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

BRIEF OF AMICI CURIAE STATES OF NEW MEXICO, ALABAMA, ARIZONA, COLORADO, DELAWARE, IDAHO, IOWA, MICHIGAN, NEW HAMPSHIRE, OKLAHOMA, UTAH AND VIRGINIA ON BEHALF OF PETITIONER

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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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INTEREST OF THE AMICI CURIAE

The Amici Curiae States appear in support of Petitioner, the State of Kansas. Supr. Ct. Rule 37.[1]

The Amici have a significant interest in the question presented by the Petition, which has the potential to affect dramatically the conduct of criminal trials across the Nation. As demonstrated by the Petition, cases around the country are hopelessly split, and the issue has been "percolating" since the Court specifically reserved ruling on it 18 years ago. *Michigan v. Harvey,* 494 U.S. 344, 354 (1990). This case is an ideal vehicle for resolving the split because it presents only the one issue, and that issue was the sole basis for the decision below.

SUMMARY OF ARGUMENT

The Kansas Supreme Court majority's opinion removes key credibility determinations from the jury. In doing so, it has effectively recognized a constitutional right to commit perjury, in direct contravention of *Nix v. Whiteside,* 475 U.S. 157, 173 (1986); *Harris v. New York,* 401 U.S. 222, 225 (1971); and *Walder v. United States,* 347 U.S. 62, 65 (1954). This Court has previously excluded a criminal defendant's statements for all purposes only when the statements

[1] As required by Supr. Ct. Rule 37.2(A), counsel for Respondent was given timely notice of Amici's intent to file this brief.

were compelled. In other situations, a witness's statements, however obtained, may be used for impeachment purposes. The distinction drawn by the Court is based on constitutional principles whose surpassing importance is not recognized in the majority's opinion. The majority explicitly holds that, under the Sixth Amendment, "truth-seeking" – that is, engagement with objective reality – is not an overriding concern of the criminal justice system. Appendix at 19a. That holding is contrary to any concept of true justice.

ARGUMENT

I. The Kansas Supreme Court's Majority Opinion, in Practical Effect, Recognizes a Constitutional Right to Commit Perjury.

The majority opinion of the Kansas Supreme Court describes its intended effect clearly: "to prohibit the State from recruiting undercover informants to obtain statements once a prosecution has commenced without a knowing and voluntary waiver of the defendant's Sixth Amendment right to counsel." Appendix at 22a. That effect, of course, would be indirect, mediated through police officers and prison officials.

Even accepting for purposes of argument that the majority's rule of total exclusion will have that indirect effect, it will also have a far more certain *direct* effect. It will, in specified circumstances, prevent the jury from learning that a witness has, on a previous

occasion, said something diametrically opposed to his or her sworn testimony.

The majority's rule removes from the jury three interrelated credibility determinations: whether the informant is telling the truth in his or her rebuttal testimony; and, if so, whether the defendant lied under oath at trial; or whether the defendant instead lied to the informant.

In the present case, the majority explicitly rejects "truth-seeking" as the criminal law's overriding principle. Appendix at 20a. "[T]ruth-seeking", in this context, means nothing more or less than accurate factfinding by the jury. The majority concludes the "error" was not harmless because "[w]ithout the jailhouse informant's testimony, the jury might have considered Ventris' story more believable and acquitted him on all of the counts." Appendix at 23a. In other words, the particular constitutional harm was that the jury was permitted to perform its constitutional function effectively. *Ramonez v. Berghuis*, 490 F.3d 482, 490 (6th Cir. 2007) ("our Constitution leaves it to the jury, not the judge, to evaluate the credibility of witnesses in deciding a criminal defendant's guilt or innocence").

The result reached by the Kansas Supreme Court majority, while justified by citations to the Sixth Amendment and this Court's precedent, is actually contrary to the Sixth Amendment principles found in that precedent.

First and foremost, this Court has "mandated the exclusion of reliable and probative evidence for all purposes only when it is derived from involuntary statements." *Michigan v. Harvey,* 494 U.S. 344, 351 (1990); *New Jersey v. Portash,* 440 U.S. 450, 458-59 (1979); *Mincey v. Arizona,* 437 U.S. 385, 398 (1978). This Court has consistently observed the distinction between voluntary and involuntary statements. *See also, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 235-44 (1973). The distinction is not arbitrary. On the contrary, it is supported by two powerful rationales. First, in cases involving volunteered statements, the deterrent purpose of the exclusionary rule is fully satisfied by exclusion from the prosecution's case in chief, because there is little realistic incentive for a police officer to violate constitutional restrictions on evidence-gathering in the hope that the suspect might someday contradict him- or herself under oath on the particular topic. Only an irrational officer would knowingly violate the Constitution based on such a wan hope, and irrational officers are beyond the reach of the exclusionary rule anyway. *Hudson v. Michigan,* 547 U.S. 586, 596 (2006) ("the value of deterrence depends upon the strength of the incentive to commit the forbidden act"); *Nix v. Williams,* 467 U.S. 431, 446 (1984); *Oregon v. Hass*, 420 U.S. 714, 723 (1975).

Moreover, the intended deterrent effect of the majority's rule of total exclusion is far broader than required by the Sixth Amendment, which does not prohibit for all purposes the investigation of persons

facing criminal charges, but only the use of evidence uncovered by such methods in trials on the then-pending charges. *Texas v. Cobb,* 532 U.S. 162, 171-72 (2001); *Maine v. Moulton,* 474 U.S. 159, 178-80 (1985).

But there is also an even more fundamental and important reason for the Court's disparate treatment of voluntary and involuntary statements. This principle is frequently expressed in negative terms: "a criminal defendant's right to testify does not include the right to commit perjury." *LaChance v. Erickson,* 522 U.S. 262, 266 (1998).

The same principle is just as frequently phrased in positive terms: "when a defendant takes the stand, 'his credibility may be impeached and his testimony assailed like that of any other witness.'" *Portuondo v. Agard,* 529 U.S. 61, 69 (2000) (quoting *Brown v. United States,* 356 U.S. 148, 154 (1958)). These principles are two sides of the same coin. The point is not simply that the defendant is *dis*entitled to commit perjury. Once the defendant has chosen to submit his or her credibility to the jury's evaluation, the jury is *entitled* to evaluate it. *See Wright v. West,* 505 U.S. 277, 296 (1992) (plurality) ("the jury was entitled to discount [the defendant]'s credibility").

By prohibiting the jury from learning that a witness has, on a prior occasion, said something contrary to his or her testimony under oath at the trial, the Kansas Supreme Court effectively recognized a constitutional right to commit perjury in certain circumstances, in flat contradiction to *Nix v.*

Whiteside, 475 U.S. 157, 173 (1986); *Harris v. New York,* 401 U.S. 222, 225 (1971); *Walder v. United States,* 347 U.S. 62, 65 (1954). The majority also diminished the jury's constitutional authority as factfinder, a result difficult to square with the Sixth Amendment principles announced in, *e.g., Blakely v. Washington,* 542 U.S. 296, 305-06 (2004) ("the right of jury trial . . . is no mere procedural formality, but a fundamental reservation of power in our constitutional structure."); *Apprendi v. New Jersey,* 530 U.S. 466, 482-90 (2000).

To justify that result, the majority rejected the underlying rationale of the very precedents that require total exclusion under the Fifth Amendment in certain circumstances, as shown in the following part of this brief.

II. Involuntary Statements Are Treated Differently than Voluntary Statements Based on the Text of the Fifth Amendment, and Considerations of Reliability and Morality.

In *Portash,* the defendant was compelled to testify under a grant of immunity. 440 U.S. at 451. The trial judge ruled that his compelled testimony could be used for impeachment. *Id.* at 452. The Court rejected that ruling:

> [T]he State asks us to weigh *Harris v. New York,* 401 U.S. 222, and *Oregon v. Hass,* 420 U.S. 714. Those cases involved the use of statements, concededly taken in violation of *Miranda v. Arizona,* 384 U.S. 436, to impeach

> a defendant's testimony at trial. In both cases the Court weighed the incremental deterrence of police illegality against the strong policy against countenancing perjury. In the balance, use of the incriminating statements for impeachment purposes prevailed. The State asks that we apply the same reasoning to this case. . . .
>
> But the State has overlooked a *crucial* distinction between those cases and this one. In *Harris* and *Hass* the Court expressly noted that the defendant made "no claim that the statements made to the police were coerced or involuntary," . . . That recognition was *central* to the decisions in those cases.

Id. at 458-59 (italics added; footnote omitted).

In the present case, the majority of the Kansas Supreme Court implicitly but necessarily concluded that the distinction drawn in *Portash* was neither "crucial" nor "central" to a proper Sixth Amendment analysis of the evidence at issue. Amici disagree.

The majority put Respondent's unguarded remarks to his cellmate in the same category as the involuntary statements at issue in *Mincey,* which the Court ruled could not be used for any purpose, including impeachment. 437 U.S. at 398. In *Mincey,* the defendant was in the intensive care unit, drugged, in pain from a bullet wound, with a tube down his throat, when he was subjected to four hours of interrogation. Justice Stewart's opinion for the Court summed up: "He was, in short, 'at the complete mercy'

of Detective Hust, unable to escape or resist the thrust of Hust's interrogation." *Id.* at 399 (citation omitted). It can hardly be maintained that Respondent was in a comparable position when he volunteered his remarks to his cellmate.

Furthermore, the total exclusion of compelled self-incrimination is required by the Constitution's explicit text, the significance of which point is emphasized in the Court's recent Sixth Amendment jurisprudence, *see, e.g., Crawford v. Washington*, 541 U.S. 36, 51 (2004); *Davis v. Washington,* 547 U.S. 813, 824 (2006); and is further justified by obvious concerns about the quality of evidence, so that *exclusion* of compelled statements may well further truth-seeking; and by deep-seated convictions regarding the relationship of the state to the individual. Freedom from official maltreatment, after all, is the only right guaranteed twice in the Bill of Rights, in both the Fifth and Eighth Amendments.

All of these various factual and doctrinal considerations support the rule of total exclusion adopted in *Mincey* and *Portash.* None supports the total exclusion of voluntary statements made to a cellmate, based solely on the cellmate's allegiance of the moment. *Cf.* Appendix at 22a (different result called for if the cellmate switches sides *after* the conversation).

It is noteworthy that the Kansas Supreme Court's majority opinion did not cite *Mincey* or *Portash*; only the dissent did so. Appendix at 42a. Thus the majority did not consider whether there was any

principled basis for this Court's precedents establishing that involuntary statements belong in a different constitutional category than those obtained without, or in violation of, *Miranda* warnings. That is, the majority did not consider whether deeper principles were involved, but rather saw its task as simply choosing between "two analytical approaches", Appendix at 19a, rather in the style of a shopper selecting items from a supermarket shelf. The majority concluded that one approach would discourage behavior of which it disapproved, Appendix at 21a, and made its decision as if no principle more significant than its disapprobation were at stake.

Amici submit that, on the contrary, principles of surpassing importance are at stake, as shown in the final part of this brief.

III. As Then-Judge Kennedy Wrote, "It Is a Disturbing Indictment of Our System of Justice" that a State Supreme Court Would Conclude that the Sixth Amendment Is Hostile to the Pursuit of Truth.

"A trial ideally is a search for the truth". *Agard,* 529 U.S. at 77 (Ginsburg, J., dissenting). The truth cannot be arrived at by concealing relevant information from the jury. On the contrary, this Court has recognized that "the need for information in the criminal context" is especially weighty. *Cheney v. United States District Court,* 542 U.S. 367, 384 (2004). The criminal justice system has a "'fundamental' and 'comprehensive'

need for 'every man's evidence'". *Id.* (quoting *United States v. Nixon,* 418 U.S. 683, 709-10 (1974)). The majority of the Kansas Supreme Court held that the system not only did not need one man's evidence, but positively rejected it.

In *Banks v. Dretke,* 540 U.S. 668 (2004), the Court emphasized "the 'special role played by the American prosecutor in the search for truth in criminal trials.'" *Id.* at 696 (quoting *Stickler v. Greene,* 527 U.S. 263, 281 (1999)). That is a role embraced by most prosecutors as a matter of professional pride. But in the following passage the Kansas Supreme Court's majority denied that judges have a duty to the truth comparable to that imposed on prosecutors:

> Although trial judges are called upon to determine the admissibility of evidence to effectuate the courts' truth-seeking function, there is nothing in our federal or state constitutions that requires us to make truth-seeking the overriding principle that trumps our constitutionally protected rights.

Appendix at 20a.

The card-game metaphor in the quoted passage seems almost too appropriate, for the passage encapsulates the sporting theory of courtroom procedure, by which the judge's sole duty is to enforce the rules of the game without regard to truth and justice. Roscoe Pound, "The Causes of Public Dissatisfaction with the Administration of Justice," 40 Am. L. Rev. 729, 738-39 (1906).

Twenty-nine years ago, then-Judge Kennedy emphatically rejected the contention that it was error to instruct the jury to seek the truth:

> It is a disturbing indictment of our system of justice that an attorney can argue to the court that it is error to instruct the jury to seek the truth. Perhaps both the substance of the argument and the fact that the attorney chooses to make it to the court indicates his agreement with a statement of Socrates that "in the law courts nobody cares a rap for the truth. . . ." Plato, Phaedrus, in Collected Diologues 272d (E. Hamilton ed. 1963). We, who take a grander view of our process, reject the suggestion[.]

United States v. Goodlow, 597 F.2d 159, 163 (9th Cir. 1979) (ellipsis in original).

Amici submit that it is a far more disturbing indictment of our system of justice that a state supreme court should have *accepted* the thrust of that argument.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari and reverse the judgment of the Kansas Supreme Court.

Respectfully submitted,

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