bathroom break (id. at 38-39, 44, 48). At about 3:00 p.m., Detective Roger Irvin testified that he went into the interview room to speak further with appellant Muhammad (id. at 38-39, 52). Earlier that day, Detective Irwin had interviewed appellant Marks (id. at 52). Detective Irwin told appellant Muhammad that other suspects had admitted involvement in the murders and had given up their weapons, and he asked appellant Muhammad if he would give up his weapon (id. at 53). In response, appellant Muhammad agreed to take Detective Irwin to where his weapon was located (id.). Appellant Muhammad signed a consent search form, and Detective Irwin took appellant Muhammad to his mother's house, where appellant Muhammad said his gun was located (id. at 59). On the way, Detective Irwin stated that he had appellant Muhammad confirm that he had waived his rights, and had him sign another waiver of rights form (id. at 54-55). After retrieving appellant Muhammad's weapon, Detective Irwin and appellant Muhammad returned to the police station, stopping on the way to get appellant Muhammad something to eat (id. at 60). They arrived at the police station at around 4:30 p.m. (id.).

Once back at the station, appellant Muhammad was interviewed again, this time by MPD police officers (4/20/98 Tr. 60-61, 117). At this time, appellant Muhammad agreed to give a videotaped statement confirming his involvement in the murder of the Littles brothers (4/20/98 Tr. 120-122; 4/23/98 Tr. 391). Detective Irwin testified that after the MPD officers finished their interview, he again spoke with appellant Muhammad, and asked him once more if he had been advised of his rights and if he wanted to make a statement without a lawyer present (4/20/98 Tr. 62). Appellant Muhammad confirmed that he had been advised of his rights, and proceeded to provide a written statement admitting his guilt in the shootings (id. at 62-63, 66, 84). According to Detective Irwin, appellant Muhammad appeared "very calm, relieved" and "remorseful" as he was writing his statement (id. at 86). At no time did appellant Muhammad ever indicate that he was unhappy with the way he had been treated after his arrest (id. at 122).

The trial court ruled that appellant Muhammad "was advised of his rights, and in writing, made voluntary, knowing and intelligent waivers of those rights and agreed, voluntarily, to make a number of statements about both this offense and the offenses in Maryland" (4/21/98 Tr. 284).

### 2. Appellant Muhammad's Statements were not Coerced.

There is no evidence that appellant Muhammad's statements were coerced, and the totality of the circumstances supports the trial court's finding that he made a knowing, intelligent, and voluntary waiver of his Miranda rights. Bradshaw, 290 U.S. App. D.C. at 133, 935 F.2d at 299.

Appellant Muhammad's claim that his waiver of rights was coerced because he was allegedly deprived of food and "unable to walk around for nearly 9 hours" (Brief for Appellant Muhammad at 20), ignores the fact that he signed his first waiver of rights form at 9:05 a.m. (4/20/98 Tr. 37). At that time, after appellant Muhammad had initially been advised of his rights by Detective Harding, he told Detective Harding that he was willing to make a statement without a lawyer present, and then told Detective Harding that he did not know anything about the murders (id.). Appellant Muhammad confirmed that he had not been threatened, nor made any promises to pressure him into making a statement (4/27/98 Tr. 17).

Because the detectives were busy interviewing other witnesses and defendants, appellant Muhammad was left alone in the interview room for several hours. Detectives did check in on him, and he did not appear to be in any distress (4/20/98 Tr. 38-39, 44, 48). He was given at least one bathroom break. The delay in conducting

appellant Muhammad's interrogation, however, does not amount to coercion, especially given that appellant Muhammad had already waived his rights. Bell, 740 A.2d 958; Byrd, 618 A.2d at 598-99.

At about 3:00 p.m., Detective Irwin spoke further with appellant Muhammad (4/20/98 Tr. 38-39, 52). Detective Irwin told appellant Muhammad that other defendants had admitted involvement in the murders and had given up their weapons, and asked appellant Muhammad if he wished to do the same (id. at 53). Detective Irwin had, in fact, obtained incriminatory information from appellant Marks, but even if his statement had been untrue, this would not have been an improper tactic. See (Robert V.) Davis, 724 A.2d at 1168 (confessions not vitiated when obtained by deception). Appellant Muhammad voluntarily agreed to take Detective Irwin to where his weapon was located (4/20/98 Tr. 53). On the way there, Detective Irwin confirmed that appellant Muhammad knew his rights, and had him sign another waiver form (id. at 54-55; 4/27/98 Tr. 28-29). At the time he signed the second waiver of rights form, appellant Muhammad confirmed that he had not been promised anything, nor threatened in any way to make a statement (4/27/98 Tr. 29). Appellant Muhammad also indicated that he knew how to read and write, and had gone to school through the 10th grade (4/24/98 Tr. 383-84). Appellant Muhammad stated that he understood his rights (id. at 384).

Appellant Muhammad was first given something to eat after his weapon was retrieved, at about 4:30 p.m. (4/20/98 Tr. 6). At this point in time, he had already signed two waiver of rights forms. After they returned to the station, appellant Muhammad agreed to give a videotaped statement to MPD Officers (id. at 120-22; 4/23/98 Tr. 391). After the videotaped interview, appellant Muhammad agreed to give a written statement. Detective Irwin once again advised appellant Muhammad of his rights, and he again confirmed that he wished to make a statement without a lawyer (4/20/98 Tr. 62).

Therefore, over the course of the entire day, appellant Muhammad was asked three separate times whether he understood his rights, and three separate times agreed to waive them. When giving his written statement, appellant Muhammad appeared "very calm, relieved" and "remorseful" (4/20/98 Tr. 86). At no time did appellant Muhammad ever indicate that he was unhappy with the way he had been treated after his arrest (id. at 122). The mere fact that appellant was questioned over a lengthy period of time and did not eat until late in the day, does not render his interrogation coercive. See, e.g., Everetts v. United States, 627 A.2d 981 (D.C. 1993) (sixteen year old voluntarily, intelligently, and knowingly waived rights even though he was detained for eleven hours before questioning), cert. denied, 115 S. Ct. 144 (1994). Given the

totality of the circumstances, the trial court properly determined that appellant Muhammad's statements were not coerced, and these statements were properly admitted at trial.[14/] Beasley, 445 A.2d at 1013.

## II. Appellant Marks' Sixth Amendment Rights were not Violated by the Admission of Appellant Muhammad's Statement.

Appellant Marks argues that the introduction of appellant Muhammad's statement as evidence at trial violated his cross-examination "rights under the Confrontation Clause of the Sixth Amendment" due to "the trial court's denial of severance" (Brief for Appellant at 19). This argument is without merit. First, appellant Muhammad's statement was redacted so that the sole person implicated by the statement was appellant Muhammad himself. Appellant Marks' trial counsel participated in discussions concerning the redactions of all appellants' statements and failed to object at trial to the redactions made to appellant Muhammad's statement. Finally, the jury was instructed on multiple occasions that appellant Muhammad's statement was only to be used in

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[14/] Appellant Muhammad argues that his statement was edited to omit all reference to his co-defendants, and "had he known the manner in which his words would be changed and used, he might well have never spoken at all" (Brief for Appellant Muhammad at 21-21). This argument is wholly speculative, and fails to address the Supreme Court's clear approval of such revisions to avoid improper use of co-defendants' statements by the jury. See Richardson v. Untied States, 481 U.S. 200, 211 (1987).

assessing the guilt of appellant Muhammad, and no other defendant, including appellant Marks. Given these safeguards, the trial court properly determined that all three appellants should be tried together, and that the redacted statements were admissible as evidence.

A. Applicable Law.

The use of a statement by a non-testifying co-defendant that expressly implicates another defendant violates that defendant's Sixth Amendment right to confront the witness testifying against him. See Bruton v. United States, 391 U.S. 123, 126 n.8 (1968). However, where a defendant's name and any reference to the defendant's existence are eliminated from the co-defendant's extrajudicial statement, the statement is properly admitted, with limiting instructions, regardless of any inference of the defendant's guilt that arises when the statement is linked with other evidence presented at trial. Richardson v. United States, 481 U.S. 200, 211 (1987). Moreover, a redacted statement that does not eliminate all references to the existence of a defendant, but substitutes a neutral pronoun in place of an individual's name may be properly admitted at trial, along with limiting instructions, without violating a defendant's right to confrontation, unless a substantial risk exists that the jury will consider the statement when determining the defendant's guilt. Foster v. United States,

548 A.2d 1370 (D.C. 1988); cf. Gray v. Maryland, 523 U.S. 185, 193-97 (1988) (use of a redacted statement that reads "[m]e, deleted, deleted, and a few other guys," was unconstitutional because the use of "obvious indications of alteration" facially incriminated the defendant because its reference to his identity could be inferred from the statement itself).

### B. Appellant Muhammad's Statement was Properly Admitted at trial as Evidence Against Appellant Muhammad, and in no Way Implicated Appellant Marks.

Appellant Marks argues that appellant Muhammad's statement "improperly allowed references to [appellant Marks]" (Brief for Appellant Marks at 25). This is incorrect. After the suppression hearing, the trial court ruled that all three appellants' statements were admissible in the government's case in chief (4/21/98 Tr. 283; 4/22/98 Tr. 169).[15/] Subsequently, the trial

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[15/] Appellant Marks argues that appellant Muhammad's statement was not a declaration against penal interest, and that it was inadmissible hearsay that did not meet the requirements of either the coconspirator exception or the adoptive admission exception (Brief for Appellant Marks at 9-19). The government did not attempt to introduce appellant Muhammad's statement under the coconspirator hearsay exception or as an adoptive admission by any of the other appellants. Instead, appellant Muhammad's statement, admitting that he participated in the murder of the Littles brothers, was clearly a declaration against penal interest, and was introduced solely as evidence against appellant Muhammad and no other person (4/24/98 Tr. 379-89). "[A] statement tending to expose the declarant to criminal liability and offered as tending to exculpate the accused is admissible when the declarant is (continued...)

court held lengthy discussions with the prosecutor and the defense attorneys respecting proposed redactions of the statements (4/21/98 Tr. 315-330). The trial court noted that they had "to redact those statements [so each is] admissible against the declarant only" (id. at 315). Each attorney had the opportunity to review and comment on the proposed redactions for each of the appellants' statements (id. at 330-31).

At trial, the prosecutor read the portions of the statement that corresponded to Detective Garvey's questions, and Detective Garvey answered with appellant Muhammad's responses (4/24/98 Tr. 381). The redacted version of appellant Muhammad's statement was retyped so that the jury would not note obvious deletions.

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[15/](...continued)
unavailable and corroborating circumstances clearly indicate the trustworthiness of the statement." Laumer v. United States, 409 A.2d 190, 199 (D.C. 1979) (en banc). See also Lyons v. United States, 514 A.2d 423, 428 (D.C. 1986) (statement may be used to inculpate a defendant). In his statement, appellant Muhammad says, among other things, that he shot at the boy screaming on the ground until he stopped screaming. This statement is sufficiently against appellant Muhammad's penal interest that a reasonable person in his position would not have made the statement unless believing it to be true. Appellant Muhammad was not available to testify as he was protected by the Fifth Amendment. Finally, there was ample corroborating evidence in the case, including the testimony of Mr. Brown, Mr. Stroman, and Ms. Milbourne, respecting appellant Muhammad's commission of the murders.

Appellant Muhammad's redacted statement, in pertinent part, read as follows:[16/]

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

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[16/] Appellant Muhammad's statement was originally videotaped. At trial, the trial court instructed the jury that the tape contained irrelevant material and had therefore been edited down to those parts pertaining to the case, which Detective Garvey would read for the jury (4/24/98 Tr. 379).

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

Q. Okay. You mentioned something about another Tony.

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

Q. Brookfield. Okay. Where at on Brookfield; do you know?

A. At the top.

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

A. He got a sister.

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

A. I think her name is Sherry.

Q. Okay. So that Tony was with you?

A. Yeah.

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

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

Q. After you came back from the shooting, where - where did you go from there?

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

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

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

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

A. No, because there was - matter of fact, I remember because I took my gun in the house and then I went and burnt the car. I went to burn the car. Then I was standing out on Brookfield. (4/24/98 Tr. 382-391.)

The redacted statement comports with the strictures of Richardson, as there was no reference therein to the other appellants' participation in the murders. Indeed, the statement did not mention the name or description of any participant in the shootings other than appellant Muhammad and the driver of the car, "Tony" (Mr. Stroman). 481 U.S. at 211. At trial, defense counsel for appellant Riley clarified that the reference in appellant Muhammad's statement to an individual named "Tony," who was with him at the shooting, was to Mr. Stroman (4/24/98 Tr. 408-09).

Although there was a reference to another "Tony" who lived on Gaylord, and appellant Muhammad testified that he went back to that "Tony's" house after the shooting, there was no implication that the "Tony" from Gaylord had participated in the shooting. Nor did appellant Marks' counsel object at trial to the reference to "Tony"

on Gaylord. If anything, given the redactions, the jury was more likely to have concluded that Mr. "Tony" Stroman was the only other person with appellant Muhammad, while the "Tony" on Gaylord was back in his home in Maryland during the shooting. Regardless, appellant Muhammad's statement was not incriminating on its face as to appellant Marks, but only potentially became so when linked with other evidence introduced at trial. Richardson, 481 U.S. at 208. This is not an impermissible use of appellant Muhammad's confession. Id.

In addition, prior to introducing appellant Muhammad's statement to the jury, the trial court instructed the jury that "it is a statement of Mr. Muhammad and is evidence only against Mr. Muhammad. It's not evidence against Mr. Marks and it's not evidence against Mr. Riley. Therefore, as to this evidence, the statement attributed to Mr. Muhammad, you must not consider it in any way in determining the guilt or innocence of Mr. Marks or Mr. Riley." (4/24/98 Tr. 380.) This instruction was repeated prior to the jury recessing to deliberate, and jurors are presumed to follow their instructions. Francis v. Franklin, 471 U.S. 307, 325 n.9 (1985).

Given these safeguards, the trial judge's decision to admit appellants' statements and to deny appellants' motions to sever was appropriate and consistent with the presumption in this

jurisdiction that two or more persons charged with jointly committing a criminal offense are to be tried jointly, see Christian v. United States, 394 A.2d 1, 20 (D.C. 1978), unless to do so would cause one of the defendants to suffer manifest prejudice. See Johnson v. United States, 596 A.2d 980, 987 (D.C. 1991).

C. Any Error was Harmless, Given the Ample Evidence of Appellant Marks' Guilt.

Even assuming arguendo that appellant Muhammad's statement was improperly introduced at trial, and improperly implicated appellant Marks, the error was harmless beyond a reasonable doubt, given the ample evidence of appellant Marks' guilt. See Chapman, 386 U.S. at 87. Mr. Brown testified that he lent appellant Marks a gun, and that he knew appellant Marks was going to use the gun in a shooting in Fairfax Village (4/23/98 Tr. 87). Mr. Brown also related that appellant Marks stood in the middle of his living room after the shooting, bragging about what he had done (id. at 56-58; 4/27/98 Tr. 70-78). Mr. Stroman described how, after appellant Muhammad told the others to get out of the car and shoot, appellant Marks got out and started shooting at the Littles brothers (4/27/98 Tr. 72). Finally, appellant Marks himself, in his post-arrest statement, which was admitted into evidence at trial, confessed that he participated in the murders (4/24/98 Tr. 395-97).

Therefore, reversal of appellant Marks' convictions would not be warranted, as there was overwhelming independent evidence of his guilt. See Reynolds v. United States, 587 A.2d 1080, 1083-84 (D.C. 1991).

## III. The Trial Court Properly Denied Appellant Muhammad's Motion to Sever.

Appellant Muhammad argues that the trial court erred when it denied his motion to sever his trial from co-defendants, and that "the conflicting defenses of [appellant Muhammad's] co-defendants and disparity of evidence resulted in manifest injustice" (Brief for Appellant Muhammad at 7). This argument is without merit. The trial court properly exercised its discretion in denying appellant Muhammad's motion to sever because the murders were jointly committed by all three appellants, there was substantial common evidence, and there was no evidence of manifest prejudice to appellant Muhammad.

### A. Applicable Law

Generally, when individuals have been charged together there is a strong presumption that they should be tried together. Russell v. United States, 586 A.2d 695, 698 (D.C. 1991). A severance may be granted, however, if trying the individuals together "prejudices any party." Id.; (Kevin) Ray v. United States, 472 A.2d 854, 856 (D.C. 1984). A denial of severance will

only be overturned for an abuse of discretion. Russell, 586 A.2d at 698. In assessing a request for severance, the trial court should weigh the potential prejudice "against the considerations of judicial economy and expeditious proceedings." Carpenter v. United States, 430 A.2d 496, 502 (D.C.), cert. denied, 454 U.S. 852 (1981). "[D]efendants are not entitled to severance merely because they have a better chance of acquittal in separate trials." Zafiro v. United States, 506 U.S. 534, 537 (1993). To show an abuse of discretion, the appellant must show not only prejudice, but manifest prejudice. Johnson, 596 A.2d at 987; Payne v. United States, 516 A.2d 484, 490 (D.C. 1986). Furthermore, "[m]utually antagonistic defenses are not prejudicial per se," instead, a trial court should grant a severance "only if there is a serious risk that a joint trial could compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Zafiro, 506 U.S. at 539.

### B. The Trial Court did not Abuse its Discretion.

Appellant Muhammad argues that he was prejudiced because "the strategy of [appellant Muhammad's] codefendants was to shift responsibility for the charged crimes to [him]" (Brief for Appellant Muhammad at 7-8). Appellant Muhammad points to instances where witnesses were asked by co-defendants' counsel if appellant

Muhammad was, in effect, the ringleader (id. at 9).[17/] Appellant Muhammad argues that these questions influenced the jury by planting ideas in their minds. This type of questioning, however, does not constitute "manifest prejudice." "Unfair prejudice does not arise merely because defendants are mutually hostile and attempt to blame each other." Ingram v. United States, 592 A.2d 992, 996 (D.C.), cert. denied, 502 U.S. 1017 (1991). Rather, "severance requires a clear and substantial contradiction between the respective defenses, causing inherent irreconcilability between them," Tillman v. United States, 519 A.2d 166, 170 (D.C. 1986) (citation omitted), and that the irreconcilability creates "a danger that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." Rhone v. United States, 125 U.S. App. D.C. 47, 48, 365 F.2d 980, 981 (1966). Appellant Muhammad has pointed to no such irreconcilable defenses. Indeed, the trial court judge specifically warned counsel for appellant Riley that there was no basis for an "argument of duress [on the part of appellant Muhammad] as a defense" (4/27/98 Tr. 362).[18/]

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[17/] Appellant Muhammad also claims that co-defendants' counsel elicited the fact that appellant Muhammad had shot at Mr. Stroman (Brief for Appellant at 13). This is incorrect. In fact, appellant Muhammad's own counsel elicited this information from Mr. Stroman while cross-examining him (4/27/98 Tr. 120).

[18/] Even if the trial court had allowed appellant Riley to argue a (continued...)

In addition, appellant Muhammad's assessment of defense counsels' tactics ignores that fact that counsel for co-defendants were not testifying. Instead, government witnesses provided the testimony implicating appellant Muhammad in the murders of the Littles' brothers. That testimony would have been admissible even if the trial court had granted appellant Muhammad's motion to sever. Further, appellant Muhammad's attorney was given ample opportunity to cross-examine these witnesses. For example, on cross-examination appellant Muhammad's counsel asked Mr. Stroman if appellant Muhammad had made him do anything, and Mr. Stroman responded, "He didn't make me do anything" (4/27/98 Tr. 116). Moreover, a concern about a second or third "prosecutor" (see Brief for appellant Muhammad at 14), is almost always present when defenses conflict, but by itself, is not a reason to forego the benefits of a joint trial. See Mitchell v. United States, 569 A.2d 177 (D.C.) ("[a]ppellant's general denial was not contradicted solely or even primarily by [codefendant's] defense" even though

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[18]/(...continued)
defense of coercion, severance would not have been warranted because there was ample evidence of appellant Muhammad's guilt. See Sweet v. United States, 438 A.2d 447 (D.C. 1981) (where one defendant argued that other defendant coerced him, severance not warranted because there was other strongly incriminating evidence as to each defendant). Therefore, any conflict between the co-defendants' defenses was not of a magnitude to raise a danger that the jury would convict appellant Muhammad based on this conflict alone. Tillman, 519 A.2d at 170.

codefendant's counsel became a "second prosecutor"; therefore no abuse of discretion in refusal to sever), cert. denied, 498 U.S. 986 (1990). Finally, the trial court instructed the jury that the statements and arguments of counsel are not evidence (4/29/98 Tr. 121).

Appellant Muhammad also argues that there was a "disparity" of evidence against him, although he omits any substantive discussion of the alleged disparity (Brief for Appellant Muhammad at 14). Further, his argument for severance, based on his contention that "the Government had far more evidence against [appellant Muhammad] than against the two co-defendants" (id.) misapprehends the law. A bases for severance may exist based on a claim of disparity only if the evidence against the defendant requesting severance is de minimis as compared to the evidence against his co-defendants. See Hawthorne v. United States, 504 A.2d 580, 585 (D.C. 1986); United States v. Gambrill, 146 U.S. App. D.C. 72, 83, 449 F.2d 1148, 1159 (1971) ("Manifest prejudice occurs only where the evidence of a defendant's complicity in the overall criminal venture is de minimis when compared to the evidence against his codefendants.").

In the instant case, the evidence against appellant Muhammad is anything but de minimus: he confessed to his involvement in the murder of the Littles brothers, a gun recovered from his yard fired

rounds that struck the victims, and witnesses testified that they saw appellant Muhammad participate in the shootings.

Finally, appellant Muhammad argues that he was prejudiced by the admission of the redacted statements of his co-defendants (Brief for Appellant Muhammad at 15-17). As discussed above, all three defense counsel, along with the prosecutor, discussed the proposed redactions of appellants' statements. Appellant Muhammad's counsel was given ample opportunity to provide his input. For example, appellant Muhammad's counsel requested that appellant Riley's statement be redacted to omit certain references with respect to burning the stolen car (4/27/98 Tr. 240). That request was granted (id.). All three statements were revised to omit any reference to the co-defendants, and indeed, appellant Muhammad has cited no specific instance where his co-defendants's statements implicated him in the murders.[19/] The jury was instructed on several occasions that it was to consider each

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[19/] Appellant Muhammad claims that police testimony indicating that he spoke to appellant Riley prior to appellant Riley making a statement rendered the redactions, which eliminated any reference to appellant Muhammad, "a mere figleaf, pointless and ineffectual" (Brief for Appellant Muhammad at 17). But appellant Riley's redacted statement was properly admitted, regardless of any inference of appellant Muhammad's guilt that may have arisen when the statement was linked with other evidence presented at trial. Richardson, 481 U.S. at 211. Unlike in Foster, appellant Riley's statement was redacted to eliminate reference not only to appellant Muhammad's identity, but also to the role he played in the murders. 548 A.2d at 1379.

statement as evidence only against the declarant making the statement and against no other defendant. Given these precautions, appellant Muhammad's argument that the statements somehow caused him manifest prejudice is meritless. See Richardson, 481 U.S. at 209-10 ("Joint trials play a vital role in the criminal justice system . . . . It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings.").

## IV. The Trial Court Properly Exercised its Discretion in Limiting the Scope of Appellant Muhammad's Cross-Examination of Mr. Brown.

Appellant Muhammad complains that the trial court did not allow him to ask a series of questions regarding whether Mr. Brown knew if anyone had been prosecuted for the shootings of two members of the Rushtown Crew (Brief for Appellant Muhammad at 22). This claim is without merit.

Although the Sixth Amendment right of the accused to confront the witnesses against him encompasses the right to cross-examine the government's witnesses, Davis v. Alaska, 415 U.S. 308, 315-16 (1974), the right of cross-examination is not without limits. Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986); (Anthony) Ray v. United States, 620 A.2d 860, 862 (D.C. 1993). After sufficient cross-examination has been allowed to satisfy constitutional

requirements, the trial court retains broad discretion to determine the scope and the extent of cross-examination. Roundtree v. United States, 581 A.2d 315, 323 (D.C. 1990) (citing In re C.B.N., 499 A.2d 1215, 1218 (D.C. 1985)). In exercising its discretion, the trial court may restrict cross-examination within reasonable limits to avoid such problems as "'harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" Roundtree, 581 A.2d at 323 (quoting Van Arsdall, 475 U.S. at 679).

In the instant case, when the prosecutor objected at trial, appellant Muhammad's counsel told the trial court that the desired cross-examination was designed to elicit a possible motive behind the Rushtown Crew's desire to "do something themselves," implying their seeking of revenge for the murders of their friends (4/23/98 Tr. 121). The trial court noted that this was not a legally recognizable motive - or justification - for the murders, and denied the line of questioning as irrelevant (id. at 120-21). The trial court noted, with respect to the line of questioning that, "frankly, it makes the government's case better than yours. The only thing it could possibly do that would help you is if the jury were to think in a nullification mode that maybe this was some sort of justice. And then, of course, that I would not permit. I can't think of any other relevant purpose it might have." (Id. at 121.)

On appeal, appellant Muhammad now argues a new theory: "that if the Rushtown members knew that the attackers of their friends were being prosecuted, the Government's evidence of motive would be greatly discredited" (Brief for Appellant Muhammad at 24). Because appellant did not raise this argument below, it is subject to plain error review. McCullough v. United States, 827 A.2d 48, 55 (D.C. 2002). Under the plain error standard of review, appellant Muhammad bears the burden of first establishing error, or a deviation from the legal rule, and second, demonstrating that the error was so plain that the trial court was derelict in countenancing it. Id.

The trial court did not plainly err in denying appellant Muhammad's request for further cross-examination on the issue of Mr. Brown's knowledge respecting prosecutions of the Rushtown Crew members. Appellant Muhammad's current theory is certainly not so "plain" that the trial court should have recognized it sua sponte. Moreover, appellant Muhammad's contention that his cross-examination might have cast doubt on the prosecution's evidence of motive is speculative at best. Finally, there was ample evidence of appellant Muhammad's guilt, including his own statement confessing to the crime. Therefore, the trial court did not err at all, much less plainly err, in denying the cross-examination. See (Anthony) Ray, 620 A 2d at 862 (trial court did not abuse its

discretion in denying appellant the opportunity to ask witness questions on cross- examination that were "highly speculative" and "without a factual basis").

## CONCLUSION

WHEREFORE, the government respectfully requests that this Court affirm the decisions below.


ROSCOE C. HOWARD, JR.
United States Attorney

JOHN R. FISHER
Assistant United States Attorney

ELIZABETH TROSMAN
Assistant United States Attorney

J. PATRICK ROWAN
Assistant United States Attorney

HEATHER R. PHILLIPS, CA BAR #191620
Assistant United States Attorney
555 Fourth Street, N.W., Room 8104
Washington, D.C. 20530
(202) 514-7088

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused two copies of the foregoing Brief for Appellee to be sent by first-class mail to the following counsel on this 22nd day of December 2003:

Robert S. Becker, Esquire
Counsel for appellant Marquette E. Riley
5505 Connecticut Ave., N.W., No. 155
Washington, D.C. 20015

Kenneth H. Rosenau, Esquire
Counsel for appellant Sayid Muhammad
1424 16th st., N.W., Suite 502
Washington, D.C., 20036

Peter N. Mann, Esquire
Counsel for appellant Antonio Marks
601 Indiana Ave., N.W., Suite 910
Washington, D.C., 20004

HEATHER R. PHILLIPS
Assistant United States Attorney