No. 07-1356

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

DONNIE RAY VENTRIS,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Kansas

BRIEF FOR 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 his Sixth Amendment right to counsel is admissible for impeachment purposes if the defendant testifies untruthfully at his trial?

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JURISDICTION

The Kansas Supreme Court issued its opinion on February 1, 2008. The petition for a writ of certiorari was filed on April 28, 2008, and granted on October 1, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL 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

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.* Ventris was sentenced to 247 months for aggravated robbery and 34 months for aggravated burglary. *Id.*

In the early morning hours of January 7, 2004, Ventris and his girlfriend, Rhonda Theel, discussed confronting Ernest Hicks about whether Hicks was abusing the children with whom Hicks was living. Pet. App. 4a. Theel also had been told that Hicks carried large amounts of cash on his person. *Id.* Ventris and Theel eventually made their way to Hicks' residence and confronted him. Hicks was shot and killed, and Ventris and Theel stole Hicks' cell phone and a wallet containing approximately $300 in cash. *Id.* at 5a–6a.

Theel entered an agreement with the State to testify against Ventris and she pled guilty to aggravated robbery and aiding a felon. Pet. App. 6a. During Ventris' trial, Theel testified that Ventris shot and killed Hicks after the two men argued. *Id.* at 6a–7a. Ventris testified in his own defense and claimed that Theel shot and killed Hicks after she and Hicks argued. *Id.* at 7a–8a; Joint Appendix ("J.A.") 56, 92–94.

To impeach Ventris' testimony, the State offered in rebuttal the testimony of Johnnie Doser, a former cellmate of Ventris during the time Ventris was awaiting trial. Pet. App. 8a; J.A. 144-51. The day after Ventris was arrested, the State had recruited Doser to share a cell with Ventris and listen for any statements Ventris might make about the murder of Hicks. *Id.*; J.A. 159. Over Ventris' objection, the trial court allowed Doser to testify. The State's trial counsel essentially conceded that placing Doser in a cell with Ventris violated the Sixth Amendment, *see infra* note *, but the trial court held that Doser's

testimony nonetheless was admissible for impeachment. Pet. App. 9a; J.A. 143.

Doser testified that Ventris told him that the Hicks robbery "went sour" and that Ventris shot Hicks before robbing him of money, keys, and a vehicle. Pet. App. 8a; J.A. 150. In exchange for testifying, Doser was released from his probation. Pet. App. 8a–9a. The jury convicted Ventris of aggravated burglary and aggravated robbery, but acquitted him of felony murder.

2. On appeal, the Kansas Court of Appeals rejected Ventris' argument that admitting Doser's testimony in the State's rebuttal case solely for impeachment purposes violated the Sixth Amendment right to counsel. Pet. App. 59a. The court recognized that this Court's decision in *Michigan v. Harvey*, 494 U.S. 344 (1990), expressly left open the issue Ventris raised. Pet. App. 57a. The court of appeals examined decisions from the lower federal courts and other state courts and found that a majority of jurisdictions have held such statements to be admissible for impeachment purposes, so long as the statements are voluntary. *Id.* at 57a–59a. The court of appeals followed the majority approach and upheld Ventris' convictions.

3a. The Kansas Supreme Court reversed, concluding that Doser's testimony could not be admitted for *any* purpose, even though there was no claim, much less any evidence in the record, that Ventris' statements were involuntary or coerced. The supreme court held that a statement obtained in violation of the rule established in cases such as

Massiah v. United States, 377 U.S. 201 (1964), and *United States v. Henry*, 447 U.S. 264 (1980), must be excluded for all purposes: "[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 court further held that the admission of Doser's testimony was not harmless error. *Id.* at 23a.

The supreme court 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. The court opined that cases such as *Harris v. New York*, 401 U.S. 222 (1971), *Oregon v. Hass*, 420 U.S. 714 (1975), and *Michigan v. Harvey*, all of which permitted unlawfully obtained evidence to be used for impeachment purposes, were distinguishable because they involved law enforcement officials speaking directly with the defendant. In contrast, the statements here "were made to a jailhouse informant who was surreptitiously acting as an agent of the State." Pet. App. 15a.

After reviewing several lower federal and state court cases addressing the issue, the Kansas Supreme Court discerned two approaches:

> 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. Adopting the "second approach," the court rejected the argument that the police conduct here "merely violates a prophylactic rule," *id.* at 21a, opining that the "purity of justice under our Sixth Amendment's constitutional right to counsel cannot be polluted by the subversive conduct of deceitful acquisition of evidence." *Id.*

3b. The Chief Justice dissented. Pet. App. 27a–48a. She argued that Doser's testimony should have been admissible for the limited purpose of impeaching Ventris, so long as Ventris' statements were voluntarily made:

> 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.

SUMMARY OF ARGUMENT

The Kansas Supreme Court's decision is wrong. The primary purpose of applying the exclusionary

rule is to deter future police misconduct that would not otherwise adequately be deterred. *Arizona v. Evans*, 514 U.S. 1, 10 (1995). The Court has recognized, however, that the exclusion of relevant, probative evidence imposes high costs on the truth-seeking function of the criminal justice system. *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 364–65 (1998).

Thus, the Court applies a now familiar cost-benefit balancing analysis in determining the proper scope of the exclusionary rule. In particular, the Court weighs the "rule's general deterrent effect" on future violations, *Evans*, 514 U.S. at 11, against the "substantial social costs," *United States v. Leon*, 468 U.S. 897, 907 (1984), of applying the rule, costs "which sometimes include setting the guilty free and the dangerous at large," *Hudson v. Michigan*, 547 U.S. 586, 591 (2006), as well as undermining "truth-seeking and law enforcement objectives." *Scott*, 524 U.S. at 364–65.

The Court has made clear that "[t]he question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the [constitutional] rights of the party seeking to invoke the rule were violated." *Illinois v. Gates*, 462 U.S. 213, 223 (1983); *Hudson*, 547 U.S. at 591–92 (same); *Evans*, 514 U.S. at 10 (same). Further, applying the exclusionary rule "has always been our last resort, not our first impulse," *Hudson*, 547 U.S. at 591, and the Court has "rejected

'[i]ndiscriminate application' of the rule." *Id.* (quoting *Leon*, 468 U.S. at 908).

The Court has recognized that the same cost-benefit balancing analysis it has applied in the Fourth Amendment and *Miranda* cases is appropriate in determining the scope of the exclusionary rule in Sixth Amendment right to counsel cases. *See, e.g.*, *Nix v. Williams*, 467 U.S. 431, 445 (1984) (exclusion is proper only if the benefits outweigh "the enormous societal cost of excluding truth in the search for truth in the administration of justice"); *Michigan v. Harvey*, 494 U.S. 344, 350–53 (1990) (engaging in the balancing analysis). Thus, the cost-benefit balancing analysis applies here.

The Court's cost-benefit balancing analysis consistently has resulted in recognition of a distinction between unlawfully obtained evidence used in the government's case in chief and such evidence used to impeach a defendant who chooses to testify untruthfully. *See, e.g.*, *Oregon v. Hass*, 420 U.S. 714, 723 (1975) ("the balance was struck in *Harris* [*v. New York*, 401 U.S. 222 (1971)], and we are not disposed to change it now"); *United States v. Havens*, 446 U.S. 620, 627 (1980) ("We reaffirm this assessment of the competing interests . . . ."). Indeed, to date, the Court's cases uniformly permit the use of evidence obtained in violation of constitutional provisions to be used for *impeachment purposes*, so long as the evidence does not consist of compelled or involuntary statements. *See, e.g.*, *Harvey*, 494 U.S. at 351 ("We have mandated the

exclusion of reliable and probative evidence for *all* purposes only when it is derived from involuntary statements.").

The same result is proper here. Excluding voluntary statements for all purposes would condone and perhaps even encourage perjury, a result that would subvert the search for truth in the adversary system. *Havens*, 446 U.S. at 626 (the Court has "stressed the importance of arriving at the truth in criminal trials, as well as the defendant's obligation to speak the truth in response to proper questions"). A criminal defendant has a constitutional right both to testify at trial and to the assistance of counsel, but there is no constitutional right to commit perjury. *LaChance v. Erickson*, 522 U.S. 262, 266 (1998) ("It is well established that a criminal defendant's right to testify does not include the right to commit perjury."). A rule of total exclusion will impose very real and very high costs on the search for truth. Not only may evidence that is probative and relevant be kept from the jury, but defendants will be permitted to affirmatively present false testimony to the jury.

On the other side of the balancing analysis, a rule of total exclusion at best will have only a highly speculative marginal effect in deterring police misconduct. Kansas acknowledges and accepts the principle that it cannot use the defendant's statements here in the prosecution's case in chief; that application of the exclusionary rule alone provides significant deterrence against police misconduct. Indeed, the only *potential* benefit to the police of intentionally violating a defendant's Sixth

Amendment right to counsel is the *possibility* that the defendant *might* make statements that *might* be helpful to the prosecution at trial *if and only if* the defendant actually testifies and does so *untruthfully*.

Moreover, police officers who engage in intentional violations of the constitutional rights of defendants risk civil liability and professional discipline, the latter potentially including suspension, demotion, or even termination. Both individual law enforcement officers and municipal entities are subject to civil suits under 42 U.S.C. § 1983. Municipalities have no immunity from such suits, and individual officers will lose their qualified immunity if they engage in violations of clearly established constitutional rights. As a result, criminal defendants have become civil rights plaintiffs in section 1983 litigation involving alleged Sixth Amendment right to counsel violations. *See, e.g.*, *Rothgery v. Gillespie County*, 554 U.S. ___, 128 S. Ct. 2578 (2008). Thus, multiple layers of deterrence already exist.

The Court has applied a rule of total exclusion only when constitutional text, in particular the Fifth Amendment privilege against self-incrimination, has effectively demanded such a result. *See, e.g.*, *New Jersey v. Portash*, 440 U.S. 450, 458–59 (1979) (for exclusionary rule purposes, the key distinction is between compelled or involuntary statements and all other statements unlawfully obtained). Unlike the Fifth Amendment's prohibition on self-incrimination, however, the Sixth Amendment's right to counsel provision grants an affirmative right to the assistance of counsel. It is not on its face a

prohibition on government conduct, nor on its face does the guarantee have anything to do with testimonial evidence. Thus, unlike the Fifth Amendment provision, the Sixth Amendment's right to counsel guarantee does not explicitly suggest a rule of total exclusion.

Finally, this case involves police misconduct that, at most, is at the edge of constitutionality, just on the other side of the line. In fact, in the *Massiah*-type cases, the reason for finding a constitutional violation may be nothing more than that an informant did not listen carefully to or did not follow the directions of police who told him only to listen for statements from the defendant, but not to interrogate or ask questions. *Cf. Kuhlmann v. Wilson*, 477 U.S. 436 (1986) (using an informant who acts only as a "listening post" does not violate the Sixth Amendment).

Thus, the case for exclusion in this setting is even weaker than in the *Michigan v. Harvey*, 494 U.S. 344 (1990), context, where the police directly interrogated the defendant following an invalid waiver of his Sixth Amendment right to counsel. Here, in contrast, there is not even a possibility, much less a significant risk, of police coercion or intimidation. Moreover, a defendant's statement to a cellmate may well be even more reliable than a statement taken by police, whether or not police obtained a valid or invalid waiver of rights.

The Kansas Supreme Court's total exclusion rule goes too far, and subverts rather than promotes the search for truth in the criminal justice system. There

is little marginal benefit from extending the exclusionary rule so far, but there certainly are high costs which result from that extension. The better and more appropriate rule is the one this Court has to date *always* adopted after applying the cost-benefit balancing analysis: evidence obtained in violation of constitutional requirements may be used for impeachment when the defendant testifies untruthfully at trial, so long as the evidence does not consist of involuntary or compelled statements.

ARGUMENT

A CRIMINAL DEFENDANT'S VOLUNTARY STATEMENTS OBTAINED WITHOUT A VOLUNTARY AND KNOWING WAIVER OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL ARE ADMISSIBLE FOR IMPEACHMENT PURPOSES IF AT TRIAL THE DEFENDANT TESTIFIES UNTRUTHFULLY.

I. The Court Has Tailored The Exclusionary Rule To Accomplish Its Remedial Purposes Without Imposing Undue Costs.

The Court engages in a now familiar balancing analysis when it decides whether the exclusionary rule should apply in a particular setting. Specifically, the Court weighs the "rule's general deterrent effect" on future violations, *Arizona v. Evans*, 514 U.S. 1, 11 (1995), against the "substantial social costs," *United States v. Leon*, 468 U.S. 897, 907 (1984), of applying the rule, costs "which sometimes include setting the guilty free and the dangerous at large," *Hudson v. Michigan*, 547 U.S. 586, 591 (2006), as well as undermining "truth-seeking and law enforcement

objectives." *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 364–65 (1998). Thus, the Court applies the rule to exclude the admission of relevant and probative evidence that is unlawfully obtained only "where [the rule's] deterrence benefits outweigh its 'substantial social costs.'" *Id.* at 363 (quoting *Leon*, 468 U.S. at 907).

The Court has made clear that the "question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether [a constitutional right] of the party seeking to invoke the rule [was] violated." *Illinois v. Gates*, 462 U.S. 213, 223 (1983); *see also Evans*, 514 U.S. at 13 (the Court's more recent cases have rejected "reflexive application of the exclusionary rule" and "emphasized that the issue of exclusion is separate from whether [a constitutional right] has been violated"); *Hudson*, 547 U.S. at 591 (same).

Fundamentally, the exclusionary rule is a remedial device "designed to safeguard against future violations of [constitutional] rights through the rule's deterrent effect." *Evans*, 514 U.S. at 10. As is appropriate for any "remedial device, the rule's application has been restricted to those instances where its remedial objectives are thought most efficaciously served." *Id.* at 11; *see also Hudson*, 547 U.S. at 591. Thus, "exclusion may not be premised on the mere fact that a constitutional violation was a 'but-for' cause of obtaining evidence." *Id.* at 592.

In consistently applying the balancing analysis, the Court has explained how it evaluates the

competing interests. Because the exclusionary rule's primary purpose is to ensure future compliance by police with constitutional requirements, *Elkins v. United States*, 364 U.S. 206, 217 (1960) ("The rule is calculated to prevent, not to repair."), the Court has emphasized that, if applying the rule "does not result in *appreciable deterrence*, then, clearly its use . . . is unwarranted." *United States v. Janis*, 428 U.S. 433, 454 (1976) (emphasis added). As a result, if there is "no sound reason to apply the exclusionary rule as a means of deterring misconduct," *Evans*, 514 U.S. at 11, the Court will not do so.

The presence or possibility of some deterrent effect and resulting benefit is only "a necessary condition for exclusion. It is not, of course, a sufficient condition." *Hudson*, 547 U.S. at 596. The Court does not apply the exclusionary rule every time doing so "might deter police misconduct." *United States v. Calandra*, 414 U.S. 338, 350 (1974); *Scott*, 524 U.S. at 368 ("We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence."). Rather, deterrent benefits can be, and the Court often has found them to be in particular cases, outweighed by the costs of applying the exclusionary rule.

Thus, not surprisingly, the Court has emphasized that "the exclusionary rule has never been applied except 'where its deterrence benefits out-weigh its 'substantial social costs.'" *Hudson*, 547 U.S. at 594 (quoting *Scott*, 524 U.S. at 363 and *Leon*, 468 U.S. at 907). Further, the Court frequently has emphasized the "grave consequences that exclusion of relevant

incriminating evidence always entails." *Id.* at 595. In addition to "setting the guilty free and the dangerous at large," *id.* at 591, significant social costs include undermining "the ability of courts to ascertain the truth." *United States v. Payner*, 447 U.S. 727, 734 (1980); *Alderman v. United States*, 394 U.S. 165, 175 (1969) (recognizing the strong public interest in having those accused of crime "acquitted or convicted on the basis of all the evidence which exposes the truth").

In sum, it is now well-settled that the Court applies a cost-benefit balancing analysis when it evaluates claims that violations of the Fourth Amendment, the *Miranda* requirements, or the Sixth Amendment right to counsel require the exclusion of evidence as a remedy for unconstitutional police conduct. There is no reason to treat Sixth Amendment right to counsel violations differently, and the Court to date has not done so. *See, e.g.*, *Nix v. Williams*, 467 U.S. 431, 445 (1984) (exclusion is proper for Sixth Amendment right to counsel violation only if the benefits outweigh "the enormous societal cost of excluding truth in the search for truth in the administration of justice"); *Michigan v. Harvey*, 494 U.S. 344, 350–53 (1990) (engaging in the balancing analysis in determining the exclusionary effect of a violation of the Sixth Amendment right to counsel rule of *Michigan v. Jackson*, 475 U.S. 625 (1986)).

Thus, the Court's cost-benefit balancing analysis applies here, and requires weighing the possible future deterrent effect of applying the rule against

the significant present and future social costs of excluding relevant and probative evidence.

II. Statements Unlawfully Obtained May Be Used For Impeachment Unless They Are Involuntary Or Compelled.

A. The Court Has Not Extended The Exclusionary Rule To Prevent The Impeachment Of A Defendant Who Testifies Untruthfully At Trial.

1. As a general rule, the Court has held that evidence obtained in violation of the Fourth Amendment, the *Miranda* requirements, and the Sixth Amendment right to counsel rule of *Michigan v. Jackson*, may be used for *impeachment* purposes, even though not admissible in the government's case in chief. *See, e.g.*, *Walder v. United States*, 347 U.S. 62 (1954) (unlawfully obtained illegal drugs may be used to impeach defendant's untruthful statement that he had never possessed any such drugs); *United States v. Havens*, 446 U.S. 620 (1980) (shirt unlawfully seized from defendant's luggage was admissible to impeach defendant's testimony that he had no knowledge of such a shirt); *Harris v. New York*, 401 U.S. 222 (1971) (voluntary statements obtained in violation of *Miranda* requirements admissible to impeach defendant's untruthful trial testimony); *Oregon v. Hass*, 420 U.S. 714 (1975) (same); *Michigan v. Harvey*, 494 U.S. 344 (1990) (voluntary statements obtained in violation of the waiver rule of *Michigan v. Jackson* are admissible for impeachment).

The analysis of the exclusionary effect of the Sixth Amendment right to counsel violation here parallels the analysis the Court has utilized for Fourth Amendment, *Miranda*, and *Jackson* violations. As explained above, the Court has recognized that the exclusionary rule is a remedial device designed to enforce constitutional rights, but not at any cost. Instead, the Court has balanced the marginal deterrent effect of expanding the exclusionary rule to preclude impeachment use of unlawfully obtained but relevant and probative evidence against the costs that such expanded exclusion will impose on society and the judicial system. To date, the Court has struck the same balance in *every* case: any possible additional future deterrent effects of expanding the exclusionary rule to preclude impeachment are outweighed by the substantial costs of undermining the search for truth and allowing defendants to commit perjury.

2. In Fourth Amendment cases, the Court for more than fifty years has held that unlawfully obtained evidence is admissible to impeach a defendant who testifies untruthfully:

> 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, 347 U.S. at 65. *See also Havens*, 446 U.S. at 627 ("the ends of the exclusionary rules were thought

adequately implemented by denying the government the use of the challenged evidence to make out its case in chief").

Moreover, the Court has made clear in Fourth Amendment cases that "the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons . . . ." *United States v. Calandra*, 414 U.S. 338, 348 (1974). The Court has rejected the automatic exclusion of evidence simply because "a constitutional violation was a 'but-for' cause of obtaining evidence." *Hudson v. Michigan*, 547 U.S. at 592. Instead, the Court has applied the exclusionary rule only when "its remedial objectives are thought most efficaciously served." *Calandra*, 414 U.S. at 348.

3. In Fifth Amendment cases, the Court has reached the same conclusion. The result is that, unless a statement is involuntary or compelled (situations discussed below in Part II.D.) the Court has refused to exclude statements obtained in violation of the *Miranda* requirements from being used to impeach a defendant's untruthful trial testimony:

> The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby. Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct,

> sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.

Harris, 401 U.S. at 225.

The Court has made clear that "when balancing the interests involved, we must weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce." *Michigan v. Tucker*, 417 U.S. 433, 450 (1974). Further, the Court has recognized that expanding the exclusionary rule to preclude the use of voluntary statements for impeachment risks condoning or even encouraging perjury: "inadmissibility would pervert the constitutional right [to testify] into a right to falsify free from the embarrassment of impeachment evidence from the defendant's own mouth." *Hass*, 420 U.S. at 723.

4. The same rule applies here. The Court has held that once the Sixth Amendment right to counsel has attached, statements elicited from a defendant outside the presence of counsel and not accompanied by a valid waiver violate the right to counsel. *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). For purposes of deciding the impeachment question presented here, Kansas does not challenge

the concession below that there was a Sixth Amendment right to counsel violation.*

The Court previously has recognized the case in chief versus impeachment distinction in the Sixth Amendment right to counsel context. Indeed, the Court enforced that precise distinction in *Michigan v. Harvey*, 494 U.S. 344 (1990), where the Court limited the exclusionary effect of a violation of the Sixth

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* Although there is no testimony in the record that law enforcement officers directed the informant, Doser, to do anything but "keep my ear open and listen," J.A. 146, and the record is unclear as to whether Doser in fact interrogated or questioned Ventris about the murder at issue here, *id.* at 154–55, the trial prosecutor assumed that a Sixth Amendment right to counsel violation occurred and argued only that Doser's testimony was admissible for impeachment purposes. *See, e.g.*, J.A. 143 (responding to defense objection to permitting Doser to testify, the prosecutor stated "[y]es, I will grant that he was placed in there and there's probably a violation); *id.* at 37 (stating in document opposing Ventris' motion for a new trial that "In the case at bar, the defendant's sixth amendment right to counsel may have been violated."); *id.* at 161–62 (arguing post-trial that Doser's testimony was admissible for impeachment even if there was a Sixth Amendment violation).

On appeal, the Kansas Supreme Court declared that "[t]he State concedes that it violated Ventris' Sixth Amendment right to counsel when it surreptitiously planted Doser in Ventris' jail cell as a human listening device." Pet. App. 10a. Though it may once have been debatable whether a Sixth Amendment violation occurred in this case, the prosecutors throughout the state courts assumed there was a violation, and Kansas does not challenge that assumption here. Thus, as to the merits of the underlying Sixth Amendment violation, "[h]appily, these issues do not confront [this Court] here. From the trial level onward, [Kansas] has conceded [a constitutional] . . . violation. The issue here is remedy." *Hudson v. Michigan*, 547 U.S. 586, 590 (2006).

Amendment anti-waiver rule established in *Michigan v. Jackson*, 475 U.S. 625 (1986). In *Harvey*, the Court held that a statement obtained in violation of the *Jackson* anti-waiver rule still may be used to *impeach* a defendant's untruthful testimony at trial. Citing and quoting frequently from Fourth and Fifth Amendment exclusionary rule precedents, the Court in *Harvey* concluded that the "speculative" marginal future deterrent effect of extending the exclusionary rule to impeachment was outweighed by the very high costs of excluding relevant, probative evidence from the search for truth and creating the opportunity for defendants to commit perjury. 494 U.S. at 351–52.

Thus, to date, the Court's Fourth, Fifth, and Sixth Amendment cases all hold that, as a general principle, the exclusionary rule should be tailored to permit the use of unlawfully obtained but relevant and probative evidence for *impeachment of a defendant's untruthful trial testimony*. In so doing, the Court has not distinguished between Fourth, Fifth, and Sixth Amendment protections. Rather, the Court has emphasized that the high costs of extending the exclusionary rule to preclude the use of probative and reliable evidence for all purposes outweigh the marginal additional deterrence of future police misconduct that might result from applying a rule of total exclusion.

As explained below in Part II.C., any potential additional deterrent benefit from extending the exclusionary rule to preclude even the impeachment use of statements obtained in violation of the

Massiah rule is outweighed by the high costs of undermining the search for truth and allowing perjured testimony by defendants. Thus, the Court should follow its traditional admonition that prohibiting the admission of unlawfully obtained but relevant and probative evidence "has always been our last resort, not our first impulse." *Hudson*, 547 U.S. at 591.

As discussed below in Part II.D., a rule of total exclusion is appropriate only when statements are compelled or involuntary. In those situations, total exclusion may be required by the express language of the Fifth Amendment, but no language in the Sixth Amendment requires a similar result. Instead, there ultimately is no reason to distinguish the *Massiah*-type violation at issue here from Fourth Amendment, *Miranda*, and *Jackson* violations. Thus, the Court should tailor the exclusionary rule here just as it has always done.

B. The Right To The Assistance Of Counsel Does Not Include A Right To Commit Perjury And Subvert The Jury's Truth-Seeking Function.

"It is well established that a criminal defendant's right to testify does not include the right to commit perjury." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998). To the extent allowing impeachment use of a defendant's own voluntary statements deters defendants from testifying in their own defense, it only deters them from offering untruthful and inconsistent statements, which the right to testify does not encompass anyway. *Id.*

Furthermore, the Sixth Amendment right to the assistance of counsel does not include the right to have counsel assist a defendant in committing perjury. *See, e.g.*, *United States v. Henkel*, 799 F.2d 369, 370 (7th Cir. 1986) ("the defendant was entitled only to ethical representation and had no right to commit perjury or have an attorney appointed to assist him in this endeavor"). As a result, the Court to date *always* has held that a criminal defendant's voluntary statements are admissible for impeachment purposes if a defendant testifies untruthfully. The general admissibility of voluntary statements for impeachment purposes reflects the fundamental purpose of our adversary system—to seek the truth. *United States v. Havens*, 446 U.S. at 626 ("There is no gainsaying that arriving at the truth is a fundamental goal of our legal system.").

Both in Sixth Amendment cases in particular and criminal procedure decisions more generally, the Court has recognized that excluding relevant probative evidence for all purposes imposes a very high cost because of the very real danger of effectively condoning or perhaps even encouraging perjured testimony. *See, e.g.*, *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*."); *Hass*, 420 U.S. at 722 ("[T]he shield provided by *Miranda* is not to be perverted to a license to testify inconsistently, or even perjuriously, free from the risk of confrontation with prior inconsistent utterances."); *Harris*, 401 U.S. at 225 ("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.").

In terms of protecting the integrity of the judicial system, there is no reason to treat a Sixth Amendment violation differently than a Fourth Amendment or *Miranda* violation, as the Court already has recognized in *Michigan v. Harvey* and *Nix v. Williams*. *See, e.g.*, *United States v. Lott*, 854 F.2d 244, 249 (7th Cir. 1988) ("the antiperjury considerations that generated the *Harris* line of cases are applicable" to Sixth Amendment violations; "To hold otherwise would pervert [the] Sixth Amendment right to counsel into a right to commit perjury."). Indeed, if anything, the Fifth Amendment provides a stronger basis for a rule of total exclusion, given the explicit textual guarantee against self-incrimination. The Sixth Amendment right to counsel, in contrast, does not expressly address or guarantee testimonial rights. Nor does the right to the assistance of counsel include a right for defendants to be assisted in committing perjury.

For more than fifty years, the Court has recognized the fundamental importance of deterring perjury in order to protect the integrity of the judicial system. *Walder v. United States*, 347 U.S. 62 (1954). At the same time, the Court has never pursued the truth at all costs and without regard for defendants' constitutional rights. Instead, the Court has tailored the exclusionary rule to strike a balance between these sometimes conflicting objectives:

> 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.

Id. at 65.

C. Once Unlawfully Obtained Statements Are Excluded From The Government's Case In Chief, Any Additional Benefit In Deterring Police Misconduct Is Outweighed By The Substantial Interests In Preventing Perjury And Subversion Of The Jury's Truth-Seeking Function.

1. For exclusionary rule purposes, the Court consistently has drawn a line between barring unlawfully obtained evidence from the government's case in chief and permitting such evidence to be used to impeach defendants who testify untruthfully. That line is appropriate as a general rule for all Sixth Amendment cases, as well as for Fourth Amendment and *Miranda* cases.

Police misconduct is adequately deterred by excluding unconstitutionally obtained voluntary statements from the prosecution's case in chief. In fact, the Court has "never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence." *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. at 368.

A rule of total exclusion at best will have only a highly speculative marginal effect in deterring future police misconduct. Indeed, the only *potential* benefit to the police of intentionally violating a defendant's Sixth Amendment right to counsel in the circumstances presented here is the *possibility* that the defendant *might* make statements that *might* be helpful to the prosecution at trial *if and only if* the defendant actually testifies and does so *untruthfully*.

There are at least two flaws in any suggestion that police have incentives to commit *Massiah*-type violations. First, if police use a cellmate informant simply as a listening post, any statements obtained from the defendant will be admissible for *all* purposes. *Kuhlmann v. Wilson*, 477 U.S. 436 (1986). Thus, the much stronger incentive for police is to *follow* the law and avoid having informants violate the *Massiah* rule. Second, the possibility that any given defendant actually will testify at trial is often remote and highly speculative. Certainly it does not appear to be the case that most or even a significant percentage of defendants testify at trial, perhaps particularly in the most serious cases such as prosecutions for murder. Thus, law enforcement officers would be risking the loss of evidence for the prosecution's case in chief, as well as the very credible threat of civil litigation against them as explained below, all for a highly speculative and uncertain potential benefit at trial.

2. State and local law enforcement officers who engage in misconduct in violation of clearly established law face the very real threat of civil

litigation under 42 U.S.C. § 1983, including for violations of the Sixth Amendment right to counsel. In fact, the Court's most recent Sixth Amendment right to counsel decision was the result of litigation under Section 1983. *See Rothgery v. Gillespie County*, 554 U.S. ___, 128 S. Ct. 2578 (2008); *see, e.g., Weatherford v. Bursey*, 429 U.S. 545 (1977) (Section 1983 suit alleging violation of the Sixth Amendment right to counsel); *Ayuyu v. Tagabuel*, 284 F.3d 1023 (9th Cir. 2002) (affirming jury verdict in § 1983 suit for violation of Sixth Amendment right to counsel).

If a municipal police or sheriff's department adopted a policy of committing *Massiah* violations, or even engaged in a custom or practice of doing so, or municipal policymakers were deliberately indifferent to the need for more training and supervision of their law enforcement officers, Section 1983 liability could extend to the municipality itself. *See, e.g., Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658 (1978); *City of Canton v. Harris*, 489 U.S. 378 (1989). Unlike individual law enforcement officials, municipal entities do not have even qualified immunity in § 1983 cases. *Owen v. City of Independence*, 445 U.S. 622 (1980). This Court recently recognized that "[f]ailure to teach and enforce constitutional requirements exposes municipalities to financial liability." *Hudson v. Michigan*, 547 U.S. at 599. Thus, the very real possibility of municipal liability is a significant incentive for local officials to ensure proper supervision and training of their law enforcement officers.

Furthermore, the potential civil liability for individual officers, including possibly for compensatory and punitive damages, as well as attorney's fees, is a significant additional deterrent. Section 1983 litigation against state and local government officials, as well as against municipal entities, is common today.

Indeed, the Court has recognized that "the threat of litigation and liability will adequately deter no matter that [individual officials] may enjoy qualified immunity." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001). The Court recently relied on the availability of such civil remedies in determining the proper scope of the exclusionary rule, pointedly declaring that "[a]s far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts." *Hudson*, 547 U.S. at 597–99.

Finally, as the Court has recognized, there are other important considerations that systematically tend to limit constitutional violations by law enforcement officers by providing incentives for those officers to follow the law. Specifically, this Court has recognized and emphasized "the increasing professionalism of police forces, including a new emphasis on internal police discipline," *Id.* at 598, noting that "[n]umerous sources are now available to teach officers and their supervisors what is required of them under this Court's cases, how to respect constitutional guarantees in various situations, and how to craft an effective regime for internal discipline." *Id.* at 599. The Court further emphasized that "modern police forces are staffed

with professionals; it is not credible to assert that internal discipline, which can limit successful careers, will not have a deterrent effect," *id.*, and that "the increasing use of various forms of citizen review can enhance police accountability." *Id.*

In fact, substituting the facts of this case for the Fourth Amendment violation at issue in *Hudson v. Michigan*, the bottom line can be stated the same:

> In sum, the social costs of applying the exclusionary rule to [impeachment use of evidence obtained from *Massiah*] violations are considerable; the incentive to such violations is minimal to begin with, and the extant deterrences against them are substantial—incomparably greater than the factors deterring [right to counsel violations] when [*Massiah*] was decided [in 1964]. Resort to the massive remedy of suppressing evidence of guilt is unjustified.

547 U.S. at 599.

D. The Court Precludes All Use Of Unlawfully Obtained Statements Only When Such Statements Are Involuntary Or Compelled.

The Court excludes evidence "for *all* purposes only when the evidence is derived from involuntary statements," *Harvey*, 494 U.S. at 351; *see also, Arizona v. Fulminante*, 499 U.S. 279 (1991), or is the product of government compulsion. *New Jersey v. Portash*, 440 U.S. 450 (1979). In other words, unlawfully obtained evidence is excluded for all purposes only when the constitutional provision that makes the statement unlawful—such as the Fifth

Amendment Self-Incrimination Clause—may command a rule of total exclusion. By its terms, the Fifth Amendment prohibits a defendant from being compelled "to be a witness against himself." U.S. CONST. amend. V. Excluding involuntary or compelled statements for all purposes may be the only way to give full effect to the plain language of the Fifth Amendment.

But a rule of total, or even partial, exclusion is not demanded or even suggested by the text of either the Fourth or Sixth Amendments. Unlike the Fifth Amendment privilege against self-incrimination, neither the Fourth Amendment protection "against unreasonable searches and seizures," U.S. CONST. amend. IV, nor the Sixth Amendment right "to have the assistance of counsel," U.S. CONST. amend. VI, expressly requires the exclusion of unlawfully obtained evidence. *See, e.g.*, *Harvey*, 494 U.S. at 351 (unlike the Sixth Amendment, the Fifth Amendment expressly prohibits the use of testimony obtained in violation of its prohibition) (citing *Portash*, 440 U.S. at 459, and *Mincey v. Arizona*, 437 U.S. 385, 398 (1978)); *see also United States v. Patane*, 542 U.S. 630, 639 (2004) (same). Expanding the exclusionary rule to prohibit the admission of relevant, probative evidence for *all* purposes for a violation of the Sixth Amendment right to counsel cannot be justified by reference to constitutional text.

Thus, the impeachment use of evidence obtained in violation of the Fourth or Sixth Amendments does not violate the express terms of any constitutional provision. Rather, from a constitutional standpoint,

such use of unlawfully obtained evidence at most implicates the remedial exclusionary rule, unlike compulsion or circumstances that render a statement involuntary in violation of the Fifth Amendment privilege against self-incrimination.

Nor can a rule of total exclusion in Sixth Amendment cases be justified by a claim that the evidence is inherently unreliable. Unlike involuntary or compelled statements that may, in some cases, be unreliable, voluntary statements obtained in violation of the Fourth or Sixth Amendments are likely to be highly reliable.

The Court has never declared that informant testimony is either inherently unreliable or a constitutionally unacceptable form of evidence. Indeed, the Court has never condemned the use of informants as per se improper. Quite to the contrary, informant testimony is often admitted and relied upon in criminal proceedings, subject always to the defendant's right to cross-examine such witnesses and pretrial disclosure by the prosecution of previous statements of such witnesses and other materials relevant to cross-examination, such as any benefits the witness may receive from the government for testifying. In fact, the informant in this case was cross-examined specifically on whether he received benefits from the government in exchange for serving as an informant, J.A. 154, and the trial judge even instructed the jury to use caution in evaluating the credibility of an informant's testimony. *Id.* at 30 ("You should consider with caution the testimony of an informant who, in exchange for benefits from the

State, acts as an agent for the State in obtaining evidence against a defendant, if that testimony is not supported by other evidence.").

Moreover, the Court already has held that some statements obtained in violation of Sixth Amendment rights are admissible for impeachment purposes. *Michigan v. Harvey*. Moreover, the Court has held that uncounseled pretrial statements may be used if they are introduced to prove offenses with which the defendant was not charged at the time of the interrogation. *Maine v. Moulton*, 474 U.S. 159, 178–80 and n.16 (1985). Thus, it is too late to argue that statements elicited from a defendant outside the presence of his counsel are inherently unreliable.

The critical line is whether the statements to be used for impeachment are involuntary or compelled. The Court has "never prevented [all] use by the prosecution of relevant *voluntary* statements by a defendant . . . ." *Harvey*, 494 U.S. at 351 (emphasis added). There is no claim that Ventris' statements here were the result of compulsion. Nor is there any reason to believe that they are inherently unreliable. Indeed, Ventris has never even alleged either of those circumstances, nor would the record in this case support such claims.

Finally, the Court has held that using an informant merely as a "listening post" does not even violate the Sixth Amendment—and the exclusionary rule is thus not even implicated in many informant cases. *Kuhlmann v. Wilson*, 477 U.S. 436 (1986). At worst, this is a case of police conduct that barely crossed the constitutional line. Ultimately, no factors

present in this case justify or require a rule of total exclusion.

III. The Case For A Rule Of Total Exclusion Is Weaker Here Than It Was In *Michigan v. Harvey*, 494 U.S. 344 (1990), Where The Police Directly Elicited Statements Following An Invalid Waiver.

A. There Is No Risk Of Police Coercion Or Intimidation When A Cellmate Informant Obtains Statements.

In *Michigan v. Jackson*, 475 U.S. 625 (1986), the Court held that a defendant's rights were violated when police initiated interrogation after a defendant's right to counsel had attached and the defendant had invoked that right, even though the defendant in *Jackson* purported to make a valid waiver of his rights in response to police questioning. In *Michigan v. Harvey*, 494 U.S. 344 (1990), the Court held that statements obtained in violation of the *Jackson* rule are still admissible for impeachment if a defendant testifies untruthfully at trial. Although this case presents one of two situations the Court did not expressly address in *Harvey*, the *Massiah*-type violation at issue here is a weaker case for exclusion of a defendant's voluntary statements than a *Jackson* violation.

The issue the Court left open in *Michigan v. Harvey* appears to arise in two contexts, one which involves the possibility of police coercion or intimidation and one which clearly does not, the latter being the situation in this case. The first situation arises when police initiate interrogation

after the right to counsel has attached and the defendant makes statements without even purporting to make a waiver of his rights. That situation is like *Jackson* in that the police initiate the questioning, but unlike *Jackson* in that the defendant does not even purport to waive his rights. *See, e.g.*, *Brewer v. Williams*, 430 U.S. 387 (1977) (the "good Christian burial speech" case).

The second situation is represented by the facts of this case, where the police use an informant to elicit statements from a defendant after the right to counsel has attached. *See, e.g.*, *Massiah v. United States*, 377 U.S. 201, 206 (1964). Such a situation, however, where the defendant is speaking to a cellmate and police are not present, creates absolutely no risk of police coercion or intimidation.

If anything, the situation presented in *Harvey* involved police conduct with far more potential to be coercive or intimidating, because the police initiated contact with the defendant and actively sought a waiver of his right to counsel. In the *Massiah* context, by contrast, the police have no direct contact with the defendant, and thus they have no opportunity by word, deed, gesture, or otherwise to coerce or intimidate the defendant into talking. Quite to the contrary, defendants in *Massiah*-type cases believe they are talking to a friend, colleague, or ally. A rule of total exclusion is only justified when there is a very real threat, or the actual presence, of coercion or intimidation. Those elements are completely missing in *Massiah*-type cases.

Again, if an informant simply acts as a "listening post," any statements a defendant makes are admissible for *all* purposes. *Kuhlmann*, 477 U.S. at 459 (placing an informant in a defendant's cell merely to listen does not violate the Sixth Amendment). No constitutional line is even crossed. The Kansas Supreme Court, in essence, declared that any misstep by an informant, such as asking the defendant a question that a court may later determine amounted to interrogation, automatically and necessarily transforms any statements the defendant makes from being *admissible* for all purposes to being *excluded* for all purposes.

Indeed, this analysis suggests the difficulties that arise from applying the *Massiah* rule. Although Kansas is not challenging that rule, it is worth remembering that criminal defendants in Ventris' position have important constitutional protections against unfair interrogation completely independent of their Sixth Amendment right to counsel as interpreted in *Massiah*. Those constitutional protections include the *Miranda* requirements, which apply to all custodial interrogations by police, and the due process principle that any involuntary statement will be excluded for all purposes. *See, e.g.*, *Colorado v. Connelly*, 479 U.S. 157, 167 (1986) ("coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment").

This case involves a setting in which there is no possibility of police coercion or intimidation, and

there is no risk that a defendant will make an involuntary statement. Yet the cost of applying a rule of total exclusion here is high. On the other side of the balance, as explained above, there is little, if any, additional deterrent benefit to applying a rule of total exclusion. Indeed, if anything, this case presents a weaker claim for total exclusion than the facts in *Michigan v. Harvey*, in which the Court allowed the statements to be used for impeachment. The same result should obtain here.

B. The Ultimate Question Is Whether The Court's Cost-Benefit Balancing Analysis Justifies A Rule Of Total Exclusion, Not Whether There Is A "Core" Right Or A "Prophylactic" Rule At Issue.

Over time, the Court sometimes has spoken in terms of "core" constitutional rights versus "prophylactic" rules. Indeed, some Justices have referred to the *Massiah* rule as "prophylactic" in nature. *See, e.g.*, *United States v. Henry*, 447 U.S. 264, 289 (1980) (Rehnquist, J., dissenting) (*Massiah* "rests on a prophylactic application of the Sixth Amendment right to counsel that in my view entirely ignores the doctrinal foundation of that right."); *see also*, *Massiah*, 377 U.S. at 213 (White, J., joined by Clark, J., and Harlan, J., dissenting) ("here there was no substitution of brutality for brains, no inherent danger of police coercion justifying the prophylactic effect of another exclusionary rule").

Standing alone, however, such labels are neither constitutionally significant nor necessarily helpful in determining the scope of the exclusionary rule in

particular situations. The Kansas Supreme Court endorsed such labeling here, holding that the use of an informant was not "merely" the violation of a "prophylactic rule," Pet. App. 21a, and thus mandated the total exclusion of Ventris' voluntary statements. But the exclusionary rule remedial issue is not whether *Jackson* or *Massiah* involved "core" constitutional rights or "prophylactic" rules. Rather, the ultimate question in determining the scope of the remedial exclusionary rule is whether a cost-benefit balancing analysis of the competing interests justifies a rule of total, partial, or no exclusion.

Labeling police misconduct as resulting in a "core" or "prophylactic" violation may be judicial shorthand for how a court balances the interests in determining the scope of the remedial exclusionary rule. But, standing alone, the labels "core" and "prophylactic" are not constitutional talismans. Rather, only an objective cost-benefit balancing analysis of the important factors the Court typically considers in exclusionary rule cases—such as the prevention of perjury and the protection of constitutional rights by deterring police misconduct—will lead to a properly tailored remedial exclusionary rule.

In Fourth Amendment cases the Court does not speak in terms of "core" violations or "prophylactic" rules. Nor was it clear for many years whether the Miranda requirements were "core" Fifth Amendment principles or "prophylactic" rules, though the Court more than once spoke of *Miranda* as prophylactic in nature. In *Dickerson v. United States*, 530 U.S. 428 (2000), however, the Court held that Congress could

not alter *Miranda* by statute, while nonetheless making no suggestion that such a conclusion in any way affected the Court's repeated holdings that voluntary statements obtained in violation of *Miranda* requirements are admissible for impeachment purposes, such as *Oregon v. Hass*, 420 U.S. 714 (1975), *Michigan v. Tucker*, 417 U.S. 433 (1974), and *Harris v. New York*, 401 U.S. 222 (1971).

Thus, it was not sufficient for the Kansas Supreme Court to label this case as one involving a "core" Sixth Amendment violation and then automatically declare that Ventris' statements must be excluded for all purposes. The issue is not whether the *Massiah* line of cases represents a prophylactic or core rule. Rather, recognizing that the exclusionary rule is remedial in nature, the inquiry is whether total exclusion of Ventris' voluntary statements is warranted under the Court's cost-benefit balancing analysis. Further, that balancing analysis must take into account its remedial purpose and recognize that the evidence in question already is excluded from the prosecution's case in chief.

A rule of total exclusion imposes high costs on the integrity of the judicial system, and does so in a context in which there is not even the potential for police coercion or intimidation. Nor are there significant police incentives to violate the *Massiah* rule; indeed there are stronger incentives to follow the law so that the prosecution can use any statements obtained for all purposes. *See Kuhlmann*. On the other side of the balance, a rule of total exclusion will prevent the jury from hearing relevant

and probative evidence, as well as condone and perhaps even encourage perjury by criminal defendants. For the reasons set forth above, a remedial rule requiring total exclusion of the defendant's voluntary statements is not warranted in this case.

CONCLUSION

The decision of the Kansas Supreme Court should be reversed, and Respondent Ventris' convictions and sentences should be reinstated.

Respectfully submitted,

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