No. 07-

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

PETITION FOR 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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PETITION FOR WRIT OF CERTIORARI

The Attorney General of the State of Kansas respectfully petitions for a writ of certiorari to review the judgment of the Kansas Supreme Court in this case.

OPINIONS BELOW

The opinion of the Kansas Supreme Court (Pet. App. 1a-48a) is reported at 176 P.3d 920 (Kan. 2008). The Kansas Court of Appeals' opinion (Pet. App. 49a-64a) is unpublished. *State v. Ventris*, No. 94,002, 2006 WL 2661161 (Kan. Ct. App. Sept. 15, 2006).

JURISDICTION

The Kansas Supreme Court issued its opinion on February 1, 2008. This petition has been filed within 90 days of that date, as required by Supreme Court Rule 13.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense." U.S. CONST., amend. VI.

The Fourteenth Amendment provides in relevant part that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. CONST., amend. XIV.

STATEMENT

In *Michigan v. Harvey*, 494 U.S. 344 (1990), the Court held that a statement made to police in

violation of *Michigan v. Jackson*, 475 U.S. 625, 636 (1986), may be used to impeach a defendant's testimony, just as statements taken in violation of the *Miranda* rule may be used for impeachment. *See Edwards v. Arizona*, 451 U.S. 477 (1981). In other words, a defendant's testimony may be used for impeachment purposes when he has knowingly and voluntarily waived his right to counsel, but his waiver is deemed invalid because police initiated interrogation following the defendant's assertion of his right to counsel. The Court in *Harvey* left open the question of "the admissibility for impeachment purposes of a voluntary statement obtained in the absence of a knowing and voluntary waiver of the right to counsel." 494 U.S. at 454. This case squarely presents that issue, which has deeply divided the Circuits and state courts of last resort.

The issue left open in *Harvey* appears to arise in two contexts: (1) the police initiate interrogation after a defendant has invoked the right to counsel and the defendant makes statements without ever purporting to make a knowing and voluntary waiver of his rights (a *Jackson*-like violation); and (2) the police use a co-defendant, informant or other agent to surreptitiously elicit statements from a defendant after his right to counsel has attached. *See Massiah v. United States*, 377 U.S. 201, 206 (1964) (defendant "was denied the basic protections of [the Sixth Amendment right to counsel] guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been

indicted and in the absence of his counsel"); *United States v. Henry*, 447 U.S. 264 (1980) (defendant's rights were violated when the government placed an informant in his cell for the purpose of eliciting incriminating statements from defendant after his right to counsel had attached); *but see Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986) (merely placing an informant in a defendant's cell to listen for, but not to elicit, such statements does not violate a defendant's rights because "the primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation").

In either scenario, the defendant does not purport to make a knowing and voluntary waiver of his right to counsel (in the *Massiah* situation he does not even realize he is being interrogated). The lower court decisions discussed below address and split on both situations, and Kansas attempts in its citations to make clear into which category each case falls, even though it appears likely that the same end result should obtain for both situations. That said, this case on its facts involves the *Massiah* situation, and squarely raises the important question the Court left unresolved in *Harvey*.

1. Respondent, Donnie Ray Ventris, was convicted of aggravated robbery and aggravated burglary by a jury in Montgomery County, Kansas. Pet. App. 9a. He was acquitted of felony murder and misdemeanor theft. *Id.* Respondent was sentenced to 247 months

for aggravated robbery and 34 months for aggravated burglary. *Id.* *

Respondent's convictions stem from the robbery and murder of Ernest Hicks. In the early morning hours of January 7, 2004, Respondent and his then girlfriend, Rhonda Theel, discussed confronting Hicks about his alleged abuse of the children with whom Hicks was living. Pet. App. 4a. Theel had also learned from friends that Hicks carried large amounts of cash on his person. *Id.* Respondent and Theel, with the help of friends, eventually made their way to Hicks' residence and confronted him. While inside, either Respondent or Theel shot and killed Hicks with a .38 revolver, then stole Hicks' cell phone and his wallet which contained approximately $300 in cash. *Id.* at 5a-6a.

During the prosecution of this case, Theel entered an agreement with the State to testify against Respondent and she was permitted to plead guilty to aggravated robbery and aiding a felon. Pet. App. 6a. During Respondent's trial, Theel testified that Respondent shot and killed Hicks after the two men argued. *Id.* at 6a-7a. Respondent also testified, but he claimed that it was Theel who shot and killed Hicks. *Id.* at 7a-8a.

In rebuttal to Respondent's testimony, the State offered the testimony of Johnnie Doser, a former cellmate of Respondent's during the time Respondent was awaiting trial. Pet. App. 8a. The State recruited Doser to share a cell with Respondent and

* Though not stated in the opinion, Respondent's sentences are consecutive for a controlling term of 281 months.

listen for any statements Respondent might make about the murder of Hicks. *Id.* According to Doser, Respondent implicated himself, claiming that the Hicks robbery "went sour" and that Respondent shot Hicks before robbing him of money, keys and a vehicle. *Id.* In exchange for Doser's testimony, the State released Doser from his probation. *Id.* at 8a-9a. Over Respondent's objection, the trial court allowed Doser to testify, concluding that although placing Doser in a cell with Respondent violated Respondent's Sixth Amendment right to counsel (a proposition that the State's trial counsel conceded), Doser's testimony was admissible for impeachment purposes in light of Respondent's testimony that Respondent did not shoot Hicks. *Id.* at 9a. The jury convicted Respondent of aggravated burglary and aggravated robbery (but acquitted him of felony murder).

2. On appeal, the Kansas Court of Appeals rejected Respondent's argument that admitting Doser's testimony for impeachment purposes violated Respondent's Sixth Amendment right to counsel. Pet. App. 59a. The intermediate court recognized, as all lower state and federal courts to address the question have, that the Court's decision in *Harvey* expressly left open the issue facing the Kansas court. *Id.* at 57a. The court of appeals then examined decisions from the lower federal courts and other state courts, and found that a majority of jurisdictions to have addressed the issue have held that such statements are admissible for impeachment purposes, so long as they were voluntarily made. *Id.*

at 57a-59a. The court of appeals followed the majority approach and upheld Respondent's convictions.

3.a. Over a dissenting opinion, the Kansas Supreme Court reversed Respondent's convictions. The court concluded that Doser's testimony could not be admitted, even for impeachment purposes and even in the absence of *any* evidence that Respondent's statements were involuntary. Instead, the court held that the only consideration which matters is that the evidence was obtained in violation of the *Massiah* rule: "[o]nce a criminal prosecution has commenced, the defendant's statements made to an undercover informant surreptitiously acting as an agent for the State are not admissible at trial *for any reason, including the impeachment of the defendant's testimony*." Pet. App. 20a (emphasis added). The majority further concluded that the admission of Doser's testimony for impeachment purposes was not harmless error. *Id.* at 23a.

The court below acknowledged that "[n]either this court nor the United States Supreme Court has previously addressed the issue presented by the facts of this case." Pet. App. 17a. After reviewing *Harris v. New York*, 401 U.S. 222 (1971), *Oregon v. Hass*, 420 U.S. 714 (1975), and *Harvey*, the Kansas Supreme Court concluded that such cases were not controlling here because in those cases the alleged or established violation involved law enforcement officials speaking directly with the defendant. In contrast, the statements at issue here "were made to

a jailhouse informant who was surreptitiously acting as an agent of the State." Pet. App. 15a.

The Kansas court concluded that *Massiah* and *Henry* were more relevant to the analysis. Pet. App. 19a-20a. Nonetheless, the Kansas Supreme Court opined that neither *Massiah* nor *Henry* answered the question presented here. *Id.* at 16a-17a.

Instead, the Kansas Supreme Court looked to lower federal court and state court cases addressing the question "specifically left open" by this Court in *Harvey.* Pet. App. 17a. In its discussion, the Kansas Supreme Court acknowledged that the lower federal and state courts have divided on the impeachment issue. The court pointed out that the Tenth Circuit and the Air Force Court of Criminal Appeals have held that such statements are admissible for impeachment purposes. *See id.* at 17a-18a (citing *United States v. McManaman*, 606 F.2d 919 (10th Cir. 1979), and *United States v. Langer*, 41 M.J. 780 (A.F. Ct. Crim. App. 1995)). The Kansas court recognized that, in contrast, the Supreme Court of Maine has held that such statements are not admissible for any purpose. Pet. App. 19a (citing *State v. York*, 705 A.2d 692 (Me. 1997)).

After reviewing the split of authority, the Kansas Supreme Court opined as follows:

> From these cases, we have discerned two analytical approaches for resolving the issue. The first approach focuses on the court's truth-seeking function by denying the defendant an opportunity to commit perjury without contradiction. This approach ignores *Henry* and the requirement that

> defendants make a knowing and voluntary waiver of their Sixth Amendment right to counsel. The second approach requires a knowing and voluntary waiver of the Sixth Amendment right to counsel. The knowing and voluntary waiver is not dependent upon whether the defendant will have an opportunity to commit perjury.

Pet. App. 19a.

The Kansas court then declared that the second approach was more consonant with this Court's decisions in *Harvey* and *Henry*. As a result, the court ruled that testimony such as Doser's is inadmissible for any purpose. Pet. App. 19a-20a.

3.b. The Chief Justice dissented. Pet. App. 27a-48a. In her view, the majority incorrectly analyzed the question, and the court's rule of exclusion for all purposes went beyond what the decisions of this Court require. *Id.* at 28a. She would have held that testimony such as Doser's is admissible for the limited purpose of impeaching a defendant's testimony, so long as the statements were voluntarily made, declaring that:

> Although the United States Supreme Court has not addressed this precise issue, it has repeatedly and consistently allowed the admission of evidence and statements otherwise inadmissible in the prosecution's case in chief to be used for purposes of impeachment, except where such evidence was obtained by coercion or was otherwise involuntary.

Id. at 27a.

REASONS FOR GRANTING THE WRIT

The question presented in this petition is the subject of a deep and enduring split in the Circuits and the state courts of last resort. Indeed, the split appears to predate the Court's decisions in *Michigan v. Jackson*, 475 U.S. 625 (1986), and *Michigan v. Harvey*, 494 U.S. 344 (1990). *See Lucas v. New York*, 474 U.S. 911 (1985) (White, J., dissenting from the denial of *certiorari*) (asserting that the Circuits and state courts had split on the question whether the prohibition in *New Jersey v. Portash*, 440 U.S. 450 (1979), against using statements obtained in violation of the Fifth Amendment for impeachment purposes "applies equally to statements taken in violation of the Sixth Amendment right to counsel"). In fact, the split of authority has only deepened and widened over time.

The Kansas Supreme Court acknowledged the split of authority but failed to appreciate both the depth and scope of that split. As demonstrated below, many Circuits and several state courts of last resort have weighed in on the question the Court expressly left open in *Harvey*, 494 U.S. at 354: "the admissibility for impeachment purposes of a voluntary statement obtained in the absence of a knowing and voluntary waiver of the [Sixth Amendment] right to counsel." The majority of courts permit the use of voluntary statements obtained without a knowing and voluntary waiver of the Sixth Amendment right to counsel to be used for impeachment purposes. But others, including now at least three courts of last resort and one Circuit, hold

to the contrary. Only a decision by this Court will resolve this split of authority. It is clear that the lower courts will not on their own reach a uniform resolution of the important constitutional question presented, especially not with the most recent decision on the issue (the Kansas Supreme Court in this case) adopting the minority position, which deepens rather than weakens the split of authority.

Legal scholars have recognized that the Court's decisions leave uncertainty regarding the precise nature of and bases for the Sixth Amendment right to counsel, with corresponding uncertainty about the very question presented in this case. *See, e.g.*, Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2527 (1996) (noting that the Court has left open the question "whether a 'core' *Massiah* violation—that is, a statement obtained from a defendant whose Sixth Amendment right to counsel has never been waived—is itself a violation of the Sixth Amendment" or instead whether *Massiah* "is not an interpretation of the Constitution, but rather a prophylactic rule designed to sweep more broadly than the actual constitutional right in order to deter police misconduct"); James J. Tomkovicz, *Saving* Massiah *from* Elstad*: The Admissibility of Successive Confessions Following a Deprivation of Counsel*, 15 WM. & MARY BILL RTS. J. 711, 749 (2007) (observing that "if exclusion is a constitutional right, even limited use for impeachment is impermissible. On the other hand, if exclusion is not a right but a deterrent safeguard or part of a prophylactic scheme

designed to prevent constitutional violations, impeachment use may be permissible. A five Justice majority, however, managed to find a way to resolve the narrow issue in *Harvey* without identifying the general rationales for Sixth Amendment exclusion.").

In addition to the deep split of authority, the Kansas Supreme Court's decision is simply wrong. Although this Court has not resolved the precise issue presented, relevant Fourth, Fifth, and Sixth Amendment precedents strongly support the conclusion that a defendant's voluntary statements may be used for impeachment, first and foremost to protect the integrity of the judicial system by deterring perjury. Certainly, that is already the rule in Fourth and Fifth Amendment cases, and the Court in *Harvey* made a step in that direction under the Sixth Amendment as well. This Court's plenary review is warranted here to resolve the precise question left unanswered in *Harvey.*

A. The Kansas Supreme Court's Decision Conflicts With Decisions From Many Circuits And Several State Courts Of Last Resort

In ruling that a defendant's voluntary statements made in violation of the right to counsel are never admissible for any reason, including impeachment, the Kansas Supreme Court acknowledged a split of authority on the question presented. Pet. App. 17a-20a. However, that court cited only a few decisions either supporting or conflicting with its holding. There are in fact many more cases on point—the split in the Circuits and courts of last resort is both much

wider and much deeper than the lower court's opinion suggests.

As the Kansas Court of Appeals correctly acknowledged, in this case, a majority of state and federal courts have found that voluntary statements obtained in violation of the Sixth Amendment right to counsel remain admissible for impeachment purposes. Pet. App. 58a. The Kansas Supreme Court, however, adopted the minority view—that such statements are never admissible for any purpose—a position taken by at least two other courts of last resort and one Circuit. *See State v. York*, 705 A.2d 692, 695 (Me. 1997) (*Massiah* violation: holding that the essence of a *Massiah* violation is the *use at trial* of the evidence obtained and, therefore, such evidence cannot be used for any purpose, including impeachment); *Simpson v. United States*, 632 A.2d 374, 382 (D.C. 1993) (police officer engaged defendant, knowing that defendant's Sixth Amendment right to counsel had attached and that any statements obtained would not be admissible in the government's case in chief; the court held that "exclusion for all purposes of the statements taken in this knowing and intentional violation of Sixth Amendment rights is mandated. To permit the balancing of competing interests here would allow the exception to swallow the rule"); *United States v. Spencer*, 955 F.2d 814, 820 (2d Cir. 1992) (government-initiated interrogation: the court held that "in the absence of a later waiver of the initially invoked right to counsel, any subsequent statement transgresses the core constitutional right to counsel,

rather than a judicially created prophylactic rule for the protection of that right, and therefore should not be available to the prosecution for any purpose."); *United States v. Abdi*, 142 F.3d 566 (2d Cir. 1998) (government initiated interrogation: the court followed *Spencer*).

On the other side of the split of authority, several Circuits and state courts of last resort have held that voluntary statements obtained in violation of *Massiah* or in a *Jackson*-like situation (without a purported waiver) are admissible for impeachment.

The Circuit Decisions: *United States v. Bender*, 221 F.3d 265, 271 (1st Cir. 2000) (*Massiah* situation: "Nothing prevents the government from using [defendant's] statements, if knowing and voluntary, for the purpose of impeachment, if he testifies"); *United States v. Stevens*, 935 F.3d 1380, 1395-96 (3d Cir. 1991) (dicta: describing distinction between impeachment and substantive guilt evidence as it relates to inconsistent statements made during pretrial services interview, and recognizing that evidence obtained in violation of Fourth, Fifth, and Sixth Amendment rules generally may be used for impeachment purposes); *United States v. Yancey*, No. 97-4893, 1998 WL 393972, at *2 (4th Cir. July 10, 1998) (*Massiah* situation: statements obtained may be used to impeach a defendant's trial testimony); *United States v. Laury*, 49 F.3d 145, 150 (5th Cir. 1995) ("It is well established that the prosecution may use a statement obtained in violation of the Sixth Amendment to impeach a defendant's false or inconsistent testimony."); *Bradford v. Whitley*, 953

F.2d 1008, 1011 (5th Cir. 1992) ("When a defendant chooses to take the stand, he assumes an obligation to speak truthfully. That the government may have resorted to unconstitutional means to obtain a confession does not mean the defendant is justified in turning the illegality to his advantage, thereby preventing the prosecution from exposing his prior inconsistent statements at trial."); *United States v. Fellers*, 397 F.3d 1090, 1097 (8th Cir. 2005), *abrogated on other grounds by United States v. Thorpe*, 447 F.3d 565, 569 n.3 (8th Cir. 2006) ("uncounseled statements obtained in violation of the Sixth Amendment may be used at trial for impeachment purposes"); *United States v. Ortega*, 203 F.3d 675, 681 (9th Cir. 2000) (government initiated questioning: the court held that the defendant assumed a reciprocal obligation to speak truthfully and thus government may use statements to impeach defendant's inconsistent testimony); *United States v. Danielson*, 325 F.3d 1054, 1067 (9th Cir. 2003) (*Massiah* violation: court states in dicta that such statements are admissible for impeachment purposes, so long as they are voluntary); *United States v. McManaman*, 606 F.2d 919, 925 (10th Cir. 1979) (evidence that is inadmissible in the Government's case in chief can be used in rebuttal to impeach the defendant); *United States v. Denetclaw*, 96 F.3d 454, 457 (10th Cir. 1996) (statements made in a prior plea hearing without the assistance of counsel are admissible for impeachment purposes in a later proceeding); *McGriff v. Dep't of Corrections*, 338 F.3d 1231, 1235-36 (11th Cir. 2003) (dicta: so long as a statement obtained in violation of the Sixth

Amendment right to counsel is deemed voluntary it may be used for impeachment purposes).

See also Trevino v. Alameida, No. C 04-0720 MMC (PR), 2007 WL 781590, at *15 (N.D. Cal. Mar. 13, 2007) ("the federal circuits that have addressed the issue are split, with the Ninth Circuit and other circuits allowing voluntary statements obtained in violation of *Massiah* to be used for impeachment"); *United States v. Red Bird*, 146 F. Supp. 2d 993, 1009 (C.D.S.D. 2001) (statement taken in violation of the Sixth Amendment that was not the product of coercion or otherwise involuntary is admissible at trial for impeachment purposes); *United States v. Martin*, 974 F. Supp. 677, 684 (C.D. Ill. 1997) (*Massiah* violation: statements obtained cannot be used in government's case in chief, but may be used for impeachment if the government establishes how the defendant's testimony on direct examination opens the door for impeachment *via* the statements at issue); *United States v. Campbell*, 805 F. Supp. 1379, 1385 (W.D. Tex. 1992) (a statement taken in violation of the Sixth Amendment that would be inadmissible during the prosecution's case in chief is admissible for impeachment purposes); *United States v. Langer*, 41 M.J. 780, 784 (A.F. Ct. Crim. App. 1995) (statement suppressed for Sixth Amendment violation remains admissible for impeachment).

The State Courts of Last Resort Decisions: *State v. Conway*, 842 N.E.2d 996, 1020 (Ohio), *cert. denied*, 127 S. Ct. 122 (2006) (*Massiah* situation: the Court held that defendant's recorded statements, "although obtained in violation of his right to counsel, were

admissible solely to impeach his untruthful trial testimony"); *State v. Mattatall*, 603 A.2d 1098, 1114 (R.I. 1992) (*Massiah* situation: the court held that "constitutional violations that are beyond the prophylactic rules do not necessarily warrant the exclusion of such evidence for all purposes. The exclusion of reliable and probative evidence for *all* purposes is not mandated unless it is derived from coerced or involuntary statements.") (emphasis in original). *Cf. People v. Branch*, 805 P.2d 1075, 1081 (Colo. 1991) (en banc) (statements made to state doctor in competency hearing: so long as statements are deemed voluntary they may be used for impeachment purposes, even if they were obtained in violation of procedural safeguards).

See also People v. Frazier, 715 N.W.2d 341, 347 (Mich. App. 2006), *rev'd in part on other grounds*, 733 N.W.2d 713 (Mich. 2007) (government-initiated interrogation: suppression for *all* purposes only necessary when statement is deemed truly involuntary); *State v. Cherry*, 83 P.3d 123, 125 (Idaho Ct. App. 2003) (government-initiated interrogation: statements obtained in the absence of a knowing and voluntary waiver of right to counsel admissible for impeachment purposes); *State v. Southworth*, 52 P.3d 987, 994 (N.M. Ct. App. 2002) (government-initiated interrogation: statements admissible for impeachment purposes); *Garza v. State*, 18 S.W.3d 813, 827 (Tex. App. 2000) ("the Sixth Amendment does not bar the use of a defendant's voluntary statement for impeachment where the defendant testifies at trial, even if the impeaching statements

were elicited in violation of that defendant's Sixth Amendment right to counsel").

The preceding citations alone demonstrate that the question presented in this petition arises frequently, will continue to arise, and has generated a deep and enduring split of authority that only this Court can resolve. The Kansas Supreme Court's decision to adopt the minority view highlights that the split is not likely to resolve itself, illustrates the continuing uncertainty regarding this important Sixth Amendment issue, and ultimately demonstrates the need for this Court to resolve now the important question the Court expressly left open in *Harvey*. *See* 494 U.S. at 354. Indeed, an objective observer cannot fairly say that the lower courts have achieved—or are even moving toward—a consensus on the question presented. Finally, this case cleanly presents the issue the Court left open in *Harvey* and is an appropriate vehicle to resolve that question.

B. The Kansas Supreme Court's Decision Is Contrary To This Court's Precedents

The Court's cases hold that once the Sixth Amendment right to counsel attaches statements elicited from a defendant outside the presence of counsel and not accompanied by a valid waiver are inadmissible in the government's case in chief. *See, e.g.*, *United States v. Gouveia*, 467 U.S. 180, 187-88 (1984); *United States v. Henry*, 447 U.S. 264, 273-74 (1980); *Massiah v. United States*, 377 U.S. 201, 206 (1964). In *Michigan v. Jackson*, 475 U.S. 625 (1986), the Court adopted a prophylactic rule that, once a defendant invokes his Sixth Amendment right to

counsel, any future waiver of that right as a result of a law enforcement-initiated interrogation is presumed invalid, even if the waiver otherwise would be considered knowing and voluntary. *Id.* at 629-32.

In *Michigan v. Harvey*, 494 U.S. 344 (1990), the Court held that a *Jackson* violation does not preclude the prosecution from using a defendant's statements for impeachment purposes. *Id.* at 350-51. The question here is possibly different for two reasons: (1) this case does not involve a *Jackson* violation but, rather, a *Massiah/Henry* violation; and (2) in this case there is no purported waiver of Respondent's Sixth Amendment rights, which presumably will always be true of *Massiah/Henry* cases. That said, the weight of the Court's precedents, including the reasoning of *Harvey* and analogies to the Fourth and Fifth Amendment contexts, strongly suggests that statements such as those at issue here should be admissible for impeachment purposes.

As a general constitutional rule, criminal defendants' voluntary statements should be admissible for impeachment purposes. The Court in Sixth Amendment cases and criminal procedure decisions more generally has weighed the costs of excluding relevant probative evidence against the very real danger of effectively countenancing perjured testimony by excluding such evidence. *See, e.g., Harris v. New York*, 401 U.S. 222, 225 (1971) ("Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury."); *Oregon v. Hass*, 420 U.S. 714, 722

(1975) ("[T]he shield provided by *Miranda* is not to be perverted to a license to testify inconsistently, or even perjuriously, from the risk of confrontation with prior inconsistent utterances."); *United States v. Havens*, 446 U.S. 620, 626 (1980) ("There is no gainsaying that arriving at the truth is a fundamental goal of our legal system."); *Nix v. Whiteside*, 475 U.S. 157, 173 (1986) ("Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying *falsely*.")(emphasis in original); *see also United States v. Lott*, 854 F.2d 244, 249 (7th Cir. 1988) ("the antiperjury considerations that generated the *Harris* line of cases are applicable" in the Sixth Amendment context and require that statements obtained in violation of that right be "admissible for impeachment purposes").

Further, the Court has made clear that it has "mandated the exclusion of reliable and probative evidence for *all* purposes only when it is derived from involuntary statements." *Harvey*, 494 U.S. at 351 (emphasis in original). Thus, the Court has "never prevented use by the prosecution of relevant voluntary statements by a defendant, particularly when the violations alleged by a defendant relate only to procedural safeguards that are 'not themselves rights protected by the Constitution.'" *Id.* (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)).

Thus, the Court has recognized that the exclusion of relevant, probative evidence for *all* purposes is appropriate only when a core constitutional right is

violated with the consequence that the evidence itself is highly suspect, typically because it was obtained by intolerable methods such as coercion or compulsion, means that might render a defendant's statements involuntary. *See, e.g., Harvey*, 494 U.S. at 351 (citing *Portash*, 440 U.S. at 459, and *Mincey v. Arizona*, 437 U.S. 385, 398 (1978)); *United States v. Patane*, 542 U.S. 630, 639 (2004). The record in this case lacks *any* indication of coercion or compulsion of Respondent. Pet. App. 35a.

For more than fifty years, the Court has recognized the fundamental importance of discouraging perjury in order to protect the integrity of the judicial system and seek the truth, while at the same time protecting defendants' constitutional rights. The Court typically has reconciled those twin objectives as follows: "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths." *Walder v. United States*, 347 U.S. 62, 65 (1954).

In Fourth and Fifth Amendment cases, as well as in *Michigan v. Harvey*, the Court has consistently drawn a constitutional line between evidence used in the government's case in chief and evidence used for impeachment purposes. That line is appropriate as a general rule for Sixth Amendment cases, and the Court should take this opportunity to adopt such a rule and clarify its Sixth Amendment jurisprudence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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