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. McCALLISTER, 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.

C O N T E N T S

P R O C E E D I N G S

(11:15 a.m.)

CHIEF JUSTICE ROBERTS: We will 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 the 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,

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

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

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

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

JUSTICE SCALIA: Do you -- do we have any

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

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

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

JUSTICE SCALIA: It's parallel to the Fifth.

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

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

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

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

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

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

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

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

violate the Sixth Amendment at all under the --

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

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

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

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

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

MR. McALLISTER: Outside -- well, it would

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

So we are asking for a precise parallel rule.

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

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

So there is a difference between the Sixth

Amendment and Fifth Amendment in that respect.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

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 is no question that Respondent's statements were voluntary, and the substantial societal cost of allowing him to commit

perjury unchecked greatly outweighs any speculative deterrence benefit 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 that 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 is no deterrent value, since the police are -- are not going to do this if they know they are not going to be able to use this in their case-in-chief. But there is also no down side, is there?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. SAHARSKY: I -- I --

JUSTICE STEVENS: I would find it rather

amazing if he has.

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

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

MS. SAHARSKY: I think --

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

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

informant in this case.

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

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

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

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

MS. SAHARSKY: Yes, every case has a

question about someone's credibility, some witness's credibility, and that's for the jury to decide. And in -- in this case there was ample cross-examination, and there was the limiting instruction that the State mentioned.

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

JUSTICE SCALIA: Ms. Saharsky, I am still a little hung up on -- on whether we would be allowing a constitutional violation. General McAllister said that in the Fifth Amendment area we -- we indeed allow -- allow it to be introduced in rebuttal even though that is the actual constitutional violation. Isn't that the case other than in the Miranda situation? I mean, suppose you have a generally coerced confession. Would we -- would we permit that to go in?

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

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

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

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

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

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

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

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

MS. SAHARSKY: I'm sorry if I suggested

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

JUSTICE SCALIA: That's right.

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

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

But, when you switch over in looking at

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Edge.

ORAL ARGUMENT OF MATTHEW J. EDGE

ON BEHALF OF THE RESPONDENT

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

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

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

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

MR. EDGE: Yes, he was.

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

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

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

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

MR. EDGE: No.

JUSTICE BREYER: How can I find out?

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

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

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

MR. EDGE: Correct, Your Honor.

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

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

JUSTICE ALITO: So in a situation like we

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

of that distinction.

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

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

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

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

MR. EDGE: Not necessarily.

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

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

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

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

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

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

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

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

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

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

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

MR. EDGE: No, I do not.

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

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

eliciting the statement or not.

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

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