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IN THE SUPREME COURT OF THE UNITED STATES

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KANSAS, :

Petitioner :

v. : No. 07-1356

DONNIE RAY VENTRIS. :

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Washington, D.C.

Wednesday, January 21, 2009

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:15 a.m.

APPEARANCES:

STEPHEN R. McALLISTER, ESQ., Solicitor General, Topeka, Kan., on behalf of the Petitioner.

NICOLE A. SAHARSKY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

MATTHEW J. EDGE, ESQ., Assistant Appellate Defender, Topeka, Kan.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:15 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 07-1356, Kansas v. Ventris.

General McAllister.

ORAL ARGUMENT OF STEPHEN R. McALLISTER

ON BEHALF OF THE PETITIONER

MR. McALLISTER: Mr. Chief Justice, and may it please the Court:

The Court has always held that a defendant's voluntary statements obtained in violation of constitutional standards may be used for impeachment purposes when the defendant testifies at trial. The Court has excluded statements for all purposes only when they are involuntary or have been compelled.

The question in this case is whether voluntary statements obtained in violation of the rule of Massiah v. United States should be treated differently than all other voluntary statements. The answer is no for at least three reasons.

First, permitting the impeachment use of voluntary statements obtained in violation of constitutional standards is necessary to prevent perjury by criminal defendants.

Second, in terms of the effect at trial,

1 there's no basis for distinguishing a voluntary statement
2 obtained in violation of the Massiah rule from Fourth
3 Amendment violations, Miranda violations, or violations of
4 the rule of Michigan v. Jackson. In all of those
5 situations the resulting evidence may limit defense
6 counsel's options at trial, but there's no basis in that
7 respect for distinguishing a Massiah violation. It has no
8 different effect than those others.

9 Also, the Sixth Amendment right to counsel does
10 not include a right to commit perjury or to have the
11 assistance of counsel in presenting false testimony.

12 JUSTICE SCALIA: When does -- when does the
13 Sixth Amendment violation occur?

14 MR. McALLISTER: That question, Your Honor, as
15 you realize, is debated a bit in the briefs. It's --
16 Kansas, for purposes of deciding this case, is willing to
17 accept the position of the United States and the Respondent
18 that it occurs when the statement is admitted at trial,
19 although the cases have not necessarily definitively
20 resolved that question. We, frankly, think it's
21 unnecessary to answer the question because it's a minimal
22 point in terms of potential deterrent -- deterrents that
23 operate in this setting --

24 JUSTICE SCALIA: Do you -- do we have any other
25 situation in which, for purposes of impeaching testimony, a

1 constitutional violation is allowed?

2 MR. McALLISTER: Well, that's the -- that's one
3 of the intricacies of -- of this particular question,
4 although arguably in the -- in the Fifth Amendment context
5 certainly, the Miranda warnings are given. The police
6 don't do that. And -- and if that is the completion of the
7 violation, it's -- it's analogous in many ways, if one
8 looks back at the cases.

9 The Court has suggested that the actual
10 violation is the use of the statement at trial against the
11 defendant, not simply obtaining it without the necessary
12 warnings being given. So we would argue that is, in
13 fact --

14 JUSTICE SCALIA: It's parallel to the Fifth.

15 MR. McALLISTER: It's parallel to the Fifth in
16 this respect, and certainly, distinct from the Fourth in
17 that respect. But we don't think it matters at the end of
18 the day. If -- if one were to treat it like the Fourth
19 Amendment, so that the violation is complete when the
20 police send in an informant and he works hard to elicit
21 statements in violation of the Messiah rule, if it's
22 complete at that time, then all of the analysis from the
23 Fourth Amendment cases is equally applicable here.

24 If the violation does not incur -- occur until
25 it's presented at trial, then it's analogous more to the

1 Fifth Amendment and also to the Michigan v. Jackson and
2 Michigan v. Harvey cases, which were a Sixth Amendment
3 right to counsel violation, in which case the Court says it
4 was wrong for the police to initiate interrogation after he
5 had invoked his rights, but will let the statement be
6 admitted for impeachment purposes. So it's also exactly
7 analogous to what the Court did in Harvey itself.

8 JUSTICE GINSBURG: It would make no difference,
9 I take it, General McAllister, if this had been a police
10 officer who was pretending to be a cellmate. In this case
11 it was a snitch, but it could be the police officer doing
12 inside the cell what he couldn't do outside. That is, the
13 police officer outside who wants to interrogate must inform
14 the arrestee of his Miranda rights, but inside the cell,
15 the police could pretend to be a jailbird and they can --
16 can get the information that way. Is that --

17 MR. McALLISTER: Well, Justice Ginsburg, I
18 believe that is correct if -- if it's for example, an
19 undercover officer, someone has gone in -- and in fact,
20 there are cases such as Weatherford v. Bursey that involved
21 an undercover agent who was present for meetings with the
22 defendant and his counsel, and the Court indicated that the
23 presence alone would not violate the right to counsel.
24 It's the deliberate elicitation and use of statements
25 obtained from the defendant that would violate the Sixth

1 Amendment.

2 So if a -- a cellmate, another defendant, is
3 the informant who listens and hears, it wouldn't make any
4 difference under the Court's cases if, in fact, it was a
5 police officer pretending to be a cellmate who listens and
6 hears, just as it wouldn't make -- it wouldn't be a
7 violation if there were a recording device in the cell and
8 the defendant talked to himself, which there are cases of
9 that, and it was picked up on the recording device. The
10 mere listening -- that goes to whether there's a violation
11 at all. But the who, there isn't -- it wouldn't matter for
12 our purposes.

13 JUSTICE GINSBURG: So the police know that they
14 -- they can get around the clear prohibition on their
15 questioning without Miranda warnings by pretending to be a
16 jailbird.

17 MR. McALLISTER: Potentially, yes. But, again,
18 the -- the violation would go to what happens in the cell.
19 So if the police officer is pretending to be another
20 defendant and sits in the cell and the defendant starts
21 telling the officer things, that would not violate the
22 Sixth Amendment at all under the --

23 JUSTICE GINSBURG: No, I'm -- I'm assuming
24 we're not in the area where the jail mate is -- is simply
25 passive. In -- in this case, the -- the jail mate made a

1 statement that encouraged the defendant. He wasn't just
2 passive. He was encouraging the defendant to speak.

3 MR. McALLISTER: There is certainly testimony
4 about what he was told to do and what he did. It does not
5 suggest aggressive efforts, certainly, to find out. He may
6 not have been completely silent, but he certainly didn't
7 say, tell me what you did, let's talk about your crimes.
8 But he did make one arguably suggestive statement to the
9 defendant.

10 JUSTICE GINSBURG: Anyway, your answer is that
11 a police officer could affirmatively elicit testimony?

12 MR. McALLISTER: No, not that he could
13 affirmatively elicit. That's the dividing line between the
14 Massiah and Kuhlmann case. If he was in the cell -- well,
15 I guess what I'm suggesting --

16 JUSTICE GINSBURG: But you're -- you're talking
17 about impeachment only. We're not talking about the case-
18 in-chief. So if the police -- he can't -- outside, when he
19 questions the defendant and gives no Miranda warnings,
20 that's inadmissible. Right?

21 MR. McALLISTER: Outside of -- well, it would
22 still be admissible for impeachment. And we're asking for
23 basically the same rule. So it would be the same thing if
24 he were in the cell, deliberately elicits, knows he's
25 violating Massiah, it couldn't be used in the government's

1 case-in-chief, but it could be used for impeachment
2 purposes. But that would be true of Miranda. If the
3 officer deliberately failed to give the warnings, got a
4 statement, they would not be admissible in the case-in-
5 chief; but -- the Court's cases are very clear -- they would
6 be admissible for impeachment purposes. So we're asking
7 for the precise parallel rule.

8 JUSTICE GINSBURG: But you're -- you're making
9 no distinction, then, between the Fifth and Sixth
10 Amendment.

11 MR. McALLISTER: Well, there may be
12 distinctions, and -- and there is an distinction in the
13 text of the Fifth Amendment -- suggests actually a rule of
14 exclusion when you truly have -- when there truly is a
15 compelled statement. And the Court has recognized that in
16 cases such as Portash, where the -- the witness is given
17 use immunity, testifies before the grand jury and the
18 government later tries to use it against him. The Court
19 says, no, you cannot use that testimony for any purpose.
20 So there is a difference between the Sixth Amendment and
21 Fifth Amendment in that respect.

22 But what I am suggesting is the way Massiah
23 and Miranda operate is similar in this context, that a
24 violation results in suppression of the evidence from the
25 government's case-in-chief, but it remains available for

1 use as impeachment.

2 JUSTICE GINSBURG: What about the argument that
3 essentially this is like taking a pretrial deposition, only
4 one side isn't represented?

5 MR. McALLISTER: Well, with all due respect to
6 that argument, Your Honor, we disagree with that. There
7 are strong incentives for the police, frankly, not to do
8 this. And in part one of the reasons -- well, there's two.

9 One is the police know if this is truly in
10 violation of the Sixth Amendment, then nothing can be used
11 in the case-in-chief. So, at most, it is impeachment if
12 the defendant testifies and if the defendant testifies
13 inconsistently with whatever is elicited.

14 But furthermore, given the line the court has
15 drawn between Massiah and Kuhlmann and what goes on with
16 the informant in the cell, if they can hear the statements
17 without deliberately eliciting them, if you will, if the
18 informant is present, the defendant wants to talk, starts
19 chatting, they discuss the crime, those statements, the
20 Court has held in Kuhlmann, are admissible for all
21 purposes, because they are not a Sixth Amendment violation
22 at all.

23 So, the police do have some -- some strong
24 incentives to actually try to gather the evidence, if
25 they're going to, in a way that makes it usable in the

1 prosecution's case-in-chief. There's much less value to
2 having it solely for impeachment, which is always going to
3 be speculative if it would ever even be used. It would
4 depend on if the defendant testifies and if he testifies
5 inconsistently with what he has told an informant.

6 And in that regard, there are other deterrents
7 I'd like to mention here as well. The informant in this
8 case, for example, in jail recognized that he did not want
9 to be an aggressive questioner or -- or obvious as a
10 government agent. In fact, he said, I didn't really want
11 to ask him questions because I was afraid if he felt I was
12 being too nosey, I might get hurt. And so, the informants
13 have their own incentives to be careful here.

14 And in this case, it's also important to
15 remember that deterrence is simply one side of the balance.
16 And the Court has said many times even if there would be
17 some deterrent effect to extending the rule to include
18 impeachment, that doesn't answer the question whether it
19 should, in fact, be excluded. That still must be weighed
20 against the costs on the other side.

21 And the Court has numerous cases emphasizing
22 the costs that are present on the other side of this case.
23 Perjury by criminal defendants is a primary one, but also
24 cases talking about the importance of allowing the jury to
25 hear the truth and to search for truth.

1 The jury here gets to evaluate and did, I would
2 argue, quite effectively from Mr. Ventris' standpoint,
3 evaluate the informant's credibility. The jury was -- was
4 informed, cross-examination of the informant's
5 circumstances, what benefit he received, who he was, all --
6 all the things they might want to know in deciding whether
7 to believe him. His testimony went not solely but
8 primarily to the question of who was the shooter in the
9 murder in the case, and the jury acquitted Mr. Ventris of
10 the murder charge. So they did not believe, at least
11 beyond a reasonable doubt, that he in fact was the shooter.
12 And that is precisely how this should work.

13 We're not saying informants are always 100
14 percent reliable, but we're saying the Court has a long
15 tradition, the country has a long tradition of putting this
16 evidence in front of a jury. It's tested by cross-
17 examination, knowledge of what the incentives are, bringing
18 that out in front of the jury, and then the jury decides.
19 There are many of these cases where it's -- this was a
20 typical, one codefendant saying, he was the shooter, the
21 other defendant saying, no, she was the shooter. And the
22 informant simply had information that was relevant to the
23 credibility. And that's the way it was used in this case,
24 was as impeachment on rebuttal to evaluate Mr. Ventris's
25 testimony and whether the jury believed him or not.

1 The other thing I would remind the Court is we
2 are simply saying that the rule should be no exclusion
3 under the Sixth Amendment for impeachment purposes, but
4 that does not mean that the normal rules of evidence and
5 other rules of trial procedure do not apply. They do. And
6 they might well result in the exclusion of some potential
7 informant's testimony. So if the government were to want
8 to put on an informant who had been convicted many times of
9 perjury and the judge said, no, I just do not think this
10 evidence is credible enough to even put in front of the
11 jury, not this person, the ordinary rules of evidence and
12 trial procedure would operate. Furthermore, as happened in
13 this case, the judge can, and often will, give cautionary
14 instructions, limiting instructions. All of that remains
15 appropriate.

16 But there's simply no reason to exclude the
17 evidence as a matter of the Sixth Amendment right to
18 counsel. It would be inconsistent, frankly, with -- with,
19 really, the general tone and holdings of the cases in the -
20 - in the Fourth Amendment, Miranda, and even Sixth
21 Amendment territory, including primarily Michigan v. Harvey
22 and Nix v. Williams.

23 Unless the Court has further questions, I'll
24 reserve the remainder of my time for rebuttal.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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Ms. Saharsky.
ORAL ARGUMENT OF NICOLE A. SAHARSKY
ON BEHALF OF THE UNITED STATES,
AS AMICUS CURIAE,
SUPPORTING THE PETITIONER

MS. SAHARSKY: Mr. Chief Justice, and may it please the Court:

This Court has consistently allowed the use of voluntary statements obtained in violation of constitutional standards for impeachment purposes, and that same rule should apply here. There's no question that Respondent's statements were voluntary, and the substantial societal costs of allowing him to commit perjury unchecked greatly outweigh any speculative deterrence benefits that would flow from a per se rule of exclusion.

The purpose of the right to counsel is to provide an adversary process to ensure the defendant gets a fair trial. And to effectuate that right, the Court has excluded deliberately elicited statements from the government's case-in-chief. But not allowing the statements for impeachment purposes doesn't further that right. Instead, what it does is allow the defendant to distort the truth-seeking process, and that's just too high a price to pay.

CHIEF JUSTICE ROBERTS: Well, you say there's

1 no deterrent value, since the police are -- are not going
2 to do this, that they know they're not going to be able to
3 use this in their case-in-chief.

4 But there's also no down side, is there? I
5 mean, you say it's only for impeachment purposes, but, you
6 know, why not? He may take the stand. He may lie. Better
7 to have this in the bank instead of not.

8 MS. SAHARSKY: But there is a down side. I
9 mean, as this Court recognized in cases versus -- like
10 Hudson v. Michigan, for example, the police have their own
11 codes of conduct. They have training on constitutional
12 rules and standards. And if they violate those
13 constitutional rules and standards, it has real effect for
14 the police. It has effect in terms of internal discipline,
15 in -- in terms of limiting their career opportunities.

16 JUSTICE GINSBURG: Is that empirically really
17 verifiable? Do police officers who engage snitches, do they
18 get disciplined, especially if they are then able to
19 accomplish what was accomplished here? That is, the -- the
20 testimony -- the snitch is then able to testify after the
21 defendant testifies.

22 MS. SAHARSKY: I don't think that there's any
23 evidence in the briefs, and I am not aware of specific
24 instances of discipline, but I think that that's because
25 this situation arises pretty infrequently. You know, when

1 this came up in the Kansas Supreme Court, it was a case of
2 first impression. And as General McAllister noted, there
3 are a lot of reasons why the police would want to just
4 follow the rule in Kuhlman and send the informant in to be
5 a passive listening post because if --

6 JUSTICE GINSBURG: At the Federal level, is
7 there anything one way or another, any manual that
8 instructs a U.S. attorney about the use of snitches to
9 extract confessions?

10 MS. SAHARSKY: I think the Department of
11 Justice manual sets out this Court's rules in terms of the
12 Kuhlman case and the Henry case. And then, of course,
13 there are also State and the Model Professional Ethics
14 Rules that talk about when a prosecutor can contact a
15 person who is represented by counsel. And there are
16 limitations there as well, both in terms of the prosecutor
17 contacting a person represented or using an agent
18 contacting a person represented. But I mean, those are --
19 those are deterrents. I think the police discipline is a
20 deterrent.

21 But I think we also need to -- to focus on this
22 Court's cases in the Fourth and Fifth and Sixth Amendment
23 Jackson context that taking the evidence and making it
24 unavailable in the government's case-in-chief is a
25 substantial deterrent. This Court said in each of those

1 previous case that not having the evidence available in the
2 government's case-in-chief is a very high price to pay,
3 because that means that the government has to come up with
4 other evidence that can meet its burden of proving all of
5 the elements of the case beyond a reasonable doubt.

6 And, as General McAllister noted, it's really
7 very speculative, and the police certainly wouldn't know at
8 the time they're asking questions of the defendant, whether
9 this rebuttal impeachment evidence could ever be used.
10 It's entirely within the control of the defendant. It's
11 only if the defendant -- if the government first meets its
12 burden of proof with other evidence at trial, and then the
13 defendant decides to testify, and then he testifies
14 inconsistently with his prior statements.

15 And our position is at that point that the jury
16 should hear the conflicting evidence just as it has heard
17 it in all of these other previous cases and be allowed to
18 make a decision about who's telling the truth.

19 JUSTICE STEVENS: It seems to me you're just
20 confirming the answer to the Chief Justice's question.
21 There really isn't any down side. The worst -- the worst
22 that happens is maybe they can't use the stuff. But what
23 -- what's the down side?

24 MS. SAHARSKY: Again, I -- I think that there
25 is a down side in terms of police discipline and the

1 deterrence --

2 JUSTICE STEVENS: Has any police officer ever
3 been disciplined for doing this, do you know?

4 MS. SAHARSKY: I -- I --

5 JUSTICE STEVENS: I'd find it rather amazing if
6 he has.

7 MS. SAHARSKY: Again, I think that most police
8 officers just follow the rule that this Court set forth in
9 Kuhlmann, so that this -- this issue has not arisen
10 frequently. But, you know, even if you thought that there
11 would be some type of minimal deterrence benefit that would
12 arise from -- from not making the evidence available for
13 impeachment purposes, you have to balance it against the
14 cost to the truth-seeking process that would be incurred if
15 the defendant --

16 JUSTICE STEVENS: Well, defendants sometimes
17 lie, but sometimes people who are in this position in
18 prison are not the most trustworthy people either.

19 MS. SAHARSKY: I think if they're --

20 JUSTICE STEVENS: You could bring that out on
21 cross-examination. I understand that.

22 MS. SAHARSKY: That -- that is what I was going
23 to say. I mean, as General McAllister noted, that -- that
24 happened in this case. The prosecutor himself got up and
25 talked about the -- the informant's prior offenses, why the

1 informant was in jail, whether the informant received
2 anything in exchange for his testimony, the fact that the
3 informant had actually gone back to jail after testifying
4 -- or after serving as an informant in this case.

5 JUSTICE STEVENS: It seems to me that -- that
6 all confirms the fact, well, they have nothing to lose.
7 Maybe we've got one witness who's not very persuasive, but
8 no harm in giving it a try.

9 MS. SAHARSKY: I think that the -- the fact
10 that the evidence would be unavailable in the government's
11 case-in-chief really is a strong price that the government
12 pays. And -- and this Court recognized it in -- in Havens,
13 in Walder, in Harris, in Hass, in Harvey, and -- and all of
14 those prior cases. And there's just -- there's not any
15 reason to depart from them because the -- the other side of
16 the balance is that, you know, you're letting a defendant
17 to get up and take the stand and -- and not subject himself
18 to this prior statement.

19 And this -- this prior statement, if believed
20 by the jury, is incredibly important to his credibility,
21 probative with respect to whether the crimes were committed
22 and the defendant is telling the truth.

23 JUSTICE STEVENS: If it is truthfully reported.
24 Of course, this is all an issue of credibility in all of
25 these cases.

1 MS. SAHARSKY: Yes. Every case has a question
2 about someone's credibility, some witness's credibility,
3 and that's for the jury to decide. And in -- in this case
4 there was ample cross-examination. There was the limiting
5 instruction that the State mentioned.

6 I mean, clearly the jury did its job here
7 because it went back and it considered all this
8 information. And it didn't come back with a -- a verdict
9 -- although you, of course, never know exactly what the
10 jury is thinking, it didn't come back with a verdict
11 suggesting it just reflexively believed the informant's
12 testimony. So --

13 JUSTICE SCALIA: Ms. Saharsky, I'm -- I'm
14 still a little hung up on -- on whether we would be
15 allowing a constitutional violation. General McAllister
16 said that in the Fifth Amendment area, we -- we indeed
17 allow -- allow it to be introduced in rebuttal even though
18 that is the actual constitutional violation.

19 Is that the case other than in the Miranda
20 situation? I mean, suppose you have a generally coerced
21 confession. Would we -- would we permit that to go in?

22 MS. SAHARSKY: Certainly not. In the Fifth
23 Amendment context, the text of the amendment itself would
24 prohibit the use of that statement for any purposes.

25 JUSTICE SCALIA: Exactly. Well, why -- why is

1 not that the case with the -- the right to counsel?

2 MS. SAHARSKY: Because the text of the Sixth
3 Amendment doesn't say anything about the exclusion of
4 evidence at trial. What it does is it guarantees counsel
5 for a purpose, and if -- and that purpose is to ensure an
6 adversary process at trial. And if counsel is not afforded,
7 then it's up to the courts to determine what the remedy is.

8 JUSTICE SCALIA: But its real meaning is that
9 counsel is guaranteed at trial. Isn't that right?

10 MS. SAHARSKY: I'm sorry. I missed the first
11 part.

12 JUSTICE SCALIA: Its root purpose is that
13 counsel is guaranteed at trial. And here we're saying it's
14 okay not to have counsel at trial so long as it's refuting
15 a lie by the defendant.

16 MS. SAHARSKY: That's not true. I mean,
17 certainly counsel is available at trial. The question is
18 just whether statements that were obtained without counsel
19 prior to trial can be used for impeachment purposes. The
20 answer --

21 JUSTICE SCALIA: So you say that -- you say the
22 Sixth Amendment violation occurs before trial.

23 MS. SAHARSKY: I'm sorry if I suggested that.
24 No, the Sixth Amendment violation occurs when the
25 statements are introduced in the government's case-in-chief

1 at trial.

2 JUSTICE SCALIA: Right.

3 MS. SAHARSKY: And that's because the
4 government should not be allowed to go behind counsel prior
5 to trial and gather up statements, and then use them to
6 prove guilt at trial. That subverts the adversary process.
7 When you're talking about impeachment, you're not talking
8 about proving guilt at trial. You're not talking about the
9 government distorting the adversary process. If there's
10 any distortion of the adversary process, it's with the
11 defendant attempting to commit perjury at that point.

12 The Sixth Amendment is just different from the
13 Fifth Amendment in that it does not say anything about
14 statements that are obtained and if they can be used at
15 trial. And that means that it's up to courts to balance
16 the costs and benefits of exclusion of evidence. And in
17 the case of the government's case-in-chief, that balance
18 means that that the statements cannot come in because it
19 would be too much of a cost to the adversary process that
20 the Sixth Amendment guarantees to allow the statements in.

21 But, when you switch over to looking at
22 impeachment, this Court said 50 years ago impeachment is a
23 very different story than the government's case-in-chief.
24 The interest that you're talking about furthering there,
25 the adversary process interest, would not be furthered by

1 allowing the defendant to take the stand and be able to
2 commit perjury unchecked. It would not be furthered, and
3 it would -- it would not lead to greater deterrence by
4 simply allowing the statements to be unavailable for
5 impeachment purposes because the great deterrent comes with
6 the statements being unavailable in the government's case-
7 in-chief.

8 We just don't think that there's any reason to
9 depart from this Court's rule that so long as statements
10 are not involuntary, they can be used for impeachment
11 purposes.

12 If there are no further questions, we submit
13 the judgment below should be reversed.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 Mr. Edge.

16 ORAL ARGUMENT OF MATTHEW J. EDGE

17 ON BEHALF OF THE RESPONDENT

18 MR. EDGE: Mr. Chief Justice, and may it please
19 the Court:

20 I guess I have basically three arguments with
21 the -- or problems with the State's position.

22 First of all, what we're dealing with in the
23 Sixth Amendment case here is a violation of a core
24 enumerated trial right, and this makes it a very different
25 animal from all the other cases that we're talking about.

1 If we're talking about the Fourth Amendment, we're talking
2 about something that isn't a trial right. It's simply a
3 right of the people to be secure in their -- in their homes
4 and possessions. The violation occurs when the police
5 commit whatever misconduct makes the search of the evidence
6 illegal. But the use of that evidence at trial doesn't
7 work any further constitutional --

8 JUSTICE BREYER: Wasn't this individual
9 represented by counsel? Was he represented by counsel?

10 MR. EDGE: Yes, he was.

11 JUSTICE BREYER: And he was represented by
12 counsel at the time that the informant took the statement --
13 got the statement elicited. Is that right?

14 MR. EDGE: No, I don't think so. The --

15 JUSTICE BREYER: I have my memo that I haven't
16 looked through carefully, but I'd be quite interested. I
17 -- I thought he asked for counsel. He was given counsel.
18 Subsequent to that, this statement was elicited. I'd like
19 to know that because the Sixth Amendment says you have a
20 right to assistance of counsel in your defense. Period.
21 And I guess, if he had a lawyer, the lawyer could have told
22 him, don't talk to informants in the jailhouse. He could
23 have said, I'm going to talk to who I want. Or he might
24 not have. But I'd be interested in knowing, did he have
25 assistance of counsel at the time the statement was

1 elicited? It's one thing to me if he did; another if he
2 didn't. Don't know?

3 MR. EDGE: No.

4 JUSTICE BREYER: How can I find out?

5 MR. EDGE: No, the -- I don't know exactly the
6 day that this happened. I do know that he was arrested on
7 the 16th of January, 2004, and there was a search of his
8 cell on January 20th. And we know from that testimony that
9 why that's relevant is that he was cellmates with Mr. Doser
10 by that time, and Mr. Doser testifies that he was the
11 cellmate of Mr. Ventris for 2 days. And on the second day,
12 Mr. Ventris supposedly made these statements. So my best
13 guess is that the -- this conversation occurred sometime
14 between the 17th and the 20th.

15 Now, the order of appointing counsel is entered
16 on January 21st, and counsel doesn't enter his appearance
17 until January 27th.

18 JUSTICE BREYER: So it might be he asked for
19 counsel but hadn't yet received counsel.

20 MR. EDGE: Correct, Your Honor.

21 CHIEF JUSTICE ROBERTS: Counsel, do -- do I
22 understand the first sentence on page 6 of your brief to
23 concede that there's no deterrent value from prohibiting
24 the introduction of these statements for impeachment? The
25 sentence says: "A Sixth Amendment exclusionary rule that

1 allowed use of uncounseled statements for impeachment would
2 not deter violations of the right to counsel."

3 MR. EDGE: That is correct, Your Honor. And
4 the reason I believe this is that, as long as there's some
5 kind of incentive for the prosecutor to use informants in
6 this manner, then the only -- then even if they're not
7 usable in the case-in-chief, there's still an incentive to
8 use this kind of evidence, and the prosecutor and the
9 police will attempt to obtain it. There's simply very
10 little downside. The prosecutor instructs the informant
11 not to deliberately elicit the statement. The prosecutor
12 is still responsible for the informant because the
13 informant is his agent, so even if -- when the informant
14 goes ahead and deliberately elicits the statement, it's
15 still a constitutional violation. But so long as you allow
16 it for some kind of purpose, then there isn't a deterrent
17 effect, and --

18 JUSTICE ALITO: So in a situation like we have
19 here where the law enforcement officers do not instruct the
20 informant to do anything that would violate the Sixth
21 Amendment and in fact, according to their testimony,
22 instruct him to engage in conduct that's consistent with
23 the Sixth Amendment, there's no deterrent value in later
24 suppressing the use of the statements for impeachment
25 purposes.

1 MR. EDGE: I mean, I guess, maybe I'm confused.
2 There's a deterrent -- there is a deterrent effect from
3 suppressing it in the case-in-chief, but it's not
4 sufficient unless it's also extended to use in rebuttal as
5 well.

6 JUSTICE ALITO: What do you want to deter? You
7 want -- you want to deter them from using informants at
8 all, even in -- even in a manner that's consistent with the
9 Sixth Amendment?

10 MR. EDGE: No, Your Honor. What I'm attempting
11 to deter is the sort of up-ending of the adversarial system
12 that this represents.

13 There was a question that was presented earlier
14 about when does this violation occur. And I think that
15 gets to the manner of -- the nature of the Sixth Amendment
16 violation. And our contention is that the violation occurs
17 when the statement is extracted, and then it's further
18 aggravated when it's used at trial. When the police obtain
19 these kinds of statements, even if they're not used at
20 trial, it does work a harm on the defendant and his
21 relationship with counsel. It affects the defendant's --

22 JUSTICE BREYER: Yes, I see the problem.

23 I wonder if you have an answer to another
24 question. You may not. I can't find it. It seems to me
25 it's been 20 years since this -- nearly 20 -- since the

1 Court decided the Michigan case. The other cases were
2 decided even earlier. And it's just surprising to me that
3 it's never come up or rarely, rarely come up, the -- the
4 question of whether the -- the State can introduce into
5 evidence a -- a statement made when the State questioned an
6 individual who'd asked for counsel or had counsel out of
7 the presence of the counsel.

8 I mean, does that normally happen, or does it
9 never happen? Why is there so little law on it? Have you
10 any idea?

11 MR. EDGE: I do not, Your Honor. And I'm
12 really kind of at a loss to speculate as to why that would
13 be.

14 CHIEF JUSTICE ROBERTS: You -- you agree with
15 the representations on -- from your friends on the other
16 side that there's no case of ours where we've excluded a
17 statement or evidence submitted for impeachment, even
18 though it would have been excluded in this case-in-chief.
19 If you prevail here, it would be the first time that any
20 evidence or statement has been excluded when submitted for
21 purposes of impeachment.

22 MR. EDGE: It would be a very different rule.
23 I think the only rule that this would be the case so far is
24 in Portash with the self-incrimination clause. We're
25 saying that the same type of rule should apply to the Sixth

1 Amendment. Otherwise, no, that's correct, whenever you're
2 talking about the Fourth Amendment or one of the
3 prophylactic rules like Miranda or Jackson, then they are
4 admissible for impeachment purposes. What makes this case
5 different is that it -- it involves a violation of an
6 enumerated Constitutional trial right.

7 JUSTICE BREYER: That's what I'm not certain
8 about. And this is why I -- I've been asking these
9 questions. What I can't figure out in my own mind is this.
10 I ask for a lawyer. The State has some period
11 of time to give me a lawyer. Now, it's one thing if what's
12 going on is once I ask for a lawyer, the State should deal
13 with me through my lawyer. That's how they're supposed to
14 do it. But that isn't as basic -- that's like a rule of
15 ethics in most States in the civil context and other
16 contexts. That's not as basic as if I ask for a lawyer,
17 and then the State just doesn't give me one, though it
18 should.

19 That's a different violation, a different kind
20 of violation. One is a kind of a rule of ethics
21 incorporated in the Constitution. The second is what the
22 cases -- is what the Constitution is really about, give him
23 a lawyer when he asks for one. And which is this case?
24 That's why I'm having hard time. Is it the first or the
25 second?

1 MR. EDGE: Well, in -- I think one of the
2 complicating factors here, Your Honor, is that the State in
3 this particular case didn't try a straightforward
4 interrogation. They sent in an undercover informant.

5 JUSTICE BREYER: No, no. But that -- that -- I
6 mean, I'll amalgamate that for you. I'll say they're
7 exactly the same thing.

8 But what I want to know is what rule was
9 violated, what Sixth Amendment rule -- rule. You know, you
10 heard what I said, the rule, don't talk to a guy who wants
11 a lawyer until you talk to the lawyer. No communications
12 with a client. It's a communication with the lawyer.
13 That's one rule. And the other rule is he's asked for a
14 lawyer, but you never gave him one. Now, which is this
15 case?

16 I mean, I first thought, well, if he didn't
17 have a lawyer at all, then it must be the second, but then
18 I thought they must have a reasonable time to give him a
19 lawyer, and they haven't violated that second.

20 If you have any view on that, it would be
21 helpful to me.

22 MR. EDGE: I don't know whether he had asked
23 for a lawyer or not. I know that he was entitled to one at
24 the time, and one would be appointed for him. But
25 otherwise --

1 JUSTICE GINSBURG: But we do know that unlike
2 the police giving Miranda warnings, there's no warning here
3 at all. I mean, he thinks he's talking to a cellmate.
4 Nobody tells him, remember, you've got a right to be
5 represented by counsel, and he's essentially giving a
6 statement without the Miranda warnings.

7 MR. EDGE: That's correct, Your Honor.

8 JUSTICE GINSBURG: But the other side says
9 well, practically the defendant is much more likely to say
10 something that's really involuntary when he's confronting
11 police officers -- that the reason that we exclude in the
12 case of a police officer is the intimidating setting when
13 the defendant is in the police station or in the cell and
14 there are these police officers. Now he thinks he's just
15 with a cellmate, so there isn't -- there isn't the coercive
16 atmosphere that there is when the police do the
17 questioning.

18 MR. EDGE: Well, Your Honor, I think that there
19 certainly can be a coercive atmosphere even if you're not
20 talking to a known police agent. Now, those aren't the
21 facts of this particular case and there is no claim that
22 the statement was involuntary.

23 However, one of the advantages of speaking to
24 known police officers is that a defendant can simply end
25 the interrogation by invoking his right to counsel, and

1 that is not necessarily a course of action that's available
2 to him if he thinks he's merely talking to a cellmate,
3 somebody who -- whether he wants to speak to him or not,
4 he's going to be in the cell with him for some time.

5 CHIEF JUSTICE ROBERTS: Counsel, you've --
6 you've emphasized that what distinguishes this case from
7 the other ones where we've allowed evidence that would be
8 excluded from the case-in-chief and for impeachment
9 purposes is that this is a trial right. But the Sixth
10 Amendment says in criminal prosecutions you have the right
11 to the assistance of counsel. Well, he had assistance of
12 counsel here, and -- and one of the things that counsel did
13 was point out the problems with relying on the snitch's
14 evidence and all the bad things that he did.

15 But -- but just like in the case of a Fourth
16 Amendment violation, where we allow the evidence to be
17 admitted at trial, this Sixth Amendment problem, you know
18 -- it doesn't -- I just don't see the -- the strength of
19 that distinction.

20 MR. EDGE: Your Honor, I think it goes to the
21 nature of the harm that comes from a Sixth Amendment
22 violation. The Sixth Amendment simply doesn't limit itself
23 to the trial. The exact wording of the -- the
24 constitutional provision is in all criminal prosecutions
25 and it talks about --

1 CHIEF JUSTICE ROBERTS: Well, it seems to me
2 you're getting away from the basis for your distinction
3 then, saying, well, it's not just at trial. Well, these
4 other constitutional rights where we've allowed the
5 evidence to come in for impeachment are indistinguishable
6 from the Sixth Amendment right outside of trial.

7 MR. EDGE: Well, because the harm isn't
8 something that just affects the outcome of the trial, it
9 also affects -- it affects the litigation in a much, much
10 deeper way. It affects counsel's trial strategy. It
11 affects a defendant's decision whether or not to testify.
12 It also --

13 CHIEF JUSTICE ROBERTS: Well, just to pause on
14 that, it affects his decision to testify because it makes it
15 more likely that he'll testify truthfully if he is going to
16 testify.

17 MR. EDGE: Not necessarily.

18 CHIEF JUSTICE ROBERTS: The focus -- the focus
19 on the trial context is at least a double-edged sword since
20 the harm that we're facilitating under your rule is to
21 allow -- allow perjured testimony.

22 MR. EDGE: Yes, Your Honor, in some contexts it
23 would.

24 I think one of the underlying assumptions of
25 the State's argument in this with regard to perjury is that

1 the mere existence of a prior inconsistent statement is
2 necessarily indicative of perjury, and we know that there
3 are many reasons why a defendant may have given a prior
4 inconsistent statement.

5 CHIEF JUSTICE ROBERTS: Yes, and if he has the
6 assistance of counsel at trial, consistent with the Sixth
7 Amendment, those -- those problems could be pointed out.
8 He wasn't -- he was -- he's not lying now. The reason he
9 said something different then was, you know, he likes to
10 brag in prison or whatever the basis is.

11 MR. EDGE: In some cases, it will be possible
12 for counsel to vigorously cross-examine the informant. In
13 others, it may not.

14 But in addition to that, Your Honor, I would
15 also say that it doesn't simply affect the decision of
16 whether or not to go to trial or whether or not to testify
17 at trial. It also affects the litigation in a very deep
18 way, inasmuch as a defendant is burdened in trying to
19 negotiate a favorable plea deal. Every statement or every
20 piece of evidence that the State has affects their
21 willingness to plea bargain, and when the State obtains
22 this kind of evidence illegally, it puts the defendant in a
23 bind for -- puts their counsel in a bind.

24 CHIEF JUSTICE ROBERTS: Oh, I think that's --
25 I think that's quite right. But I don't see how excluding

1 the evidence, even on impeachment, helps that. I mean
2 they've still got the statement, and they -- you know,
3 I guess your point is, you know, maybe they'll get
4 some leads from it even if they can't use it. But
5 excluding the evidence for impeachment purposes doesn't
6 eliminate that harm.

7 MR. EDGE: It would, Your Honor, inasmuch as it
8 would remove any disincentive for the police to obtain this
9 evidence by this manner in the first place. So there would
10 be that marginal deterrent factor.

11 JUSTICE ALITO: Which of the things that you've
12 just said that result from the use of this for impeachment
13 would not be true with respect to the other situations
14 where illegally obtained evidence has been used for
15 impeachment purposes? Take the Fourth Amendment, for
16 example.

17 MR. EDGE: I think they would be largely the
18 same, Your Honor. The difference would be in the interests
19 protected. The self-incrimination clause in the Fifth
20 Amendment is aimed primarily at the coercion of the
21 defendant; whereas, the Sixth Amendment aims primarily at
22 the preservation of an adversarial process, that
23 relationship between counsel and his attorney.

24 JUSTICE ALITO: You don't dispute that there
25 was a Sixth Amendment violation at the time when the

1 statement was taken, do you?

2 MR. EDGE: No, I do not.

3 JUSTICE GINSBURG: You urged a -- a fall-back
4 position. You said at least there should be a
5 determination by the judge that the defendant intentionally
6 testified falsely. And I was wondering how that would
7 operate. You're here in the -- the heat of the trial, and
8 the prosecutor says, I want to call snitch so-and-so. And
9 then what do we do? Just interrupt the trial and have kind
10 of a mini-trial to test the credibility of -- of the
11 informant?

12 MR. EDGE: Yes, you could, Your Honor.

13 Also, you could have it as part of the pretrial
14 suppression hearings. I would anticipate that even if the
15 -- if the Court were to adopt our position, these kinds of
16 Sixth Amendment cases are still going to be litigated. The
17 issue is simply going to be whether or not the -- the
18 States -- or the police agent is deliberately eliciting the
19 statement or not. So there -- there's likely going to be
20 some kind of pretrial litigation regarding the
21 admissibility of the statements, and it could be handled at
22 that time.

23 If there are no further questions from the
24 Court, I'll yield my remaining time.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. McAllister, you have 6 minutes remaining.

2 REBUTTAL ARGUMENT OF STEPHEN R. McALLISTER

3 ON BEHALF OF THE PETITIONER

4 MR. McALLISTER: Two quick points by way of
5 rebuttal. The balancing of the interests here is, frankly,
6 water under the bridge even in the Sixth Amendment context.
7 In both *Nix v. Williams* and *Michigan v. Harvey* where the
8 Court was dealing with Sixth Amendment interests and -- and
9 Sixth Amendment right-to-counsel violations, both of those
10 cases make clear that the question of what exclusionary
11 effect to give a violation is subject to a balancing
12 analysis. And that's what we're asking for here. That's
13 why it's treated for these purposes like the Fourth
14 Amendment in the *Miranda* context.

15 And *Nix* itself, to paraphrase the Court, makes
16 a fundamental point which I think illustrates how this
17 works, and it worked effectively to defendant's advantage
18 in this case. In *Nix v. Williams*, the Court said the Sixth
19 Amendment right to counsel -- and I'm paraphrasing slightly
20 -- protects against unfairness by assuring an adversary
21 process in which proffered evidence is tested by cross-
22 examination. And it's done in front of a jury. It is not
23 about requiring the exclusion of entire categories of
24 witnesses or types of evidence for all purposes.

25 So the right to counsel was exercised. It was

1 exercised effectively in this case when Mr. Doser was
2 strongly cross-examined by defense counsel.

3 JUSTICE STEVENS: Wouldn't that apply equally
4 to use of the statement on --

5 MR. McALLISTER: It could, Your Honor. I
6 realize a logical extension is you could say just test all
7 of it. But that's where the -- the police here and the
8 prosecutor paid the price of the way in which the evidence
9 was obtained. It's excluded from the government's case-in-
10 chief.

11 Unless there are further questions, we would
12 respectfully ask that this Court reverse the decision
13 below.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 The case is submitted.

16 (Whereupon, at 12:01 p.m., the case in the
17 above-entitled matter was submitted.)

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