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 KANSAS SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Donnie Ray Ventris respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Kansas Supreme Court in this case. That opinion is reported at 176 P.3d 920 (2008).

STATEMENT OF FACTS

Rhonda Theel and Mr. Ventris were introduced and began dating in September or October 2003. Ms. Theel moved in with Mr. Ventris a few weeks later.

Ms. Theel had heard from Kim Eytcheson that Ernest Hicks was abusing one of the children of his girlfriend, Helen Cargile. Ms. Cargile and Ms. Theel did not know each other very well, but they had a mutual acquaintance in Ms. Eytcheson, who was Ms. Cargile's ex-sister-in-law and was dating Ms. Cargile's ex-husband. Ms. Eytcheson told Ms. Theel that Mr.

Hicks usually carried several hundred dollars in cash. Ms. Theel wanted to confront him about the alleged abuse.

On January 7, 2004, Ms. Theel persuaded Mr. Ventris to come with her to Mr. Hick's house. Mr. Ventris, who later claimed not to know at that time that Mr. Hicks carried a lot of money, agreed to go with Ms. Theel so she would stop talking constantly about the alleged child abuse. Ms. Theel called Ms. Eytcheson to find out when Ms. Cargile's children went to school and Mr. Hicks would be alone at the house. Ms. Theel arranged for Martha Denton and Keith Holt to give her and Mr. Ventris a ride so Mr. Ventris would not have to take his truck.

Ms. Denton and Mr. Holt dropped them off at Mr. Hicks' house and drove away. They went inside Mr. Hicks' home. When they left in Mr. Hicks' pickup truck, Mr. Hicks had been shot in the torso and head, and lay dead on the floor of his home. Ms. Theel drove the truck to Oklahoma and parked it in a spot by the side of a gravel road. Ms. Theel sprayed down the truck with cleaner to remove fingerprints. They walked along the gravel road for a few hours. Along the way, Ms. Theel tried unsuccessfully to disassemble the gun that shot Mr. Hicks. The gun ended up in a culvert. Ms. Theel and Mr. Ventris eventually came to a roadside store, where they waited an hour for Ms. Denton and Mr. Holt to pick them up and return them to their home in Kansas.

Ms. Denton and Mr. Holt later suspected that Ms. Theel and Mr. Ventris may have been involved in the death of Mr. Hicks. Ms. Denton and Mr. Holt contacted the police. The State charged Mr. Ventris with one count each of felony murder, aggravated robbery, aggravated burglary, and misdemeanor theft. Ms. Theel pleaded down to just aggravated robbery and aiding a felon in return for her testimony against Mr. Ventris.

Ms. Theel and Mr. Ventris both testified at trial. According to Ms. Theel, she was unarmed when they went Mr. Hicks' home, and unaware that Mr. Ventris had a gun. She claimed she went to Mr. Hicks' door and knocked. She could see Mr. Hicks coming to the door. When she saw Mr. Hicks' eyes grow wide, she turned to see Mr. Ventris charging past her into the house. He supposedly struggled with Mr. Hicks, then produced the gun and demanded his wallet. Mr. Ventris was unhappy with the amount of money in the wallet. Mr. Hicks told him there was more money in the bedroom. He followed Mr. Hicks into the bedroom and shot him. Mr. Ventris supposedly shot Mr. Hicks two more times.

According to Mr. Ventris, he was unarmed and unaware that Ms. Theel had a gun. Ms. Theel went to Mr. Hicks' door while he stayed back. When Mr. Ventris came to the door, Ms. Theel was already across the threshold and Mr. Hicks said to come in and shut the door. Once inside, Ms. Theel began screaming at Mr. Hicks about the alleged abuse. Thinking Mr. Hicks might try to grab Ms. Theel, Mr. Ventris grabbed Mr. Hicks. The two men fell to the ground. As they struggled, Ms. Theel pulled out the gun and demanded Mr. Hick's wallet. Mr. Hicks said his wallet was in the bedroom. She followed Mr. Hicks into the bedroom and shot him. She shot him two more times.

In rebuttal to Mr. Ventris' testimony, the State called Johnnie Doser, whom the trial court permitted to testify over Mr. Ventris' objection. Mr. Doser was an inmate in the county jail at the time Mr. Ventris was there awaiting trial. Mr. Doser, who happened to be the stepbrother of a county corrections officer, had violated his probation and faced the possibility of having to serve a prison sentence. The prosecutor recruited him to be Mr. Ventris' cell mate. In return for gathering information from Mr. Ventris, the prosecutor agreed to release him from probation.

Mr. Doser testified that on his second day as Mr. Ventris' cell mate, he told Mr. Ventris that he had a troubled look, and asked what was on his mind. Mr. Ventris asked Mr. Doser if he could be trusted. Mr. Doser replied that he could. Mr. Ventris then asked if what he told Mr. Doser would not leave their cell. Mr. Doser said that it would not. According to Mr. Doser, Mr. Ventris showed him his arrest warrant, then confessed that he and Theel "went to rob somebody and that it went sour. He'd shot this man in his head and in his chest. That he took his keys, his wallet, about $350.00, and took a vehicle."

The jury acquitted Mr. Ventris of felony murder and theft, and convicted him of aggravated robbery and aggravated burglary. Mr. Ventris filed a timely notice of appeal. On direct appeal, the Kansas Supreme Court reversed the conviction and remanded for a new trial. The State did not seek any stay of the order of the Kansas Supreme Court, and on February 28, 2008, the mandate of the Kansas Supreme Court was filed by the state trial court clerk.

On June 4, 2008, citing his right under a state speedy trial statute, Mr. Ventris moved for discharge from the current prosecution. On June 26, 2008, the state trial court heard and denied Mr. Ventris' motion. Further review of this order in the Kansas Supreme Court is expected at the time of filing this brief in opposition.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The split of authority on the question presented is not so deep and enduring as petitioner suggests; many of the cases petitioner cites do not actually address the question.

Petitioner frames the question presented as:

> 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?

Pet. i. The narrow framing of the question suggests that it does not frequently arise, and then only in cases where (1) the Sixth Amendment right to counsel has attached, (2) the defendant has made a statement without knowingly and voluntarily waiving that right, and (3) the prosecution has prosecution has offered that statement to impeach the defendant's testimony. Many of the cases petitioner cites as examples of lower courts addressing the question presented lack one of these elements.

In some of the cases petitioner cites, the Sixth Amendment right to counsel has not attached, or the defendant has not claimed a Sixth Amendment violation. There is no Sixth Amendment claim in *United States v. Stevens*, 935 F.2d 1380, 1393-94 (3rd Cir. 1991), only the issue of whether statements made to a federal pretrial services officer in a bail application are admissible for impeachment despite the confidentiality provisions of 18 U.S.C. § 3153(c)(1) and (c)(3). No Sixth Amendment right to counsel had attached in *McGriff v. Dep't of Corrections*, 338 F.3d 1231, 1235-36 (11th Cir. 2003), in which the issue was whether the petitioner's testimony in a § 2254 action, where the petitioner had only a statutory, not constitutional, right to counsel, could be used for impeachment in a subsequent hearing in the same action. Similarly, there was no Sixth Amendment right to counsel in *United States v. Denetclaw*, 96 F.3d 454, 456-

457 (10th Cir. 1996), in which the government used the defendant's pleas in an Indian tribal court for impeach defendant's testimony, because the defendant did not have the right to counsel in tribal court, nor had the government yet indicted the defendant when he entered those pleas.

Many of the cases petitioner cites actually involve defendants who knowingly and voluntarily waived the right to counsel. *See, e.g. United States v. Laury*, 49 F.3d 145, 149 (5th Cir. 1995); *Bradford v. Whitley*, 953 F.2d 1008, 1009-10 (5th Cir. 1992); *United States v. Red Bird*, 146 F. Supp. 2d 993, 995 (C.D.S.D. 2001); *State v. Cherry*, 83 P.3d 123, 125 (Idaho Ct. App. 2003); *State v. Southworth*, 52 P.3d 987, 994 (N.M. Ct. App. 2002); *Trevino v. Alameida*, No. C 04-0720 MMC (PR), 2007 WL 781590 at *14 (N.D. Cal. Mar. 13, 2007). These cases do not support the proposition that there is a split of authority on the question presented, which petitioner correctly frames as one which the Court left open in *Harvey*, but instead support the proposition that the Circuits and state courts of last resort follow the rule the Court laid out in *Harvey*.

Finally, a few of the cases petitioner cites do not involve statements offered to impeach the defendant's testimony. The issue in *United States v. Fellers*, 397 F.3d 1090, 1095 (8th Cir. 2005), *abrogated on other grounds by United States v. Thorpe*, 447 F.3d 565, 597 n.3 (8th Cir. 2006), is not about the admissibility of the statements, but whether a later statement, made after the defendant had voluntarily and knowingly waived the right to counsel, was the fruit of an earlier, uncounseled statement. Similarly, the issue in *United States v. Danielson*, 325 F.3d 1054, 1067 (9th Cir. 2003), was not the use of the statements for impeachment, but whether the government's gathering of information about the defendant's trial strategy had led to a Sixth Amendment violation.

The Court does not need to grant certiorari to address the question presented. The fact that many of the cases petitioner cites in support of the proposition that there is a split of authority on question presented do not, in fact, actually address the question indicates that the split is not so deep and enduring as petitioner suggests. Many of the cases cited involve waivers and merely suggest that the lower courts follow *Harvey*.

2. The uncommon facts of this case result from the prosecution's use of disfavored practices and make it a poor case for considering the question presented.

Law enforcement agencies sometimes use jailhouse informants to investigate ongoing criminal enterprises or attempts to obstruct justice, but take various precautions to prevent abuse and ascertain that the information obtained is reliable. In this case, the prosecutor and law enforcement took few precautions to make sure Doser's testimony was reliable. The question presented implicitly pits the need to prevent possible perjury against the need to preserve the integrity of the adversarial process. The use of disfavored practices in recruiting Doser and procuring his testimony make this a problematic case for examining those considerations.

In *United States v. Massiah*, 377 U.S. 201, 207 (1964), this Court firmly established the rule that statements obtained from a defendant in violation of the right to counsel could not be used against him at trial. One of the policy goals of the exclusionary rule is to remove the incentives for the State to violate defendants' constitutional rights. *See Nix v. Williams*, 467 U.S. 431, 442-43 (1984). By including violations of the right to counsel within the exclusionary rule's ambit, the *Massiah* rule limited the usefulness of employing informants to obtain statements from defendants who had already been charged or indicted.

Nevertheless, the government still has use for informants to investigate ongoing criminal enterprises. *See Massiah*, 377 U.S. at 207. The government also uses informants to investigate attempts by defendants to obstruct justice by fabricating testimony and threatening government

witnesses. *See, e.g., United States v. McManaman*, 606 F.2d 919, 923 (10th Cir. 1979) (plans to kill government witnesses). This case does not involve either of those scenarios; the prosecutor recruited Doser solely to obtain statements to use in prosecuting Ventris on the charges in this case.

Doser testified in return for having his probation terminated after he had violated the terms of probation and faced having to serve the underlying prison sentence. Although Doser denied that he was promised anything in return for his testimony, he admitted that the government coincidentally released him from probation after he provided them with a statement. The trial court saw fit to instruct the jury to consider his testimony with caution.

In other cases where the government used an undercover informant, he or she has carried a recording or transmitting device so that the government has a record of the defendant's statement independent of the informant's recollection. An informant who agrees to provide testimony in return for special treatment has obvious incentives to lie. *See* Robert M. Bloom, Ratting: The Use and Abuse of Informants in the American Justice System 63 (2002). Past experience demonstrates that informants can easily distort a defendant's words to make a discussion of the government's allegations seem like a confession. *See* Bloom at 65. Recording the conversation is an often simple expedient that provides an independent record of the defendant's statement and prevents the most obvious forms of abuse. In this case, however, the government did not record the alleged conversation between Doser and Ventris.

The government's conduct in recruiting Doser and procuring his testimony at trial betrays an utter disregard for any sort of procedural safeguard that would provide some minimal assurance that his testimony was reliable. The government recruited Doser, not to investigate an ongoing criminal enterprise or attempts to obstruct the prosecution, but simply to get additional

evidence against Doser in a case where Ventris and Theel were likely to implicate each other. The government reached out to the stepbrother of a county corrections officer and offered to terminate his probation in return for testimony about a conversation with Ventris of which there is no independent record.

The disregard for procedural safeguards makes this a poor case for examining the question presented. The question requires an examination of two competing interests in our criminal justice system. On one hand, our courts have a legitimate and fundamental interest in avoiding perjurious testimony. *See Napue v. Illinois*, 360 U.S. 264 (1959). On the other hand, the Sixth Amendment right to counsel is fundamental to the adversarial process our courts use to find the truth. *See Johnson v. Zerbst*, 304 U.S. 458, 462-463 (1938). In essence, the question presented asks about the admissibility of testimony that would promote the former consideration at the expense of the latter. But the disregard for safeguards in recruiting Doser means his testimony is not particularly reliable, and does not particularly promote the truth-finding function of our court, while still undermining the right to counsel. The Court should not grant certiorari because this is a poor paradigm case for examining the competing considerations implicit in the question presented.

3. Because Mr. Ventris is currently entitled to discharge from criminal liability under the Kansas speedy trial statute, there is an independent and adequate state law ground for reversing the convictions in this case; as a result, this Court lacks jurisdiction to consider this case.

Procedural timeline

On February 1, 2008, the Kansas Supreme Court issued its decision reversing the conviction in this matter. Petitioner did not file a motion for rehearing and did not file any motion to stay the mandate of the Kansas Supreme Court. As a result, on February 25, 2008, the

Kansas Supreme Court issued its mandate to the state trial court. This clerk of the state trial court received and filed the mandate on February 28, 2008. See Appendix "A".

On or about February 27, 2008, petitioner filed a pleading in the state trial court titled "Notice of Appeal to the United States Supreme Court," which indicated its intent to file a petition for a writ of certiorari and reflecting the time limits for such a petition. See Appendix "B".

On April 28, 2008, petitioner filed its petition for a writ of certiorari with this Court.

On June 4, 2008, Mr. Ventris filed a motion in state trial court seeking discharge pursuant to state law based on the failure of the state to retry him in compliance with state statute. See Appendix "C". On June 26, 2008, the state trial court held a hearing and denied the motion, citing K.S.A. 22-3604, governing appeals by the prosecution. The state trial court held that this statute applied, adopting petitioner's argument that a petition for a writ of certiorari is equivalent to an appeal by the prosecution under the statute. Further review by the Kansas Supreme Court is pending.[1]

Discharge under Kansas statute

K.S.A. 22-3402(1) provides that

> If any person charged with a crime and held in jail solely by reason thereof shall not be brought to trial within 90 days after such person's arraignment on the charge, such person shall be entitled to be discharged from further liability to be tried for the crime charged.

K.S.A. 22-3402(6) covers the precise situation where a criminal defendant obtains a reversal on appeal: "[i]n the event . . . a conviction is reversed on appeal to the supreme court or court of appeals, the time limitations provided for herein shall commence to run from . . . the date the mandate of the supreme court or court of appeals is filed in the district court." *See also State v.*

[1] Although resolution of the issue regarding Mr. Ventris' claim for discharge is not final, by Rule "Any objections to the jurisdiction of the Court to grant a petition for a writ of certiorari shall be included in the brief in opposition." Rule 15.4. If and when a final resolution of this claim is issued by the Kansas Supreme Court, counsel for respondent will file a supplemental brief pursuant to Rule 15.8.

Clements, 244 Kan. 411, 413, 536, 694 P.2d 407 (1985). Therefore, petitioner had 90 days from February 28, 2008 in which to bring Mr. Ventris to trial; that time ended on May 28, 2008. As of that date, pursuant to state law, Mr. Ventris was entitled to final discharge.

A petition for a writ of certiorari to the United States Supreme Court does not stay the judgment of a lower court. *See, e.g., Lawrence v. St. Louis.-S.F. Ry.*, 278 U.S. 228, 232 (1929) (United States Supreme Court appeal does not operate as a supersedeas). *See generally* Robert L. Stern, et al, Supreme Court Practice § 17.10 (8th ed. 2002)("Neither the filing nor the granting of a petition for certiorari operates as a stay, either with respect to the execution of the judgment below or the issuance of the mandate below to a lower court.").

Petitioner might have sought a stay of the Kansas Supreme Court's mandate and has done so in other cases where it contemplated certiorari litigation. *See State v. Marsh*, Appeal No. 81,335 (motion for stay of mandate filed December 17, 2004 and granted December 20, 2004), rev'd by *Kansas v. Marsh*, 548 U.S. 163 (2006). But petitioner did not seek any stay in this case from the Kansas Supreme Court or this Court.

Discharge is adequate and independent state ground for reversal

Mr. Ventris acknowledges the general proposition that issuance of a mandate and execution of a judgment by a lower court does not deprive this Court of certiorari jurisdiction. *See United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983); *Aetna Cas. & Surety Co. v. Flowers*, 330 U.S. 464, 467 (1947). But this general proposition presupposes that the new judgment can be "undone" at a later date.

This Court's jurisprudence makes it clear that, in certain circumstances, a judgment entered in conformity with a state appellate court mandate would deprive this Court of jurisdiction. In fact, such circumstances are the practical basis for one of the exceptions to the

final judgment requirement found in 28 U.S.C. § 1257(3). When considering a claim that a state supreme court judgment suppressing evidence was not "final," this Court noted that if the defendant was convicted on retrial, the suppression issue would be moot. "In the event respondent was successful in obtaining an acquittal on retrial, under California law the State would have no appeal. Satisfied that in these circumstances the decision below constituted a final judgment under 28 U.S.C. 1257(3) (1964 ed.), we denied the motion [to dismiss]." *California v. Stewart*, 384 U.S. 436, 499 n.71 (1966); *see New York v. Quarles*, 467 U.S. 649, 651 n.1 (1984) (same).

Similarly, by failing to obtain a stay of mandate and allowing the state statutory speedy trial clock to run in this case, there is now an adequate and independent state ground for reversing the conviction. And in such situations, this Court lacks jurisdiction:

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review would amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 1225-126 (1945) (quoted in Stern, § 3.22 at 196).

This is exactly the situation at hand. Even if this Court would grant the writ of certiorari and reverse the Kansas Supreme Court's opinion in this case, Mr. Ventris is still entitled to discharge. The mandate of the Kansas Supreme Court lawfully issued effective February 28, 2008. By Kansas statute, petitioner was required to bring Mr. Ventris to trial within 90 days of the filing of the mandate. On May 29, 2008, Mr. Ventris became entitled to absolute discharge. As noted in *Pitcairn*, any review in this case would be nothing but advisory with regard to Mr. Ventris' case.

Because, regardless of this Court's decision, Mr. Ventris is entitled to discharge pursuant to Kansas statute, there is an adequate and independent state ground supporting reversal of the conviction in this matter. In such circumstances, this Court lacks jurisdiction and should dismiss the state's petition for writ of certiorari.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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