IN THE
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 98-CF-1045

Marquette E. Riley,
Appellant,
vs.
United States,
Appellee.

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

PETITION FOR REHEARING AND SUGGESTION OF REHEARING *EN BANC*

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CONCISE STATEMENT OF ISSUES FOR *EN BANC* REVIEW AND THEIR IMPORTANCE

Appellant Marquette E. Riley challenged his conviction arguing that admission into evidence of a written confession obtained after he asserted his right to counsel and to remain silent violated the Fifth and Sixth Amendment rights. A Panel of this Court affirmed Riley's conviction, holding that, at the time of the arrest he did not have a right to counsel under the Sixth Amendment. It said his negative response when asked whether he was willing to talk to investigators without a lawyer present was not an assertion of the Fifth Amendment right. Even though it found that Riley had asserted his Fifth Amendment right to remain silent, and that a Prince George's County detective violated that right by making statements intended to subvert Appellant's invocation of the right, the Panel concluded that he eventually made a knowing, voluntary decision to waive the right.

The Court should vacate the Panel opinion because it is contrary to holdings in a long line of U.S. Supreme Court cases beginning with *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932). Under those decisions the Sixth Amendment right to counsel attaches when the government files a formal complaint charging a specific individual with committing the crime. That event marks the point when the investigation shifts from a search for a suspect to an organized effort to convict the accused.

In Riley's case, two days before the arrest and interrogation, the government filed criminal complaints charging him and three codefendants with first-degree premeditated murder and obtained arrest warrants. In his first encounter with Metropolitan Police detectives Riley asserted his right to counsel and to remain silent. But, beginning less than two hours later a Prince George's detective deliberately set out to coerce Appellant to confess, and he eventually succeeded some 14 hours after arrest.

The Panel reached its conclusion that the Sixth Amendment right had not attached by misinterpreting an unambigous statute stating that the filing of a criminal complaint before a judicial officer empowered to issue a warrant commences adversary judicial proceedings against

the accused. D.C. Code § 23-113(c)(3).

The Panel's conclusion that Riley never asserted his Fifth Amendment right to counsel conflicts with the Supreme Court's opinion in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and this Court's interpetation of the rights waiver form used in this case. *Tindle v. United States*, 778 A.2d 1077 (D.C. 2001). In addition, although the Panel found that the Prince George's detective improperly sought to elicit a confession, it never applied the correct test to determine whether Appellant's confession should have been suppressed. Because Riley asserted his right to counsel under the Fifth Amendment, as well as the Sixth Amendment, the detective's effort to obtain a confession without first granting access to a lawyer was presumptively prejudicial, and admission of the confession was a structural error requiring reversal. *McNeil v. Wisconsin*, 501 U.S. 171, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991).

Not only does the Panel opinion conflict with binding Supreme Court precedent, it is an invitation to over-reaching by investigators. It incorrectly teaches that police use of a single question that conflates the right to counsel and the right to remain silent satisfies the requirements of *Miranda, supra*, even though it places the burden on the defendant, who often is poorly-educated, to comprehend that simply answering "No" will be interpreted as a waiver of the more important right, the right to counsel. It teaches that police can mount a concerted effort to subvert a defendant's assertion of the right, so long as they then allow sufficient time to elapse, or create a diversion that permits the Court to conclude that something other than coercion induced a waiver.

For these reasons the Court *en banc* should grant this Petition, vacate the Panel opinion and reconsider the arguments presented by Riley.

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DISTRICT OF COLUMBIA COURT OF APPEALS

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

STATEMENT OF THE CASE

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

The grand jury indicted Riley for conspiracy to commit assault and murder in violation of D.C. Code § 22-105(a) (Count A), possession of a firearm during a crime of violence or dangerous offense in violation of D.C. Code § 22-3204(b) (Count B), unauthorized use of a vehicle in violation of D.C. Code § 22-3815 (Count C), assault with intent to kill while armed in violation of D.C. Code §§ 22-501 and 22-3202 (Count D), two counts of first-degree premeditated murder while armed in violation of §§ 22-2401 and 22-3202 (Counts E and F), and destruction of property in violation of D.C. Code § 22-403 (Count G). R. 7.

Counsel moved to suppress Riley's statements because police had interrogated him after he asserted his right to counsel. R. 11. The government opposed Riley's motion. R. 14, 15.

The Trial Court denied the motion April 22, 1998. R. 2, 2. Jury selection began that day and the trial ended April 29. *Id.* The jury returned guilty verdicts April 30, 1998 on two counts of

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

first-degree premeditated murder, possession of a firearm during a crime of violence, and assault with intent to kill while armed (Counts B, D, E and F). R. 2, 2. The Trial Court sentenced Riley to 30 years to life on each murder count, 5 to 15 years for possession of a firearm during a violent crime, and 10 to 30 years for assault with intent to kill while armed. Riley's aggregate D.C. sentence totaled 70 years to life, and he would have to serve mandatory terms totaling 65 years before becoming eligible for parole. *Id.*

Appellant filed a timely Notice of Appeal on July 9, 1998. R. 23. A Panel of this Court affirmed Riley's conviction in an opinion filed May 3, 2007.

STATEMENT OF FACTS

These homicides were part of a long-running feud between rival gangs, the Fairfax Village Crew in Southeast Washington and the Rushtown Crew in Suitland, Maryland.

Wayne Brown, a drug dealer, testified that in the summer of 1996 Rushtown Crew members Russell Tyler and Lawrence Lynch were shot and Lynch died of his wounds. Tr. 4/23/98, 43, 48. Believing that the Fairfax Village Crew committed the crimes, Marks, Muhammad and other gang members discussed seeking revenge. *Id.* at 45, 49 – 50.

Stroman, a Rushtown Crew member, testified that in mid-August Fairfax Village Crew members attacked him. Tr. 4/27/98, 59 – 61. On August 20 Stroman, Muhammad, Riley and TJ went to Marks's house. *Id.* at 63 – 64. Several other individuals were at the house, and Muhammad said he knew where the Fairfax Village Crew would be that evening. *Id.* at 67 – 70. Stroman drove a blue car with Muhammad, Marks and Riley as passengers. *Id.* All were armed.

Larnell "Shawn" Littles, 19, and Larell "Ike" Littles, 12, were outside their home in the 3800 block of Pennsylvania Avenue, S.E., with Robert Johnson, 13, who testified that a car drove into the parking lot next door and several people jumped out of it and started shooting. Tr. 4/23/98, 138 – 44. Shawn ran toward the house. *Id.* at 144. Johnson hid behind some bushes and after the shooters left he saw Ike lying on the ground. *Id.* at 148 – 9.

Stroman testified that Muhammad jumped out of the car. Tr. 4/278/98, 71. After he shot Larnell Littles, according to Stroman, Muhammad started shooting at Larell Littles. *Id.* at 72.

Then, Muhammad ordered the others to start shooting, and Marks and Riley complied. *Id.* at 72 – 3. He said they drove back to Marks's house. *Id.* at 75, 101 – 3.

Brown said he went to Marks's house shortly after the defendants returned from Fairfax Village and retrieved the shotgun he had loaned to Marks earlier. Tr. 4/23/98, 55. The defendants and several other men were there talking about the shooting, and they decided to burn the blue car used in the crime, he testified. *Id.* at 62. Brown bought gasoline and then followed in another car as Muhammad and Riley drove to a place where they could burn the vehicle. *Id.* at 66 – 8.

With assistance from the Prince George's County Police, D.C. detectives arrested Muhammad, Marks, Riley and Stroman early September 9, 1996 at their homes in Suitland, and took them to the Prince George's County Police headquarters. Investigators arrested Riley at about 7 a.m. and MPD detectives Oliver Garvey and Don Sauls attempted to interview him at about 9 a.m. Tr. 4/20/98, 151. When they advised Riley of his rights using a Prince George's County Police rights waiver form, Riley indicated that he did not want to answer questions without a lawyer present. Garvey asked if "he was sure he did not want to talk to us? He said, yes." *Id.* at 148 – 50, 154. They left the interrogation room and Garvey gave the form to a Prince George's County detective, saying Riley had "invoked." *Id.* at 150, 154.

At about 10:45 a.m., on orders from his supervisor, Det. Dwight S. DeLoach entered the interrogation room and told Riley "how important it was for him to tell his side of the story." Tr. 4/20/98, 161, Tr. 4/21/98, 208. He had been ordered to focus on the Fairfax Village homicide. Tr. 4/20/98, 163. DeLoach did not advise Riley of his rights, Tr. 4/21/98, 208, even though Riley denied involvement in the Fairfax Village homicides. *Id.* at 210. DeLoach next entered the interrogation room at 1:30 p.m. "to basically check on him and also talk to him again," and "he wanted to tell me his side of what his participation was in D.C.… He kept blurting out things." Tr. 4/20/98, 168. The detective advised Riley of his rights and Appellant again checked the box indicating he did not want to answer questions without a lawyer present. Tr. 4/20/98, 170. DeLoach said, "I told him, in order for me to discuss this case with him to go into the details of the case, in order for him to talk to me about the case, that he had to sign this waiver of rights."

Tr. 4/21/98, 217. After Riley changed his answer and signed the waiver DeLoach began questioning him about the D.C. homicide. Tr. 4/20/98. 173. DeLoach rejected Riley's denial of involvement, *Id.* at 194, and left Appellant alone until about 6:40 p.m., when he took Riley to be booked and presented before a commissioner for a bond hearing. Tr. 4/20/98, 174.

While being fingerprinted Riley asked to talk to Muhammad, DeLoach said. Tr. 4/20/98, 176 & Tr. 4/21/98, 190. At about 7:30 p.m. he brought Muhammad into the room. Tr. 4/20/98, 177. "I told Sayid to talk to Marquette," and the "very first word that was said was Mr. Muhammad told Mr. Riley to go ahead and tell us everything because the police knew, he told them everything that he knew," DeLoach testified. *Id.*, Tr. 4/21/98, 194. DeLoach then worked with Riley from 8 p.m. to 9:41 p.m. on a written statement. Tr. 4/21/98, 197.

In a mid-trial *voir dire* DeLoach examined a log of events September 9, 1996 which included a notation that at 6 p.m. an attorney had called to say he represented Riley and that police should not question him. Tr. 4/27/98, 193 – 4. The detective said the note was in Prince George's Police Sgt. Daniel Smart's handwriting, and that no one had told him about the call. *Id.* DeLoach said he saw the note for the first time in Court and he was surprised that no one informed him about it September 9, 1996. [2] *Id.* at 197.

Smart could not recall when he learned that Appellant had refused to waive his rights. Tr. 4/28/98, 210. When he ordered DeLoach to interview Riley he "was aware … that … Garvey, had … attempted to interview Mr. Riley. I did not know ... if they had obtained anything from him. I do know they were in there for a very brief period of time." *Id.* at 211. Smart said he wrote the note on the log when the lawyer called but did not communicate that information to DeLoach because "I don't know who Mr. Marc O'Bryan is.… It has been my position that if an attorney wants to represent someone they will at least come down to the station … in person…." *Id.* at 215. He added that, "I was aware that Mr. Riley had waived his rights to an attorney and it is my understanding that an attorney can't call someone and say I am representing this individual

[2] The note said "Mark O'Brian called. Advised he was representing Marquette Riley gave phone number 627-8970. Recess/desist." Tr. 4/27/98, 197.

without that person requesting an attorney." *Id.* He said that normally he would have informed the defendant about such a call but he did not do so in this case. *Id.* at 215 – 6.

ARGUMENT

When police arrested Riley 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. He asserted his right to counsel and his Fifth Amendment protection against self incrimination the first time he met with Metropolitan Police detectives.

DeLoach violated Appellant's Fifth and Sixth amendment rights at 10:45 a.m. when he entered the room intent on eliciting a confession and made statements designed to subvert Riley's earlier decision. *McNeil, supra*, 501 U.S. at 176 – 7; *Maine v. Moulton*, 474 U.S.159, 177 n. 14, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985). When DeLoach re-entered the interrogation room at 1:30 p.m. he again violated Appellant's rights. Police had not provided Riley a lawyer and he had remained tethered in the same room almost the entire time.[3]

The Panel rejected Riley's Sixth Amendment argument, concluding erroneously that it is not supported by controlling Supreme Court precedent. Despite the unambiguous wording of D.C. Code § 23-113(c) that "A prosecution is commenced when: … (3) a complaint is filed before a judicial officer empowered to issue an arrest warrant; provided, that such warrant is issued without unreasonable delay," and the fact that the Complaint was filed September 7, the Panel said no criminal charges were pending against Riley when he was arrested.

Although it found that Riley asserted his Fifth Amendment right to remain silent, it agreed with the Trial Judge that, due to the ambiguity of the Prince George's rights waiver form, he did not assert his Fifth Amendment right to counsel. Finding that DeLoach violated Riley's right to remain silent, the Panel held that Appellant eventually made a valid waiver of the right. It erroneously concluded that despite DeLoach's deliberate efforts to elicit a confession, Riley's

[3] It is irrelevant that DeLoach asked no questions, he intended to elicit a response. *See, e.g., Brewer v. Williams*, 430 U.S. 387, 399, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977); *Rhode Island v. Innis*, 446 U.S. 291, 299, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980)(applying the same principle in the context of a request under the Fifth Amendment for the assistance of counsel).

decision to confess resulted from his conversation with codefendant Muhammad.

THE SIXTH AMENDMENT VIOLATION

Relying on *Kirby v. Illinois*, 406 U.S. 682, 688 – 9, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972), the Panel erroneously concluded that Riley's Sixth Amendment right to counsel had not attached because no "adversary judicial proceedings [had] been initiated" against him "by way of formal charge, preliminary hearing, indictment, information or arraignment." *Slip Op.* 23. Noting incorrectly that § 23-113 states that " 'prosecution' of an individual commences with the filing of a complaint *to obtain an arrest warrant,*" the Panel asserted that, "these are not the same 'formal' charges of which *Kirby* speaks." *Id.* at 24 – 5 (emphasis added). [4]

The purpose of § 23-113 is to establish statutes of limitations for crimes under D.C. law, when the limitation period begins, and what events toll the limitations period.[5] Council of the District of Columbia Report, Bill No. 4-104, the "District of Columbia Criminal Statute of Limitations Act of 1982" (Judiciary Report), 1, 6. It puts a "complaint [] filed before a judicial officer empowered to issue an arrest warrant" on the same footing as an indictment or information. § 23-113(c)(3). The report accompanying Bill 4-104 makes clear that subsection (c) "would [] provide, for the first time, statutory criteria for determining when an offense has been committed and when a prosecution has commenced." Judiciary Report, 6. "The basic purpose of this subsection is to insure that the accused will be informed of the decision to prosecute and the general nature of the charge within such time to allow the defendants to prepare their defenses before evidence of their innocence becomes weakened with age." *Id*.

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[4] *Kirby* is distinguishable on its facts, as is *United States v. Gouveia*, 467 U.S. 180, 184, 104 S. Ct. 2292, 81 L. Ed. 2d 146 (1984), also cited by the Panel. Kirby was arrested without a warrant after police found him in possession of items taken in a robbery. Gouveia, a federal prison inmate, was subject to administrative detention before he was indicted. The Court rejected his claim that he had been deprived of his Sixth Amendment right to counsel while in detention because he had not been arrested or charged.

[5] D.C. Code § 23-561, and D.C. Crim. R. 4 and D.C. Crim. R. 9, establish procedures for obtaining arrest warrants. Rule 4 requires the filing of a Complaint, "a written statement of the essential facts constituting the offense charged," to obtain a warrant. Rule 9 establishes a nearly identical procedure for obtaining a warrant based on an indictment or information.

Although the language of the statute is unambiguous, the Panel erroneously interpreted it as establishing a procedure for obtaining a warrant, with the filing of a complaint as the first step. Yet it made no effort to explain why the Sixth Amendment right attaches if the government files an indictment or information to obtain a warrant, but not when it files a complaint.

As a practical matter the September 7, 1996 Complaint was the only charging document in this case until the grand jury returned an indictment over a year later. It started the prosecution of Riley for first-degree murder within the meaning of the statute and the Sixth Amendment.

The Panel concluded that

> If this court were to hold that the Sixth Amendment right to counsel attaches when the government files a complaint to obtain an arrest warrant, "we would be granting greater protection to persons arrested with warrants than without, thus discouraging the use of warrants in making arrests." … Moreover, "holding that . . . the issuance of an arrest warrant is akin to the initiation of adversary judicial proceedings would result in swinging the pendulum of criminal justice far too distant from society's interest in effective and meaningful criminal investigations."

In reaching this conclusion the Court relied on *United States v. Moore*, 112 F.3d 1154, 1156 (8th Cir, 1997)(which specifically limits its holding to application of Fed. R. Crim. P. 3); and *United States v. Duvall*, 537 F.2d 15, 17 – 18 (2d Cir. 1972)(addressing issuance of an arrest warrant under Fed. R. Crim. P. 4). Citing *Chewning v. Rogerson*, 29 F.3d 418, 420 (8th Cir. 1994), the *Moore* Court, *supra*, specifically stated that it was not addressing whether the Sixth Amendment right to counsel attaches under state law upon the filing of a criminal complaint. The *Duvall* Court noted that in interpreting a New York statute similar to § 23-113 the Second Circuit had held that the right attached when the government filed a complaint to obtain a warrant. *Id.* at 17 (citing *United States ex rel. Robinson v. Zeiker*, 468 F.2d 159 (2d Cir. 1972), *cert. denied*, 411 U.S. 939, 93 S. Ct. 1892, 36 L. Ed. 2d 401 (1973).

The Panel's reliance on *State v Beck*, 687 S.W.2d 155, 160 (Mo. 1985), is equally unavailing. In that case Appellant made a statement after the prosecutor filed an *ex parte* affidavit supporting a request for an arrest warrant, a procedure similar to that discussed with approval in *Duvall*. In fact, the Missouri Supreme Court had previously held that, "Although filing of a complaint does not constitute a 'criminal prosecution' …, filing of a complaint is the first step in

the institution of a criminal charge under Missouri procedure. … The filing of a complaint and issuance of a warrant is the initiation of 'adversary judicial proceedings' within the *Kirby* case." *Arnold v. State* 484 S.W.2d 248, 250 (Mo. 1972).

There is no precedential basis for the Panel's conclusion that it would violate Fifth Amendment equal protection principles to recognize the Sixth Amendment right to counsel when a defendant is arrested on a warrant after a Complaint has been filed, but not to afford the same protection to a suspect arrested without a warrant.

> [A]fter a formal accusation has been made — and a person who had previously been just a "suspect" has become an "accused" within the meaning of the Sixth Amendment — the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation.

Michigan v. Jackson, 475 U.S. 625, 632, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986).

The Supreme Court has drawn a similar distinction between suspects and accused persons in other contexts, holding, for example, that a show-up identification shortly after a warrantless arrest does not implicate the Sixth Amendment right to counsel, but a line-up identification after a charge is filed does. *Kirby, supra*, at 689; *Gilbert v. California*, 388 U.S. 263, 272, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967)(line-up in absence of counsel after charges filed violates Sixth Amendment). In the former situation society's interest in quickly identifying and detaining the perpetrator, and the innocent detainee's interest in exoneration militate in favor of permitting the show-up without counsel. *Stovall v. Denno*, 388 U.S. 293, 301 – 2, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967). In the latter, "the government's role has shifted from investigation to accusation" and the defendant is "faced with the prosecutorial forces of organized society," and counsel must be present. *Michigan v. Harvey*, 494 U.S. 344, 358, 110 S. Ct. 1176, 108 L. Ed. 2d 293 (1990)(quoting *Kirby, supra*, at 682.).

Applying the plain meaning of § 23-113(c) will not unduly impair society's interest in effective investigations. In the U.S. District Court in D.C. the government obtains indictments in most criminal cases before it obtains arrest warrants. Thus, in most federal criminal cases here the Sixth Amendment right to counsel has attached before investigators make arrests. There is no

evidence that society has suffered because federal investigators cannot engage in the clearly improper tactics DeLoach employed in this case.

Finally, holding that the Sixth Amendment right to counsel attaches with the filing of a complaint under § 23-113(c) will not, as the Panel claims, discourage police from obtaining arrest warrants. D.C. Code § 23-581 clearly defines the limited circumstances under which police may make arrests without first obtaining warrants.

If anything, the Panel's opinion is an invitation to over-reaching by local police.

THE FIFTH AMENDMENT VIOLATION

The Panel held that because the Prince George's Police rights waiver form is ambiguous, asking whether the suspect is willing to answer questions without a lawyer present, the Trial Court correctly found that Appellant asserted his right to remain silent but not his right to counsel. *Slip Op.* 28 – 30. The Panel is wrong for several reasons. First, this Court and the Maryland Court of Special Appeals have interpreted a "No" answer on that form as an assertion of both rights. *Tindle v. United States*, 778 A.2d 1077 (D.C. 2001), *Waitland v. State*, 49 Md. App. 636, 435 A.2d 102, 105 (Md. 1985). Second, if the waiver form is read as not explicitly explaining the right to counsel and ascertaining whether Riley was willing to waive the right, it does not satisfy the requirements of *Miranda v. Arizona*, 384 U.S. 436, 475, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Third, to the extent that the question on the form is ambiguous, it must be construed in Riley's favor because a criminal defendant's silence cannot be construed as a waiver. *Id.*; *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).

Contrary to the Panel's holding, this is not a case where the defendant made an ambiguous verbal request for counsel, or, after waiving the right and submitting to interrogation for some period, changed his mind and asserted the right. To hold in this situation that Riley waived his Fifth Amendment right to counsel by answering "No" to an ambiguous question posed in a standard police form would violate fundamental common law principles – that ambiguity in a document is to be construed against the party that drafted it — and would encourage police to employ vague rights waivers to circumvent *Miranda*.

The Panel correctly stated that appellate courts examine the totality of the circumstances to determine whether a defendant waived the Fifth Amendment right to remain silent. *Slip Op.* 30 – 36. But when the issue is whether the defendant waived his Fifth Amendment right to counsel, as in Riley's case, the Court does not apply a totality of the circumstances test to determine whether DeLoach's deliberate acts[6] induced Appellant to waive his rights.

> Once a suspect asserts the right, not only must the current interrogation cease, but he may not be approached for further interrogation "until counsel has been made available to him," … which means, we have most recently held, that counsel must be present…. If the police do subsequently initiate an encounter in the absence of counsel (assuming there has been no break in custody), the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards.

McNeil, supra (citing *Minnick v. Mississippi*, 499 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2[d] 489 (1990); *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2[d] 378 (1981)). The constitutional violation is a structural error, not subject to harmless-error analysis.

CONCLUSION

For the reasons stated above and any others that appear to the Court Appellant Marquette E. Riley respectfully requests that the Court grant this petition, vacate his conviction and remand the case for a new trial with instructions that all oral and written statements police obtained from him in this case must be suppressed.

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[6] Even if this Court credits DeLoach's claim that he was unaware Riley asserted his rights at 9 a.m., it must vacate Appellant's conviction. There is no "good faith exception" to the exclusionary rule.

> [C]ustodial interrogation must be conducted pursuant to established procedures, and those procedures in turn must enable an officer who proposes to initiate an interrogation to determine whether the suspect has previously requested counsel. … The police department's failure to honor that request cannot be justified by the lack of diligence of a particular officer.

Arizona v. Roberson, 486 U.S. 675, 687 – 8, 108 S. Ct. 2093, 100 L. Ed. 2[d] 704 (1988).

> Sixth Amendment principles require that we impute the State's knowledge from one state actor to another. For the Sixth Amendment concerns the confrontation between the State and the individual. One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court).

Michigan v. Jackson, supra, at 634 (citing *Moulton, supra*, 474 U.S. at 170 – 1).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert S. Becker, counsel for Marquette E. Riley, certify that on November 17, 2003 I served a true copy of the attached Petition for Rehearing and Suggestion of Rehearing *en Banc* by first-class mail on counsel listed below.

____

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