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1 P R O C E E D I N G S

2 (11:15 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument next in Case 07-1356, Kansas v. Ventris.

5 General McAllister.

6 ORAL ARGUMENT OF STEPHEN R. McALLISTER

7 ON BEHALF OF THE PETITIONER

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

10 The Court has always held that the  
11 defendant's voluntary statements obtained in violation  
12 of constitutional standards may be used for impeachment  
13 purposes when the defendant testifies at trial.

14 The Court has excluded statements for all  
15 purposes only when they are involuntary or have been  
16 compelled. The question in this case is whether  
17 voluntary statements obtained in violation of the rule  
18 of Massiah v. United States should be treated  
19 differently than all other voluntary statements.

20 The answer is "no" for at least three  
21 reasons. First, permitting the impeachment use of  
22 voluntary statements obtained in violation of  
23 constitutional standards is necessary to prevent perjury  
24 by criminal defendants.

25 Second, in terms of the effect at trial,

1   there is no basis for distinguishing a voluntary  
2   statement obtained in violation of the Massiah rule from  
3   Fourth Amendment violations, Miranda violations, or  
4   violations of the rule of Michigan v. Jackson.

5               In all of those situations the resulting  
6   evidence may limit defense counsel's options at trial,  
7   but there is no basis in that respect for distinguishing  
8   a Massiah violation. It has no different effect than  
9   those others. Also, the Sixth Amendment right to  
10   counsel does not include a right to commit perjury or to  
11   have the assistance of counsel in presenting false  
12   testimony.

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

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

25              JUSTICE SCALIA: Do you -- do we have any

1 other situation in which, for purposes of impeaching  
2 testimony, a constitutional violation results?

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

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

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

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

1           If the violation does not occur until it's  
2   presented at trial, then it's analogous more to the  
3   Fifth Amendment and also to the Michigan v. Jackson and  
4   Michigan v. Harvey cases, which were Sixth Amendment  
5   right to counsel violations, in which case the Court  
6   said it was wrong for the police to initiate  
7   interrogation after he invoked his right but will let  
8   the statement be admitted for impeachment purposes. So  
9   it is exactly analogous to what the Court did in Harvey  
10  itself.

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

21           MR. McALLISTER: Well, Justice Ginsburg, I  
22  believe that is correct if -- if it's for example, an  
23  undercover officer, someone has gone in -- in fact,  
24  there are cases such as Weatherford v. Bursey that  
25  involved an undercover agent who was present for

1 meetings with the defendant and his counsel, and the  
2 Court indicated that the presence alone would not  
3 violate the right to counsel. It's the deliberate  
4 solicitation and use of statements obtained from the  
5 defendant that would violate the Sixth Amendment.

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

17           JUSTICE GINSBURG: So, the police know that  
18 they can get around the clear prohibition of their  
19 questioning without Miranda warnings by pretending to be  
20 a jailbird?

21           MR. McALLISTER: Potentially, yes. But,  
22 again, the violation would go to what happens in the  
23 cell. So if the police officer is pretending to be  
24 another defendant and sits in the cell and the defendant  
25 starts telling the officer things, that would not

1 violate the Sixth Amendment at all under the --

2 JUSTICE GINSBURG: No, I am assuming we are  
3 not in the area where the jail mate is simply passive.  
4 In this case, the jail mate made a statement that  
5 encouraged the defendant. He wasn't just passive. He  
6 was encouraging the defendant to speak.

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

14 JUSTICE GINSBURG: Anyway, your answer is  
15 the police officer could affirmatively elicit testimony?

16 MR. McALLISTER: No, not that he could  
17 affirmatively elicit. That's the dividing line between  
18 the Massiah and Kuhlmann case. He was in the cell --  
19 well, I guess what I'm suggesting is --

20 JUSTICE GINSBURG: And for your -- you are  
21 talking about impeachment only. We are not talking  
22 about the case in chief. So if the police -- he  
23 can't -- outside, when he questions the defendant and  
24 gives no Miranda warnings, that is inadmissible, right?

25 MR. McALLISTER: Outside -- well, it would



1 still be admissible for impeachment. We are asking for  
2 basically the same rule. It would be the same thing if  
3 he were in the cell, deliberately elicits, knows he is  
4 violating Massiah, it couldn't be used in the government  
5 case in chief, but it could be used for impeachment  
6 purposes. But that would be true of Miranda, if the  
7 officer deliberately failed to give the warnings, got a  
8 statement, they would not be admissible in the case in  
9 chief; but the Court cases are very clearly, it would be  
10 admissible for impeachment purposes.

11 So we are asking for a precise parallel  
12 rule.

13 JUSTICE GINSBURG: You are making no  
14 distinction, then, between the Fifth and Sixth  
15 Amendment?

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

25 So there is a difference between the Sixth

1 Amendment and Fifth Amendment in that respect.

2 But what I was suggesting is the way Massiah  
3 and Miranda operate is similar in this context, that a  
4 violation results in suppression of the evidence from  
5 the government's case in chief, but it remains available  
6 for use as impeachment.

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

10 MR. McALLISTER: Well, with all due respect  
11 to that argument, Your Honor, we disagree with that.  
12 There are strong incentives for the police, frankly, not  
13 to do this. And in part one of the reasons -- well,  
14 there is two. One is the police know if this is truly  
15 in violation of the Sixth Amendment, then nothing can be  
16 used in the case in chief. So, at most, it is  
17 impeachment if the defendant testifies and if the  
18 defendant testifies inconsistently with whatever is  
19 elicited.

20 But furthermore, given the line the court  
21 has drawn between Massiah and Kuhlmann and what goes on  
22 with the informant in the cell, if they can hear the  
23 statements without deliberately eliciting them, if you  
24 will, if the informant is present, the defendant wants  
25 to talk, starts chatting, they discuss the crime, those

1 statements, the Court has held in Kuhlmann, are  
2 admissible for all purposes, because they are not a  
3 Sixth Amendment violation at all.

4               So, the police do have some strong  
5 incentives to actually try to gather the evidence, if  
6 they are going to, in a way that makes it usable in the  
7 prosecution's case in chief. It's much less value to  
8 having it solely for impeachment, which is always going  
9 to be speculative if it were ever going to be used. It  
10 would depend on if the defendant testifies and if he  
11 testifies inconsistently with what he has told an  
12 informant.

13              And in that regard, there are other  
14 deterrents I would like to mention here as well. The  
15 informant in this case, for example, in jail recognized  
16 that he did not want to be an aggressive questioner or  
17 obvious as a government agent. In fact, he said, I  
18 didn't really want to ask him questions because I was  
19 afraid if he felt I was being too nosey, I might get  
20 hurt. So, the informants have their own incentives to  
21 be careful here.

22              And in this case, it's also important to  
23 remember that deterrence is simply one side of the  
24 balance. And the Court has said many times even if  
25 there would be some deterrent effect to extending the

1 rule to include impeachment, that doesn't answer the  
2 question whether it should, in fact, be excluded. That  
3 still must be weighed against the costs on the other  
4 side.

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

10 The jury here gets to evaluate and did, I  
11 would argue, quite effectively from Mr. Ventris's  
12 standpoint, evaluate the defendant's credibility. The  
13 jury was informed, cross-examination, of the informant's  
14 circumstances, what benefit he received, who he was, all  
15 the things they might want to know in deciding whether  
16 to believe him. His testimony went not solely but  
17 primarily to the question of who was the shooter in the  
18 murder in the case, and the jury acquitted Mr. Ventris  
19 of the murder charge, so they did not believe, at least  
20 beyond a reasonable doubt, that he in fact was the  
21 shooter. And that is precisely how this should work.

22 We are not saying informants are always  
23 100 percent reliable, but we are saying the court has a  
24 long tradition, the country has a long tradition, of  
25 putting this evidence in front of a jury. It's tested

1 by cross-examination, knowledge of what the incentives  
2 are, bringing that out in front of the jury, and then  
3 the jury decides. There are many of these cases where  
4 -- this was a typical, one codefendant saying, "he was  
5 the shooter," the other defendant saying, "no, she was  
6 the shooter."

7 And the informant simply had information  
8 that was relevant to the credibility. And that's the  
9 way it was used in this case, was as impeachment on  
10 rebuttal to evaluate Mr. Ventris's testimony in whether  
11 the jury believed him or not.

12 The other thing I would remind the Court is  
13 we are simply saying that the rule should be no  
14 exclusion under the Sixth Amendment for impeachment  
15 purposes, but that does not mean that the normal rules  
16 of evidence and other rules of trial procedure do not  
17 apply. They do. And they might well result in the  
18 exclusion of some potential informant's testimony. So  
19 if the government were to want to put on an informant  
20 who had been convicted many times of perjury and the  
21 judge said, no, I just do not think this evidence is  
22 credible enough to even put in front of the jury, not  
23 this person, the ordinary rules of evidence and trial  
24 procedure would operate. Furthermore, as happened in  
25 this case, the judge can, and often will, give

1 cautionary instructions, limiting instructions. All of  
2 that remains appropriate, but there is simply no reason  
3 to exclude the evidence as a matter of the Sixth  
4 Amendment right to counsel.

5 It would be inconsistent, frankly, with --  
6 with, really, the general tone and holdings of the cases  
7 in the Fourth Amendment, Miranda, and even Sixth  
8 Amendment territory, including primarily  
9 Michigan v. Harvey and Nix v. Williams.

10 Unless the Court has further questions, I  
11 will reserve the remainder of my time for rebuttal.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 Ms. Saharsky.

14 ORAL ARGUMENT OF NICOLE A. SAHARSKY

15 ON BEHALF OF THE UNITED STATES,

16 AS AMICUS CURIAE,

17 SUPPORTING THE PETITIONER

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

20 This Court has consistently allowed the use  
21 of voluntary statements obtained in violation of  
22 constitutional standards for impeachment purposes, and  
23 that same rule should apply here. There is no question  
24 that Respondent's statements were voluntary, and the  
25 substantial societal cost of allowing him to commit

1 perjury unchecked greatly outweighs any speculative  
2 deterrence benefit that would flow from a per se rule of  
3 exclusion.

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

13           CHIEF JUSTICE ROBERTS: Well, you say there  
14 is no deterrent value, since the police are -- are not  
15 going to do this if they know they are not going to be  
16 able to use this in their case-in-chief. But there is  
17 also no down side, is there?

18           I mean, you say it's only for impeachment  
19 purposes, but, you know, why not? He -- he may take the  
20 stand. He may lie. It is better to have this in the  
21 bank instead of not.

22           MS. SAHARSKY: But there is a down side. I  
23 mean, as this Court recognized in cases versus -- like  
24 Hudson v. Michigan, for example, the police have their  
25 own codes of conduct. They have training on

1 constitutional rules and standards. And if they violate  
2 those constitutional rules and standards, it has real  
3 effect for the police. It has effect in terms of  
4 internal discipline, in -- in terms of limiting their  
5 career opportunities.

6 JUSTICE GINSBURG: Is that internal  
7 discipline verifiable? Do police officers who engage  
8 snitches, do they get disciplined, especially if they  
9 are then able to accomplish what was accomplished here?  
10 That is, the -- the testimony -- the snitch is then able  
11 to testify after the defendant testifies.

12 MS. SAHARSKY: I don't think that there is  
13 any evidence in the briefs, and I am not aware of  
14 specific instances of discipline, but I think that that  
15 is because this situation arises pretty infrequently.  
16 You know, when this came up in the Kansas Supreme Court  
17 it was a case of first impression. And as General  
18 McAllister noted, there are a lot of reasons why the  
19 police would want to follow the rule in Kuhlman and send  
20 the informant in to be a passive listening post.  
21 Because if --

22 JUSTICE GINSBURG: On the Federal level is  
23 there anything one way or another, any manual that  
24 instructs a U.S. Attorney about the use of snitches to  
25 extract confessions?



1 MS. SAHARSKY: I think the Department of  
2 Justice Manual sets out this Court's rules in terms of  
3 the Kuhlman case and the Henry case. And then, of  
4 course, there are also State and the Model Professional  
5 Ethics Rules that talk about when a prosecutor can  
6 contact a person who is represented by counsel. And  
7 there are limitations there as well, both in terms of  
8 the prosecutor contacting a person represented or using  
9 an agent contacting a person represented.

10 But I mean, those are -- those are  
11 deterrents. I think the police discipline is a  
12 deterrent. But I think we also need to -- to focus on  
13 this Court's cases in the Fourth and Fifth and Sixth  
14 Amendment Jackson context that taking the evidence and  
15 making it unavailable in the government's case-in-chief  
16 is a substantial deterrent.

17 This Court said in each of those previous  
18 case that not having the evidence available in the  
19 government's case-in-chief is a very high price to pay,  
20 because that means that the government has to come up  
21 with other evidence that can meet its burden of proving  
22 all of the elements of the case beyond a reasonable  
23 doubt.

24 And, as General McAllister noted, it is  
25 really very speculative, and the police certainly

1 wouldn't know at the time they are asking questions of  
2 the defendant, whether this rebuttal impeachment  
3 evidence could ever be used. It's entirely within the  
4 control of the defendant. It is only if the defendant  
5 -- if the government first meets its burden of proof  
6 with other evidence at trial, and then the defendant  
7 decides to testify, and then he testifies inconsistently  
8 with his prior statements.

9                   And our position is at that point that the  
10 jury should hear the conflicting evidence just as it has  
11 heard it in all of these other previous cases and be  
12 allowed to make a decision about who is telling the  
13 truth.

14                   JUSTICE STEVENS: It seems to me you are  
15 just confirming the answer to the Chief Justice's  
16 question. There really isn't any down side. The worst  
17 that -- the worst that happens is maybe they can't use  
18 the stuff. But what -- what is the down side?

19                   MS. SAHARSKY: Again, I -- I think that  
20 there is a down side in terms of police discipline and  
21 the deterrence --

22                   JUSTICE STEVENS: Has any police officer  
23 ever been disciplined for doing this; do you know?

24                   MS. SAHARSKY: I -- I --

25                   JUSTICE STEVENS: I would find it rather

1     amazing if he has.

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

11                  JUSTICE STEVENS:  The defendant could  
12    sometimes lie.  But sometimes people who are in this  
13    position in prison are not the most trustworthy people,  
14    either.

15                  MS. SAHARSKY:  I think --

16                  JUSTICE STEVENS:  You could bring that out  
17    on cross-examination.  I understand that.

18                  MS. SAHARSKY:  That -- that is what I was  
19    going to say.  I mean, as General McAllister noted, that  
20    -- that happened in this case.  The prosecutor himself  
21    got up and talked about the -- the informant's prior  
22    offenses, why the informant was in jail, whether the  
23    informant received anything in exchange for his  
24    testimony, the fact that the informant had actually gone  
25    back to jail after testifying -- or after serving as an

1 informant in this case.

2 JUSTICE STEVENS: It seems to me that that  
3 all confirms the fact, well, they have nothing to lose.  
4 Maybe we have one witness who is not very persuasive,  
5 but no harm in giving it a try.

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

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

22 JUSTICE STEVENS: If it is truthfully  
23 reported. Of course, that is always -- that is an issue  
24 of credibility in all of these cases.

25 MS. SAHARSKY: Yes, every case has a

1 question about someone's credibility, some witness's  
2 credibility, and that's for the jury to decide. And in  
3 -- in this case there was ample cross-examination, and  
4 there was the limiting instruction that the State  
5 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  
9 verdict -- although you, of course, never know exactly  
10 what the jury is thinking, it didn't come back with a  
11 verdict suggesting it just reflexively believed the  
12 informant's testimony.

13 JUSTICE SCALIA: Ms. Saharsky, I am still a  
14 little hung up on -- on whether we would be allowing a  
15 constitutional violation. General McAllister said that  
16 in the Fifth Amendment area we -- we indeed allow --  
17 allow it to be introduced in rebuttal even though that  
18 is the actual constitutional violation. Isn't that the  
19 case other than in the Miranda situation? I mean,  
20 suppose you have a generally coerced confession. Would  
21 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  
24 would prohibit the use of that statement for any  
25 purposes.

1 JUSTICE SCALIA: Exactly, but why -- why is  
2 not that the case with the right to counsel?

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

10 JUSTICE SCALIA: But its real meaning is  
11 that counsel is guaranteed at trial; isn't that right?

12 MS. SAHARSKY: I'm sorry. I missed the  
13 first --

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

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

23 JUSTICE SCALIA: So you say that -- you say  
24 the Sixth Amendment violation occurs before trial?

25 MS. SAHARSKY: I'm sorry if I suggested

1     that.  No, the Sixth Amendment violation occurs when the  
2     statements are introduced in the government's case in  
3     chief at trial.

4                     JUSTICE SCALIA:  That's right.

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

15                    The Sixth Amendment is different from the  
16    Fifth Amendment in that it doesn't say anything about  
17    statements that are obtained and if it can be used at  
18    trial.  And that means it's up to courts to balance the  
19    cost and benefit of exclusion of evidence.  And in the  
20    case of the government's case in chief, that balance  
21    means that that the statements cannot come in because it  
22    would be too much of a cost to the adversary process  
23    that the Sixth Amendment guarantees to allow the  
24    statements in.

25                    But, when you switch over in looking at

1 impeachment, this Court said 50 years ago impeachment is  
2 a very different story than the government's case in  
3 chief. The interest that you are talking about  
4 furthering there, the adversary process interest, would  
5 not be furthered by allowing the defendant to take the  
6 stand and be able to commit perjury unchecked. It would  
7 not be furthered, and it would not lead to greater  
8 deterrence by simply allowing the statements to be  
9 unavailable for impeachment purposes, because the great  
10 deterrent comes with the statements being unavailable in  
11 the government's case in chief.

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

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

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Edge.

20 ORAL ARGUMENT OF MATTHEW J. EDGE

21 ON BEHALF OF THE RESPONDENT

22 MR. EDGE: Mr. Chief Justice, and may it  
23 please the Court:

24 I guess I have basically three arguments  
25 with the -- or problems with the State's position. First



1 of all, what we are dealing with in the Sixth Amendment  
2 case here is a violation of a core enumerated trial  
3 right, and this makes it a very different animal from  
4 all the other cases that we are talking about. If we are  
5 talking about the Fourth Amendment, we are talking about  
6 something that isn't a trial right. It's a right of the  
7 people to be secure in their homes and possessions. The  
8 violation occurs when the police commit whatever  
9 misconduct makes the search of the evidence illegal. But  
10 the use of that evidence at trial doesn't work any  
11 further constitutional --

12 JUSTICE BREYER: Wasn't this individual  
13 represented by counsel? Was he represented by counsel?

14 MR. EDGE: Yes, he was.

15 JUSTICE BREYER: And he was represented by  
16 counsel at the time that the informant took the  
17 statement, got the statement elicited? Is that right?

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

19 JUSTICE BREYER: I have my memo that I  
20 haven't looked through carefully, but I would be quite  
21 interested. I thought he asked for counsel. He was  
22 given counsel, and subsequent to that, this statement  
23 was elicited. I would like to know that because the  
24 Sixth Amendment says you have right to assistance of  
25 counsel in your defense, period. And I guess, if he had

1 a lawyer, the lawyer could have told him, "Don't talk to  
2 informants in the jailhouse." He could have said, "I'm  
3 going to talk to who I want." Or he might not have. But  
4 I would be interested in knowing, did he have assistance  
5 of counsel at the time the statement was elicited? It's  
6 one thing to me if he did, and another if he didn't.  
7 Don't know?

8 MR. EDGE: No.

9 JUSTICE BREYER: How can I find out?

10 MR. EDGE: No, the -- I don't know exactly  
11 the day that this happened. I do know that he was  
12 arrested on the 16th of January of 2004, and there was a  
13 search of his cell on January 20th. And we know from  
14 that testimony that -- why that's relevant that he was  
15 cellmates with Mr. Doser by that time, and Mr. Doser  
16 testified that he was the cellmate of Mr. Ventris for  
17 two days. And on the second day, Mr. Ventris supposedly  
18 made these statements.

19 So my best guess is that the -- this  
20 conversation occurred sometime between the 17th and the  
21 20th. Now, the order of appointing counsel was entered  
22 on January 21st, and counsel doesn't enter his  
23 appearance until January 27th.

24 JUSTICE BREYER: So it might be he asked for  
25 counsel but hadn't yet received counsel?

1 MR. EDGE: Correct, Your Honor.

2 CHIEF JUSTICE ROBERTS: Counsel, do I  
3 understand the first sentence on page 6 of your brief to  
4 concede that there's no deterrent value from prohibiting  
5 the introduction of these statements for impeachment?  
6 The sentence says, "A Sixth Amendment exclusionary rule  
7 that allowed use of uncounseled statements for  
8 impeachment would not deter violations of the right to  
9 counsel."

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

25 JUSTICE ALITO: So in a situation like we

1 have here, where the law enforcement officers do not  
2 instruct the informant to do anything that would violate  
3 the Sixth Amendment and in fact, according to their  
4 testimony, instruct him to engage in conduct that is  
5 consistent with the Sixth Amendment, there's no  
6 deterrent value in later suppressing the use of the  
7 statements for impeachment purposes?

8 MR. EDGE: I mean -- I guess, maybe I am  
9 confused. There is a deterrent -- there is a deterrent  
10 effect from suppressing it in the case in chief, but  
11 it's not sufficient unless it's also extended to use in  
12 rebuttal as well.

13 JUSTICE ALITO: But what do you want to  
14 deter? You want to deter them from using informants at  
15 all, even in a manner that is consistent with the Sixth  
16 Amendment?

17 MR. EDGE: No, Your Honor. What I am  
18 attempting to deter is the sort of up-ending of the  
19 adversarial system that this represents. There was a  
20 question that was presented earlier about when does this  
21 violation occur? And I think that gets to the manner of  
22 -- or the nature of the Sixth Amendment violation. Our  
23 contention is that the violation occurs when the  
24 statement is extracted, and then it's further aggravated  
25 when it's used at trial. When the police obtain these

1 kinds of statements, even if they are not used at trial,  
2 it does work a harm on the defendant and his  
3 relationship with counsel. It affects defendant's --

4 JUSTICE BREYER: I see the problem. I wonder  
5 if you have an answer to another question. You may not.  
6 I can't find it. It seems to me it's been 20 years since  
7 this -- nearly 20 -- since the Court decided the  
8 Michigan case. The other cases were decided even  
9 earlier. And it's just surprising to me that it has  
10 never come up or rarely, rarely come up that the  
11 question of whether the State can introduce into  
12 evidence a statement made when the State questioned an  
13 individual who'd asked for counsel or had counsel out of  
14 the presence of the counsel.

15 I mean, does that normally happen, or does  
16 it never happen? Why is there so little law on it? Do  
17 you have any idea?

18 MR. EDGE: I do not, Your Honor. And I am  
19 really at a loss to speculate as to why that would be.

20 CHIEF JUSTICE ROBERTS: You agree with the  
21 representations on -- from your friends on the other  
22 side that there is no case of ours where we have  
23 excluded a statement of evidence submitted for  
24 impeachment, even though it would have been excluded in  
25 this case in chief? If you prevail here, it would be

1 the first time that any evidence or statement has been  
2 excluded when submitted for purposes of impeachment?

3 MR. EDGE: It would be a very different  
4 rule. I think the only rule that this would be the case  
5 so far is in Portash, the self-incrimination clause. We  
6 are saying that the same type of rule should apply to  
7 the Sixth Amendment. Otherwise, no, that's correct,  
8 whenever you are talking about the Fourth Amendment or  
9 one of the prophylactic rules like Miranda or Jackson,  
10 then they are admissible for impeachment purposes. What  
11 makes this case different is that it -- it involves a  
12 violation of an enumerated Constitutional trial right.

13 JUSTICE BREYER: That's what I'm not certain  
14 about. And this is why I ask -- have been asking these  
15 questions and what I can't figure out in my own mind is  
16 this.

17 I ask for a lawyer. The State has some  
18 period of time to give me a lawyer. Now it's one thing  
19 if what's going on is once I ask for a lawyer, the State  
20 should deal with me through my lawyer; that's how they  
21 are supposed to do it. But that isn't as basic --  
22 that's like a rule of ethics in most States in civil  
23 context and other contexts -- that's not as basic as if  
24 I ask for a lawyer and then the State just doesn't give  
25 me one, though it should.

1           That's a different violation, a different  
2   kind of violation. One is a kind of a rule of ethics  
3   incorporated in the Constitution. The second is what  
4   the case is -- is what the Constitution is really about,  
5   give him a lawyer when he asks for one. And which is  
6   this case? That -- that's why I'm having hard time. Is  
7   it the first or the second?

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

12           JUSTICE BREYER: No, no, no. I will  
13   amalgamate that for you. I will say they are exactly  
14   the same thing. But what I want to know is what rule is  
15   violated, what Sixth Amendment rule. The rule -- you  
16   heard what I said, the rule "don't talk to a guy who  
17   wants a lawyer until you talk to the lawyer." No  
18   communications with a client. It's a communication with  
19   the lawyer. That's one thing.

20           And the other rule is he has asked for a  
21   lawyer but you never gave him one. Now which is this  
22   case? I mean, I first thought well if he didn't have a  
23   lawyer at all, then it must be the second; but then I  
24   thought they must have a reasonable time to give him a  
25   lawyer, and they haven't violated that second.

1                   If you have any view on that, it would be  
2   helpful to me.

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

7                   JUSTICE GINSBURG: But we do know that  
8   unlike the police giving Miranda warnings, there's no  
9   warning here at all. I mean, he thinks he is talking to  
10  a cellmate. Nobody tells him, "remember you've got a  
11  right to be represented by counsel," and he's  
12  essentially giving a statement without the Miranda  
13  warnings.

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

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

25                  MR. EDGE: Well, Your Honor, I think that



1    there certainly can be a coercive atmosphere even if you  
2    are not talking to a known police agent.  Now, those are  
3    not the facts of this particular case and there is no  
4    claim that the statement was involuntary.  However, one  
5    of the advantages of speaking to known police officers  
6    is that a defendant can simply end the interrogation by  
7    invoking his right to counsel, and that is not  
8    necessarily a course of action that is available to him  
9    if he thinks he is merely talking to a cellmate,  
10   somebody who whether he wants to speak to him or not is  
11   going to be in the cell with him for some time.

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

22                   But -- but just like in the case of a Fourth  
23   Amendment violation where we allow the evidence to be  
24   admitted at trial, this Sixth Amendment problem, you  
25   know, it doesn't -- I just don't see the -- the strength

1 of that distinction.

2 MR. EDGE: Your Honor, I think it goes to  
3 the nature of the harm that comes from a Sixth Amendment  
4 violation. The Sixth Amendment simply doesn't limit  
5 itself to the trial. The exact wording of the -- the  
6 constitutional provision is in all criminal  
7 prosecutions.

8 CHIEF JUSTICE ROBERTS: Well, it seems to me  
9 you are getting away from the basis for your  
10 distinction, then. Saying well, it's not just at trial.  
11 Well, these other constitutional rights where we have  
12 allowed the evidence to come in for impeachment are  
13 indistinguishable from the Sixth Amendment right,  
14 outside of trial.

15 MR. EDGE: Well, because the harm isn't  
16 something that just affects the outcome of the trial, it  
17 also affects the -- it affects the litigation in a much,  
18 much deeper way. It affects counsel's trial strategy,  
19 it affects the defendant's decision whether or not to  
20 testify. It also --

21 CHIEF JUSTICE ROBERTS: Just to pause on  
22 that, it affects his decision to testify because it  
23 makes it more likely that he will testify truthfully if  
24 he is going to testify.

25 MR. EDGE: Not necessarily.

1 CHIEF JUSTICE ROBERTS: The focus -- the  
2 focus on the context is at least a double-edged sword  
3 because the harm that we are facilitating under your  
4 rule is to allow perjured testimony.

5 MR. EDGE: Yes, Your Honor, in some contexts  
6 it would. I think one of the underlying assumptions of  
7 the State's argument with regard to perjury is that the  
8 mere existence of a prior inconsistent statement is  
9 necessarily indicative of perjury, and we know there are  
10 many reasons why the defendant may have given a prior  
11 inconsistent statement.

12 CHIEF JUSTICE ROBERTS: Yeah, and if he has  
13 the assistance at trial consistent with the Sixth  
14 Amendment, those -- those problems could be pointed out.  
15 He was -- he was he is not lying now. The reason he  
16 said something different then was, you know, he likes to  
17 brag in prison or whatever the basis is.

18 MR. EDGE: In some cases it will be possible  
19 for counsel to vigorously cross-examine the informant.  
20 In others it may not. But in addition to that, Your  
21 Honor, I would also say that it doesn't simply affect  
22 the decision whether or not to go to trial or whether or  
23 not to testify at trial; it also affects the litigation  
24 in a very deep way, inasmuch as the defendant is  
25 burdened in trying to negotiate a favorable plea deal.

1           Every statement or every piece of evidence  
2   that the State has affects their willingness to plea  
3   bargain, and when the State obtains this kind of  
4   evidence illegally, it puts the defendant in a bind for  
5   -- puts the defendant's counsel in a bind.

6           CHIEF JUSTICE ROBERTS: I think -- I think  
7   that's quite right. But I don't see how excluding the  
8   evidence even on impeachment helps that. I mean,  
9   they've still got the statement, and they -- I mean, you  
10   know -- I guess your point, you know, maybe they will  
11   get some leads from it even if they can't use it. But  
12   excluding the evidence for impeachment purposes doesn't  
13   eliminate that harm.

14          MR. EDGE: It would, Your Honor, inasmuch it  
15   would remove any disincentive for the police to obtain  
16   this evidence by this manner in the first place. So  
17   there would be that marginal deterrent factor.

18          JUSTICE ALITO: Which of the things that  
19   you've just said result from the use of this for  
20   impeachment would not be true with respect to the other  
21   situations where illegally obtained evidence has been  
22   used for impeachment purposes? Take the Fourth  
23   Amendment, for example.

24          MR. EDGE: I think they would be largely the  
25   same, Your Honor. The difference would be in the

1 interest protected. The self-incrimination clause in  
2 the Fifth Amendment is aimed primarily at coercion of  
3 the defendant; whereas, the Sixth Amendment aims  
4 primarily at the preservation of an adversarial process,  
5 the relationship between counsel and his attorney.

6 JUSTICE ALITO: You don't dispute that there  
7 was a Sixth Amendment violation at the time this  
8 statement was taken, do you?

9 MR. EDGE: No, I do not.

10 JUSTICE GINSBURG: You urged a -- a  
11 fall-back, and you said at least that there may -- there  
12 should be a determination by the judge that the  
13 defendant intentionally testified falsely. And I was  
14 wondering how that would operate. You are here in the  
15 -- the heat of the trial, and the prosecutor says, I  
16 want to call snitch so-and-so. And then what do we do,  
17 just interrupt the trial and have kind of a mini trial  
18 to test the credibility of the -- the informant?

19 MR. EDGE: Yes, you could, Your Honor.  
20 Also, you could have it as part of the pretrial  
21 suppression hearings. I would anticipate that even if  
22 the -- if the Court were to adopt our position, these  
23 kinds of Sixth Amendment cases are still going to be  
24 litigated. The issue is simply going to be whether or  
25 not the States or the police agent is deliberately

1 eliciting the statement or not.

2           So there is -- there is likely going to be  
3 some kind of pretrial litigation regarding the  
4 admissibility of the statements, and it could be handled  
5 at that time.

6           If there are no further questions, I will  
7 reserve the remainder of my time.

8           CHIEF JUSTICE ROBERTS: Thank you, counsel.  
9 Mr. McAllister, you have six minutes remaining.

10           REBUTTAL ARGUMENT OF STEPHEN R. McALLISTER  
11           ON BEHALF OF THE PETITIONER

12           MR. McALLISTER: Two points by way of  
13 rebuttal. The balancing of the interests here is  
14 sprinkling water under the bridge even in the Sixth  
15 Amendment context. In both Nix versus Williams and  
16 Michigan versus Harvey where the Court was dealing with  
17 Sixth Amendment interests and the Sixth Amendment right  
18 to counsel violations, the bulk of those cases make  
19 clear that the question of what exclusionary effect to  
20 give a violation is subject to a balancing analysis.  
21 And that's what we are asking for here. That's why it's  
22 treated for these purposes like the Fourth Amendment in  
23 the Miranda context.

24           And Nicks itself, to paraphrase the Court,  
25 makes a fundamental point which I think illustrates how

1 this works, and it worked effectively to defendant's  
2 advantage in this case.

3 In Nix v. Williams, the Court said the Sixth  
4 Amendment right to counsel -- and I am paraphrasing  
5 slightly -- protects against unfairness by assuring an  
6 adversary process in which proffered evidence is tested  
7 by cross-examination. And it's done in front of a jury.  
8 It is not about requiring the exclusion of entire  
9 categories of witnesses or types of evidence for all  
10 purposes.

11 So the right to counsel was exercised. It  
12 was exercised effectively in this case when Mr. Doser  
13 was strongly cross-examined by defense counsel.

14 JUSTICE STEVENS: Would that apply equally  
15 for statements under oath?

16 MR. McALLISTER: It could, Your Honor. I  
17 realize a logical extension is you could say just test  
18 all of it. But that is where the -- the police here and  
19 prosecutor pay the price of the way in which the  
20 evidence was obtained. It's excluded from the  
21 government's case-in-chief.

22 Unless there are further questions, we would  
23 respectfully ask that this Court reverse the decision  
24 below.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 The case is submitted.

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

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