No. 07-10336

IN THE SUPREME COURT OF THE UNITED STATES

MARQUETTE E. RILEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's Sixth Amendment right to counsel attached when the government filed a complaint needed to obtain a warrant for petitioner's arrest.

2. Whether the court of appeals erred in holding that petitioner did not invoke his Fifth Amendment right to counsel and waived his right to remain silent before giving incriminating statements.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A22) is reported at 923 A.2d 868.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 2007. A petition for rehearing was denied on January 10, 2008. The petition for a writ of certiorari was filed on April 9, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the Superior Court for the District of Columbia, petitioner was convicted of two counts of first-degree murder while armed, in violation of D.C. Code §§ 22-2401 and 22-

3202; assault with intent to kill while armed, in violation of D.C. Code §§ 22-501 and 22-3202; and possession of a firearm during a crime of violence, in violation of D.C. Code § 22-3204(b). He was sentenced to consecutive terms of 30 years to life for each of the two murders and ten to 30 years for assault with intent to kill while armed, and to a concurrent term of five to 15 years for possession of a firearm during a crime of violence. The court of appeals affirmed. Pet. App. A3; Gov't C.A. Br. 2-3.

1. Petitioner was a member of the Rushtown Crew, a street gang of teenagers from Suitland, Maryland. The Rushtown Crew began feuding with a District of Columbia gang known as the Fairfax Village Crew, and, as a result, two Rushtown Crew members were shot. Pet. App. A4.

The Rushtown Crew members decided to retaliate. On August 20, 1996, petitioner, co-defendants Sayid Muhammad and Antonio Marks, and James Stroman, all of whom were armed, drove to an area in the District of Columbia associated with the Fairfax Village crew. After Stroman stopped their car, Muhammad exited and began shooting at three boys -- Larnell Littles (age 19), his younger brother Larell Littles (age 12), and Larell's friend Robert Johnson, Jr. (age 13) -- who were tossing a football in the Littles' front yard. The initial barrage struck both Littles brothers. The older brother, Larnell, and Johnson (who was not injured) were able to run to escape the assailants. The younger brother, Larell,

attempted to crawl towards his house. Muhammad told petitioner and the others to get out of the car and shoot him, and both petitioner and Marks complied. The men then re-entered the car and escaped. The Littles brothers died from their injuries. None of the victims was associated with the Fairfax Village Crew. Pet. App. A4-A5 & n.3.

2. On September 7, 1996, an officer from the D.C. Metropolitan Police Department (MPD) executed an affidavit and obtained arrest warrants for petitioner, Muhammad, and Marks for the murder of Larell Littles. Police officers from the MPD and from Prince George's County, Maryland, then arrested them two days later. Pet. App. A5; Gov't Opp. to Pet. for Reh'g at 4-5 & n.5.

After petitioner's arrest on September 9, 1996, he was placed in an interview room at the Prince George's County police station by himself. At approximately 9:00 a.m., two MPD detectives read petitioner his rights from a standard Prince George's County waiver form, and they asked petitioner to read the form and answer its four questions by checking either the "yes" or "no" box next to each question. In response to the question, "Do you want to make a statement at this time without a lawyer," petitioner checked the "no" box and told one of the detectives, in response to the detective's question, that he was sure that he did not want to talk to the officers. The MPD detectives left the room. Pet. App. A6.

At about 10:45 a.m., Prince George's County Detective Dwight

DeLoatch, who did not know whether petitioner had been advised of his rights and interviewed, briefly entered the interview room and told petitioner that there were "two sides to every story"; that he "wanted to hear [petitioner's] side of the story"; and that others had implicated petitioner in the shootings. Pet. App. A6. He informed petitioner that he would return and left the room. Ibid.

DeLoatch returned to the interview room at about noon to escort petitioner to the bathroom, and again at about 1:30 p.m. By that time, DeLoatch found petitioner anxious to talk as he kept "blurting out" his denial of any involvement in the murders. Pet. App. A6. In response to these overtures, DeLoatch informed petitioner that he could not talk to him unless petitioner was advised of his rights and signed a waiver form. DeLoatch produced the same form that petitioner had previously reviewed, and petitioner gave no indication that he had already completed a similar form earlier in the day. Ibid.

DeLoatch reviewed each question with petitioner, and petitioner again checked "no" to the question whether he wished to make a statement without a lawyer. Immediately after checking that box and without prompting, petitioner told DeLoatch that he wanted to talk to the detective but that he did not want to write anything down. DeLoatch explained that the question on the form was not concerned with written statements but with whether petitioner wished to talk. Petitioner then checked "yes," scratched out his

"no" answer, and initialed the change. Pet. App. A6.

Petitioner then told DeLoatch that he was not involved in the murders. The detective conveyed his skepticism and eventually left the room around 3:00 p.m. Pet. App. A6-A7.

At about 6:00 p.m., another police officer received a telephone call from an individual who stated that he was petitioner's attorney and that the police should "desist" from questioning petitioner. Neither DeLoatch nor petitioner was given the message. Pet. App. A7.

Meanwhile, Maryland officials decided to arrest petitioner on separate Maryland charges related to the murder of Keith Simms in Prince George's County, Maryland. 4/21/98 Tr. 220-221. DeLoatch's conversations with petitioner had addressed the Maryland murder in addition to the D.C. murders at issue in this case, id. at 196-197, 207, and, around 6:40 p.m. that evening, DeLoatch took petitioner to be processed and presented to a Maryland State commissioner on Maryland charges stemming from the Simms murder. Id. at 192, 221-222; see Pet. App. A7.[1]

While petitioner was processed on the Maryland charges, petitioner asked DeLoatch whether he could speak to Muhammad, and DeLoatch arranged the meeting. During their meeting, Muhammad told petitioner to cooperate and petitioner learned that Muhammad had

[1] Petitioner subsequently pleaded guilty in Maryland court to first-degree murder. See Pet. 13 n.10.

confessed "everything" about the D.C. murders to the police. Pet. App. A7. As a result, petitioner spoke again with DeLoatch and provided a written statement about the murder of the Littles brothers. That statement confirmed that petitioner was aware of his rights, did not want an attorney, and "had never asked for an attorney." Ibid.

3. On March 26, 1997, a seven-count indictment was filed, charging petitioner, Muhammad, and Marks with two counts of first-degree murder of Larell and Larnell Littles, while armed; assault with intent to kill Johnson, while armed; conspiracy to commit assault and murder; possession of a firearm during a crime of violence; unauthorized use of a vehicle; and destruction of property. Petitioner moved to suppress his statements, and the trial court held a suppression hearing in which MPD Detective Oliver Garvey and DeLoatch testified to the events described above. Petitioner testified at the hearing, directly contradicting the officers' testimony. Pet. App. A7; Gov't C.A. Br. 13-20.

The trial court credited the officers' version of the events and ruled that petitioner's statements were admissible. Although it found that the Prince George's County waiver form was ambiguous, it concluded that petitioner never requested the assistance of counsel, as petitioner expressly acknowledged in his written statement. The court also ruled that, although petitioner had initially invoked his right to remain silent, he later voluntarily,

knowingly, and intelligently waived that right. Pet. App. A7-A8. Petitioner was subsequently convicted following a jury trial at which his statements were admitted into evidence. Id. at A3, A9, A11.

4. On appeal, petitioner argued that his Sixth Amendment right to counsel attached when the government filed a criminal complaint to obtain an arrest warrant charging him with first-degree murder of Larell Littles and that the police violated his Sixth Amendment right when they interrogated him after he had invoked his right to counsel and failed to inform him that an attorney had called on his behalf. The court of appeals rejected his Sixth Amendment challenges, concluding that the process of obtaining an arrest warrant is not the type of "adversary judicial criminal proceeding" that triggers the Sixth Amendment. Pet. App. A12 (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

The court of appeals also rejected petitioner's claim that the police violated his Fifth Amendment right to counsel. The court affirmed the trial court's ruling that petitioner did not unambiguously invoke his right to counsel when he initially responded "no" on a waiver card to the ambiguous question whether he was "willing to make a statement at this time without a lawyer?" Pet. App. A13. Considering the totality of the circumstances, including petitioner's acknowledgment that he had never requested an attorney and his explanation of his waiver-card response, the

court held that petitioner failed to invoke his Fifth Amendment right to counsel. Id. at A14.

The court further held that, although Detective DeLoatch improperly attempted to interrogate petitioner at 10:45 a.m. after petitioner invoked his right to remain silent earlier that morning, petitioner subsequently waived his Miranda rights. The court reasoned that "[t]he timing of [petitioner's] confession persuades us that the key factor in prompting him to confess was his 7:30 p.m. meeting with Muhammad, which was arranged at [petitioner's] behest," and that the confession was not tainted by DeLoatch's "ultimately inconsequential misstep." Pet. App. A16-A17.

ARGUMENT

Petitioner contends (Pet. 6-9, 18-21) that his voluntary statement admitting his participation in the murders at issue in this case should have been excluded from evidence because that confession purportedly was obtained in violation of his Fifth and Sixth Amendment rights to counsel. "The Fifth Amendment protection against compelled self-incrimination provides the right to counsel at custodial interrogations." Michigan v. Jackson, 475 U.S. 625, 629 (1986). In contrast, the accused's Sixth Amendment right "to have the Assistance of Counsel for his defense," U.S. Const. amend. VI, attaches only after such a defense is triggered by "the initiation of adversary judicial proceedings." Jackson, 475 U.S. at 629-630. The court of appeals correctly determined that

petitioner's Fifth and Sixth Amendment rights were not violated, and its fact-bound decision does not conflict with a decision of this Court or a court of appeals. Further review is unwarranted.

1. Petitioner first contends (Pet. 9-15, 18-20) that the government violated the Sixth Amendment by taking his voluntary confession without providing petitioner legal counsel. In petitioner's view, his Sixth Amendment right to counsel attached when the police filed a complaint (Pet. App. A25) with a judge in order to obtain a judicial warrant for petitioner's arrest. That contention lacks merit and warrants no further review.

a. The Sixth Amendment right to counsel "does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings -- whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." McNeil v. Wisconsin, 501 U.S. 171, 175 (1991) (internal quotation marks and citation omitted); accord Rothgery v. Gillespie County, 128 S. Ct. 2578, 2583 (2008); Fellers v. United States, 540 U.S. 519, 523 (2004). At that point, "'the government has committed itself to prosecute,' 'the adverse positions of government and defendant have solidified,' and the accused 'finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" Rothgery, 128 S. Ct. at 2583 (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion)); accord

United States v. Gouveia, 467 U.S. 180, 189 (1984).

This Court has thus repeatedly held that a defendant's "initial appearance before a judicial officer" (normally at a "preliminary arraignment" or "arraignment on the complaint") "marks the point at which the [Sixth Amendment] right attaches." Rothgery, 128 S. Ct. at 2584 & n.10 (citing Jackson and Brewer v. Williams, 430 U.S. 387 (1977)); see id. at 2592 ("reaffirm[ing]" that rule). The Court, however, has "never held that the right to counsel attaches at the time of arrest." Gouveia, 467 U.S. at 190. Yet petitioner contends that the right attaches even before an arrest, when officers submit a sworn complaint to a judicial officer to establish the probable cause necessary for an arrest warrant. The courts of appeals have consistently rejected the view that a formal prosecution commences for Sixth Amendment purposes upon filing of such a complaint whose purpose is to establish probable cause for a warrant.[2]

Petitioner's citation (Pet. 20) to United States ex rel. Robinson v. Zelker, 468 F.2d 159 (2d Cir. 1972), cert. denied, 411

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[2] See, e.g., United States v. Alvarado, 440 F.3d 191, 200 (4th Cir.), cert. denied, 127 S. Ct. 81 (2006); Beck v. Bowersox, 362 F.3d 1095, 1101-1102 & n.4 (8th Cir.), cert. denied, 543 U.S. 914 (2004); United States v. Langley, 848 F.2d 152, 153 (11th Cir.), cert. denied, 488 U.S. 897 (1988); United States v. Pace, 833 F.2d 1307, 1312 (9th Cir. 1987), cert. denied, 486 U.S. 1011 (1988); United States v. Reynolds, 762 F.2d 489, 493 (6th Cir. 1985); Lomax v. Alabama, 629 F.2d 413, 415-416 (5th Cir. 1980), cert. denied, 450 U.S. 1002 (1981); United States v. Duvall, 537 F.2d 15, 22 (2d Cir.), cert. denied, 426 U.S. 950 (1976).

U.S. 939 (1973), does not aid his cause. Zelker ruled that the Sixth Amendment right to counsel attached when the defendant was arrested on a warrant obtained under a New York statute that, the court concluded, expressly made the filing of the type of complaint needed for such a warrant "the exact equivalent of the filing of an indictment." Id. at 160 & n.2, 163. The Second Circuit has since limited Zelker to the specific context of that statute (which has been repealed) and has held that Sixth Amendment rights do not attach when a suspect is arrested on a warrant obtained by filing a federal complaint analogous to that at issue here. See United States v. Duvall, 537 F.2d 15, 21-22 (2d Cir.) (Friendly, J.), cert. denied, 426 U.S. 950 (1976). The Second Circuit has thus questioned the continued vitality of Zelker, see O'Hagan v. Soto, 725 F.2d 878, 879 (2d Cir. 1984), which at best reflects unresolved tension within that court and does not warrant this Court's review. Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) (intra-circuit conflicts do not warrant Supreme Court review).

Petitioner primarily relies (Pet. 18-19) on a D.C. statute of limitations that specifies the time within which a "prosecution" may be brought, D.C. Code § 23-113(a), and states that a "prosecution" is deemed to commence when an indictment is entered, an information is filed, or "a complaint is filed before a judicial officer empowered to issue an arrest warrant." D.C. Code § 23-113(c). That local provision, however, merely defines the

commencement of a "prosecution" for statute of limitations purposes and does not purport to define the start of "adversary judicial criminal proceedings" for purposes of the Sixth Amendment right to counsel. In any event, the point at which a prosecution begins for Sixth Amendment purposes is "an issue of federal law unaffected by" procedural labels in local statutes. Rothgery, 128 S. Ct. at 2588-2589; see id. at 2584 n.9 ("[T]he constitutional significance of judicial proceedings cannot be allowed to founder on the vagaries of state criminal law, lest the attachment rule be rendered utterly 'vague and unpredictable.'").[3]

b. Because petitioner's Sixth Amendment right to counsel did not attach before petitioner confessed, petitioner's related claims (Pet. 9-15) premised on the existence of such a right are unavailing. Petitioner claims (Pet. 15), for example, that the police violated his Sixth Amendment rights by interfering with a lawyer's efforts to contact him. But petitioner had no Sixth

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[3] Petitioner has abandoned any argument that his Sixth Amendment right to counsel attached when he was taken before a Maryland State commissioner on the evening of September 9, 1996, for purposes of setting petitioner's bond on Maryland charges stemming from the murder of Keith Simms. Cf. p. 5 & n.1, supra. In any event, such an argument would lack merit. While that appearance might have triggered petitioner's Sixth Amendment rights with respect to the Maryland charges, see Rothgery, supra, it did not initiate adversary proceedings on the separate D.C. charges in this case. See Texas v. Cobb, 532 U.S. 162, 172-174 (2001) (Sixth Amendment right to counsel is offense specific). Moreover, petitioner had waived any right to counsel before his appearance before the commissioner, see Patterson v. Illinois, 487 U.S. 285, 292-296 (1988), and he did not subsequently invoke it.

Amendment right to counsel at the time of that attempted contact. And the police had no obligation under the Fifth Amendment to inform petitioner whether someone claiming to be his lawyer had called. See Moran v. Burbine, 475 U.S. 412, 422-423, 428 (1986) (officers do not undermine Fifth Amendment protections under Miranda in failing to inform suspect that lawyer has called); Pet. App. A12. Similarly, while the court of appeals agreed that DeLoatch erred in his initial attempt to question petitioner, id. at A15, it concluded that the totality of the circumstances showed that that "isolated act did not invalidate [petitioner's] subsequent waiver of [petitioner's Fifth Amendment] rights or make his confession inadmissible." Ibid. Petitioner cites no decision holding otherwise. See Pet. 14-15.

2. Petitioner accordingly claims (Pet. 15-18, 21) that the court of appeals erred in finding that he voluntarily waived his Fifth Amendment rights. Two lower courts have reviewed that fact-intensive question and have correctly concluded, based on the totality of the circumstances, that petitioner's statements were voluntarily, knowingly, and intelligently made. Under this Court's two-court rule, further review of that fact-bound determination is unwarranted. See Exxon Co. v. Sofec, Inc., 517 U.S. 830, 841 (1996) (quoting Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949)); Branti v. Finkel, 445 U.S. 507, 512 n.6 (1980).

a. In any event, petitioner's contention that he invoked his right to counsel by checking "no" to a question on his initial waiver form is unsound. The form asked petitioner whether he "want[ed] to make a statement at this time without a lawyer." Pet. App. A13. Petitioner's response did not unambiguously invoke his right to counsel because the question itself creates ambiguity by merging the separate questions of a suspect's willingness to speak with his willingness to speak without a lawyer. Id. at A13-A14. Indeed, petitioner himself confirmed the ambiguity by explaining to Detective DeLoatch that he answered "no" to that question because he wanted to provide an oral but not a written statement. Id. at A6. Petitioner again confirmed that his response was at best ambiguous by stating later that he never requested a lawyer that day. Id. at A7, A14. Authorities need not cease questioning when the suspect's invocation of his right to counsel is ambiguous, Davis v. United States, 512 U.S. 452, 459-462 (1994), and both courts below correctly concluded that petitioner's responses were ambiguous.[4]

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[4] Petitioner misreads (Pet. 21) the decision of the court of appeals in claiming that the court interpreted his initial response to the ambiguous waiver form as an affirmative waiver of his right to counsel. The court considered whether petitioner had invoked (not waived) his right to counsel in the morning of September 9, 2006, and concluded that he had not unambiguously done so. Pet. App. A14.

Petitioner also asserts (Pet. 21) that, unlike the courts below, the state court in Wantland v. Maryland, 435 A.2d 102, 105 (Md. Ct. Spec. App. 1981), found a similar form unambiguous. The

b. Petitioner did initially invoke his right to remain silent, Pet. App. A14, but his subsequent statements are admissible if his "right to cut off questioning was scrupulously honored." Michigan v. Mosley, 423 U.S. 96, 104 (1975) (internal quotation marks omitted). This Court has identified four factors that govern the relevant analysis: (1) whether the suspect was initially advised of his Fifth Amendment rights and whether he orally acknowledged them; (2) whether the police immediately ceased questioning and did not attempt to resume the questioning or ask the suspect to reconsider; (3) whether there was a break between the suspect's invocation of the right to remain silent and further questioning, including whether a significant amount of time lapsed between the two interrogations, whether the same officer conducted both interrogations, and whether the second interrogation pertained to a separate crime; and (4) whether the suspect was given fresh Miranda warnings before the subsequent interrogation. Id. at 104-106.

The court of appeals applied this test and correctly held

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court in Wantland addressed the question whether Wantland waived his right to counsel after having initially invoked it. Id. at 102-103, 107-108. While the court briefly noted its conclusion that Wantland invoked his right to counsel after responding to a question similar to that at issue here, id. at 105, it is unclear whether the basis for the court's statement rests on the text of the question alone or on other circumstances. Moreover, because Wantland was decided long before Davis held that a Fifth Amendment right to counsel must be unambiguously invoked, Wantland, unlike the courts in this case, did not address whether Davis's standard had been met.

that, under the totality of the circumstances, petitioner's "right to cut off questioning" was fully honored. Pet. App. A14-A17. The police immediately ceased their questioning when petitioner first invoked his right to remain silent at 9:00 a.m. After an interval of more than four hours, with the exception of Detective DeLoatch's brief improper remarks around 10:45 a.m., petitioner himself initiated a conversation with DeLoatch and indicated that he wished to speak about the murders. DeLoatch, who had not participated in the initial questioning, then advised petitioner of his Miranda rights and petitioner, without prompting, clarified that he wanted to make an oral statement (but not a written one). Finally, petitioner confessed to his participation in the murders only after he met with Muhammad and learned that Muhammad had confessed and implicated petitioner. Ibid.

DeLoatch's isolated, albeit improper, comments to petitioner in the morning did not taint the voluntariness of petitioner's subsequent statements. As the court of appeals concluded, the timing of petitioner's confession demonstrates that petitioner's conversation with Muhammad (which petitioner himself requested) was "the key factor in prompting [petitioner] to confess." Pet. App. A16. Petitioner does not appear to take issue with this analysis of his waiver of his Miranda right to silence (see Pet. 15-18, 21 (focusing on right to counsel)), and, in any event, the fact-bound conclusions of the court of appeals warrant no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2008