No. 07-1356

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

DONNIE RAY VENTRIS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a criminal defendant's "voluntary statement obtained in the absence of a knowing and voluntary waiver of the [Sixth Amendment] right to counsel," *Michigan v. Harvey*, 494 U.S. 344, 354 (1990), is admissible for impeachment purposes—a question the Court expressly left open in *Harvey* and which has resulted in a deep and enduring split of authority in the Circuits and state courts of last resort?

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Respondent acknowledges that there is a longstanding split of authority on the question presented in the petition for a writ of certiorari. Brief in Opposition (hereinafter "Opp.") at 7 (implicitly acknowledging the split of authority by arguing only "that the split is not so deep and enduring as petitioner suggests"). Furthermore, Respondent acknowledges that the Question Presented is one which the Court itself expressly reserved in *Michigan v. Harvey*, 494 U.S. 344, 354 (1990). Opp. 6 ("petitioner correctly frames [the question presented] as one which the Court left open in *Harvey*").

Respondent's arguments in opposition do nothing to undermine the certworthiness of the Petition, and with respect to the claim of an adequate and independent state ground, Respondent is simply wrong. Respondent's arguments are an effort to muddy waters which are in fact crystal clear. The Petition should be granted to address an important issue that has divided the lower courts.

I. Respondent Acknowledges A Split Of Authority On The Precise Constitutional Issue Presented In This Case

Respondent's protestations to the contrary, there is a well-established, enduring split of authority in the Circuits and state courts of last resort on the precise issue this Petition presents. The split is well-documented, and the cases identified and briefly described, in the Petition on pages 12–17. An objective examination of the cases will quickly verify

the split of authority. Furthermore, the Petition is careful not to overstate the holdings and decisions of the cited cases, using parentheticals to indicate where the relevant statement of law may have been dicta or the facts a little unusual.

Even if one were to eliminate from consideration all of the cases that Respondent claims are not part of the split—ten in all, including four that Petitioner recognizes do not "count" because they are intermediate state appellate court or federal district court decisions—there remain on each side of the split many cases whose legitimacy Respondent does not contest. (To be clear, Petitioner is neither conceding nor agreeing that the cases Respondent discusses are in fact distinguishable; rather Petitioner is simply suggesting that even if the Court were to accept all of Respondent's allegations as true, there remains a significant conflict of authority.)

First, Respondent does not question the following cases which, like the Kansas Supreme Court, hold that the statements at issue are inadmissible for any purpose: *State v. York*, 705 A.2d 692, 695 (Me. 1997); *Simpson v. United States*, 632 A.2d 374, 382 (D.C. 1993); *United States v. Spencer*, 955 F.2d 814, 820 (2d Cir. 1992); *United States v. Abdi*, 142 F.3d 566 (2d Cir. 1998).

Second, Respondent does not question the following cases holding that such statements remain admissible for impeachment purposes: *United States v. Bender*, 221 F.3d 265, 271 (1st Cir. 2000); *United States v. Yancey*, No. 97-4893, 1998 WL 393972, at

*2 (4th Cir. July 10, 1998); *United States v. Ortega*, 203 F.3d 675, 681 (9th Cir. 2000); *United States v. McManaman*, 606 F.2d 919, 925 (10th Cir. 1979); *State v. Conway*, 842 N.E.2d 996, 1020 (Ohio), *cert. denied*, 127 S. Ct. 122 (2006); *State v. Mattatall*, 603 A.2d 1098, 1114 (R.I. 1992).

There is a significant split of authority—with Circuits and state courts of last resort on each side—and it is enduring, with two state supreme courts reaching contrary conclusions just in the last two years (Ohio in 2006, Kansas in 2008). Further, Respondent does not and could not question that the Kansas Supreme Court recognized in this case that its decision added to an existing split of authority. Pet. App. 17a–20a. Add the fact that the Court expressly recognized and left open this very issue in *Michigan v. Harvey*, and this case is the epitome of "certworthy."

II. There Is No Independent And Adequate State Ground In This Case

By far, Respondent's most remarkable assertion is that there is an independent and adequate state ground for the Kansas Supreme Court's decision in this case. With all due respect, Respondent's suggestion is patently erroneous.

First, the Court will look in vain for any hint or suggestion of any state ground—much less an independent and adequate one—in the Kansas Supreme Court's opinion in this case. *See* Pet. App. 1a–48a. There is simply nothing in the opinion mentioning, suggesting, or even hinting at a state

law ground on which the Kansas Supreme Court might have relied in reaching its decision in this case. And with good reason—there is no such ground. The Kansas Supreme Court addressed only the *Michigan v. Harvey* issue, and clearly rested its decision *solely* on federal grounds. *See* Pet. App. 23a ("The admission of the evidence violated Ventris' Sixth Amendment right to counsel.")

Second, the independent and adequate state ground that Respondent asserts has no basis in either fact or law. With respect to facts, Respondent wants to ignore that his erroneous argument that the Kansas Speedy Trial Act has been violated was rejected by the trial court. *See* Appendix to this Reply 1a–3a. As a factual matter, Respondent's entire argument relies upon a premise that is simply not true; indeed Respondent's factual premise is demonstrably false.

More importantly, Respondent's false factual premise is irrelevant as a matter of law. Even assuming for the sake of argument that the speedy trial clock has run and Respondent cannot be retried in state court on the charges at issue in this case, that would not alter this Court's jurisdiction in any way, shape or form. Respondent wisely does not contest the well-established legal principle "that issuance of a mandate and execution of a judgment by a lower court does not deprive this Court of certiorari jurisdiction." Opp. 11 (citing the cases Petitioner presented in opposing Respondent's motion for discharge in the state trial court). That

proposition is crystal clear. *See, e.g., United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983) (The Court has jurisdiction in a criminal case—even when the lower court reversed a conviction, the mandate issued, and the trial court dismissed the case—because a reversal by the Supreme Court will reinstate the former conviction and sentence); *Aetna Cas. & Surety Co. v. Flowers*, 330 U.S. 464, 467 (1947) (issuance of a lower court's mandate does not defeat the Supreme Court's jurisdiction).

Remarkably, Respondent argues that this case is not controlled by the general rule, because somehow if Respondent was discharged on speedy trial grounds a decision of this Court reversing the Kansas Supreme Court could be given no effect. Not surprisingly, Respondent fails to explain why that would be so, and Petitioner is at a loss to comprehend the argument.

Contrary to Respondent's assertion, and assuming again for the moment Respondent's erroneous factual premise that the speedy trial clock has run and Respondent cannot be retried in state court, this case would present precisely the situation in *United States v. Villamonte-Marquez*, where the district court had dismissed the indictment against Respondent while this Court considered the prior appeal. What the Court held in *Villamonte-Marquez* applies equally (and logically) here: even if Kansas could not retry Respondent on the charges in this case, a reversal by this Court of the Kansas Supreme Court's decision necessarily would reinstate

Respondent's prior convictions and sentences, with no further state proceedings required.

Thus, a decision by this Court on the Sixth Amendment issue is in no sense an "advisory" opinion, as Respondent also erroneously suggests. Nor would any further proceedings or another trial be necessary to hold Respondent validly convicted and sentenced. All that would be required is that Respondent finish serving his prior sentences. In fact, lower courts have gone much further than the situation presented in *Villamonte-Marquez* and this case in recognizing the scope of this Court's certiorari jurisdiction. *Cf. United States v. Perez*, 110 F.3d 265, 266–67 (5th Cir. 1997) (holding that defendant could be prosecuted even where the Court of Appeals mandate dismissing the charges had issued and the district court had dismissed the indictment *before* the Government even filed a petition for a writ of *certiorari* in the Supreme Court seeking reversal of the Court of Appeals' decision).

This Court has jurisdiction over this case and the important federal question it presents. Respondent's contrary assertion is both factually and legal wrong—indeed, it is wishful thinking at best.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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