No. 07-1356

In the Supreme Court of the United States

STATE OF KANSAS, PETITIONER

v.

DONNIE RAY VENTRIS

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF KANSAS

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a voluntary statement deliberately elicited from a criminal defendant in the absence of a valid waiver of the Sixth Amendment right to counsel may be used to impeach the defendant if he testifies at trial.

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INTEREST OF THE UNITED STATES

This case presents the question whether a voluntary statement obtained from a criminal defendant in the absence of a valid waiver of the Sixth Amendment right to counsel may be used to impeach the defendant at trial. Because the Sixth Amendment applies to the federal government as well as to the States (through the Fourteenth Amendment), resolution of the question presented will have substantial implications for the conduct of federal criminal investigations and trials. The United States therefore has a significant interest in the Court's disposition of this case.

STATEMENT

1. Early in the morning of January 7, 2004, respondent and his girlfriend, Rhonda Theel, went to the home

of local resident Ernest Hicks, ostensibly to confront him about rumors that he was abusing the children of his live-in girlfriend. Pet. App. 4a. Respondent and Theel were using methamphetamine and marijuana at the time, and neither had slept for days. *Ibid.* Theel verified that Hicks was home alone, then arranged for a friend to drive her and respondent to Hicks's home. *Ibid.*

Theel knocked on Hicks's front door, Hicks answered, and respondent and Theel went inside. Pet. App. 6a. One or both of them then shot Hicks with a .38 revolver and took his wallet and a cell phone. *Ibid.* They fled in Hicks's truck, then abandoned the truck and discarded the murder weapon. *Ibid.* They then walked to a convenience store and obtained a ride home. *Ibid.* They eventually were arrested and charged with several crimes in connection with the robbery and murder. *Ibid.*

While respondent was in jail awaiting trial, a state law enforcement officer arranged for another inmate in the jail, Johnny Doser, to be placed in the same cell as respondent. Pet. App. 8a. Doser was told that respondent "was under suspicion of some charges" and was instructed "[j]ust to keep [his] ear open and listen" for any incriminating statements. J.A. 146. On their second day together, Doser told respondent "that [he] could tell by the look in [respondent's] eyes that he had something more serious weighing in on his mind." J.A. 154. Respondent asked Doser if he could trust him, and Doser replied that he could. J.A. 149, 154. Respondent then told Doser that "him and his girlfriend, Rhonda, had went to rob somebody and that it went sour" and that "[h]e'd shot this man in his head and in his chest" and "took his keys, his wallet, about $350.00, and * * * a vehicle." J.A. 150. Doser reported those statements to the police. J.A. 150, 155.

2. Respondent's case proceeded to trial. Both he and Theel testified, presenting competing accounts of the events at Hicks's home. Pet. App. 6a-7a. According to Theel, when Hicks opened the front door, respondent rushed into the home, confronted Hicks with a gun, asked Hicks for money, and then shot Hicks in Hicks's bedroom. *Id.* at 7a. According to respondent, Theel entered Hicks's house first, confronted Hicks about the alleged child abuse, drew the gun, demanded money from Hicks, and then shot him. *Id.* at 7a-8a.

The prosecution sought to call Doser as a witness. Pet. App. 8a. Respondent objected, arguing that because the police placed Doser in his jail cell in order to obtain an incriminating statement, introducing that statement for any purpose would violate his Sixth Amendment right to counsel. J.A. 142-143. The prosecutor conceded that Doser "was placed in there and there's probably a violation," but argued that respondent's statement was admissible for impeachment purposes, because even if the police had obtained the statement illegally, "that doesn't give [respondent] * * * a license to just get on the stand and lie." J.A. 143. The trial court agreed and allowed Doser to testify. *Ibid.*

The jury convicted respondent of aggravated burglary and aggravated robbery, and the court sentenced him to 281 months of imprisonment. Pet. App. 9a; Pet. 4 n.*; J.A. 15-16. In a post-verdict motion, respondent renewed his contention that his jailhouse statement was not admissible at trial for any purpose. J.A. 31-35. The trial court again rejected the claim, holding that respondent's statement could be used for impeachment purposes at trial as long as it was given voluntarily. J.A. 161-162. The trial court then found, based on Doser's uncontroverted trial testimony, that respondent's statement to

Doser "was a complete, spontaneous, [and] voluntary statement." J.A. 162.

3. The Kansas Court of Appeals affirmed. Pet. App. 49a-64a. It noted the State's "conce[ssion] that through the use of an informant, it initiated a discussion with [respondent] in violation of his Sixth Amendment right to counsel." *Id.* at 57a. The court observed, however, that respondent "has never argued his statements were involuntary, nor would such an argument seem reasonable under the facts here." *Ibid.* The court then agreed with the majority of courts that have considered the issue that "statements taken in violation of the Sixth Amendment right to counsel (as opposed to the prophylactic rule) can be used for impeachment." *Id.* at 58a. To hold otherwise, the court explained, "would weaken the integrity of a trial as a truth-seeking process" by permitting a defendant to commit perjury without consequence. *Id.* at 59a.

4. The Kansas Supreme Court reversed. Pet. App. 1a-48a. Like the court of appeals, it accepted the State's concession that the police failed to respect respondent's right to counsel when they placed Doser in a cell with him "as a human listening device." *Id.* at 10a.[1] But unlike the court of appeals, it concluded that the effect of that violation was to render respondent's statements inadmissible at trial for *any* purpose. *Id.* at 20a-21a.

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[1] In accepting the State's concession, both the court of appeals (Pet. App. 57a) and the state supreme court (*id.* at 10a, 20a-21a) cited *State* v. *McCorgary*, 543 P.2d 952, 956-958 (Kan. 1975), cert. denied, 429 U.S. 867 (1976), which held that the State contravenes the Sixth Amendment when it places an informant in the defendant's jail cell to report on his statements, even if the informant does not take any active steps to elicit them. *McCorgary* is of questionable vitality in light of this Court's decision in *Kuhlmann* v. *Wilson*, 477 U.S. 436, 459 (1986). See Pet. App. 35a (McFarland, C.J., dissenting).

The state supreme court observed that this Court has permitted the use of physical evidence obtained in violation of the Fourth Amendment, as well as statements obtained in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and *Michigan* v. *Jackson*, 475 U.S. 625 (1986), for impeachment purposes when a defendant testifies at trial. Pet. App. 10a-15a (citing *Walder* v. *United States*, 347 U.S. 62 (1954), *Harris* v. *New York*, 401 U.S. 222 (1971), *Oregon* v. *Hass*, 420 U.S. 714 (1975), and *Michigan* v. *Harvey*, 494 U.S. 344 (1990)). The court observed that, in each of those cases, this Court concluded that the "truth-seeking function" of a criminal trial outweighed the deterrence that would be achieved by excluding the evidence for all purposes. *Id.* at 11a-14a.

But rather than weigh the societal costs and deterrence benefits of excluding statements like respondent's for all purposes at trial, the state supreme court simply adopted a per se rule of exclusion. Pet. App. 19a-20a. It explained that "in *Harris*, *Hass*, and *Harvey*, the defendant dealt directly with law enforcement officers," whereas "the statements at issue in this case were made to a jailhouse informant." *Id.* at 15a. That fact is "significant," in the court's view, because the surreptitious nature of the questioning made it impossible for the police to obtain a knowing and voluntary waiver of the right to counsel from respondent. *Id.* at 15a, 19a-20a. And "[w]ithout a knowing and voluntary waiver of the right to counsel," the court concluded, "the admission of the defendant's uncounseled statements to an undercover informant who is secretly acting as a State agent violates the defendant's Sixth Amendment rights." *Id.* at 20a-21a. In so holding, the court rejected the State's argument that it could use respondent's statements to impeach him so long as they were voluntary. *Id.* at 21a.

Chief Justice McFarland dissented. Pet. App. 27a-48a.[2] She noted that this Court "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 the statement "was obtained by coercion or was otherwise involuntary," because "the deterrence policy supporting exclusion is outweighed by the importance of impeachment to the proper functioning of the truth-finding process." *Id.* at 27a.

After weighing those interests in this case, Chief Justice McFarland concluded that respondent's statements to Doser were properly admitted at trial. Pet. App. 44a-48a. In her view, the majority's "per se rule of exclusion" placed undue weight on "the surreptitious nature of the police conduct," *id.* at 28a-37a; improperly treated the lack of a waiver of the right to counsel as dispositive, *id.* at 37a-40a; and failed to account for the fact that respondent's statements were made voluntarily, *id.* at 40a-43a. Further, she cautioned that the majority's rule "expands exclusion jurisprudence beyond the limits of that ever recognized by the Supreme Court" and "seriously undermines the truth finding process of the adversary system." *Id.* at 47a-48a.

SUMMARY OF ARGUMENT

The Sixth Amendment permits the use of voluntary statements deliberately elicited from a criminal defendant in the absence of counsel for the limited purpose of impeaching the defendant once he testifies at trial.

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[2] As an initial matter, Chief Justice McFarland observed that "there is a legitimate issue" regarding whether the State even acted illegally in placing Doser in respondent's jail cell. Pet. App. 35a-37a; see note 5, *infra*.

A. This Court has permitted the introduction of illegally obtained evidence to impeach a testifying defendant in a number of circumstances. For example, the Court has long recognized that evidence obtained in violation of the Fourth Amendment's prohibition on unreasonable searches and seizures need not be excluded for all purposes at trial, because exclusion in the government's case in chief is sufficient to remedy the constitutional violation. The Court came to the same conclusion in the context of the Fifth Amendment, where it held that statements obtained in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), while not admissible as affirmative evidence, could be used for impeachment. And the Court applied the same principles in the Sixth Amendment context in *Michigan* v. *Harvey*, 494 U.S. 344 (1990), where the Court determined that statements police elicited from a criminal defendant whose waiver of the right to counsel was invalid under *Michigan* v. *Jackson*, 475 U.S. 625 (1986), are admissible at trial for impeachment.

In each of those situations, the Court excluded the evidence from the government's case in chief and then weighed the benefits of prohibiting the use of the evidence for impeachment of a testifying defendant against the substantial societal costs of exclusion. Because only marginal benefits would be achieved by completely excluding material, probative evidence, at the great cost of permitting criminal defendants to commit perjury without being confronted with their prior inconsistent statements, the Court struck the balance in favor of admission for impeachment purposes.

B. Whether statements deliberately elicited from a criminal defendant in violation of Sixth Amendment standards are admissible for impeachment purposes depends on weighing the costs of exclusion against its benefits.

The core purpose of the Sixth Amendment right to counsel is to ensure a fair trial through an adversary process. To achieve that purpose, this Court has extended the right to counsel to certain critical pre-trial stages. In particular, the Court has held that, once formal criminal proceedings have begun, the Sixth Amendment prohibits the prosecution from using as substantive evidence statements deliberately elicited from a defendant unless the defendant has validly waived his right to counsel. When evidence is elicited in that manner, the Court excludes the evidence from the government's case in chief because, if statements could be gathered before trial in circumvention of the right to counsel, the value of the right to have counsel at trial would be seriously diminished.

It does not follow, however, that statements deliberately elicited from a criminal defendant in the absence of a valid waiver of counsel are inadmissible at trial for all purposes. The Sixth Amendment does not, by its text, prohibit the introduction of certain evidence; instead, it leaves to the courts the question of how to enforce the guarantee of the assistance of counsel. Accordingly, this Court has tailored Sixth Amendment remedies to the injury suffered and has accounted for competing interests.

In *Harvey*, this Court determined that the statements at issue could be used to impeach the defendant after balancing the benefits of exclusion against its costs. That balancing of costs and benefits is applicable to the question presented here as well. Although *Harvey* considered a violation of a "prophylactic" Sixth Amendment rule that invalidated a waiver, and this case involves no waiver at all, both the prophylactic protection at issue there and the prohibition on use of statements deliberately elicited from an uncounseled defendant reflect constitutional

rulings, and in both cases, the Constitution does not require exclusion but leaves it to the courts to determine whether the statements may be used for impeachment.

C. In this case, as in each of the other Fourth, Fifth, and Sixth Amendment cases where this Court has considered the question, the costs that excluding the defendant's material, probative statements would impose on the truth-seeking function of criminal trials significantly outweigh any benefits.

The costs of precluding impeachment with voluntary, deliberately elicited statements would be substantial. The criminal trial process is a search for the truth, and excluding a defendant's prior statements from his trial would greatly impede the jury's ability to find the truth. Although a criminal defendant has a right to testify, he does not have a right to testify falsely. Yet a prohibition on impeachment use of deliberately elicited statements would permit a criminal defendant to take the stand and lie without fear of confrontation with his own prior conflicting statements. Moreover, there is nothing unfair about permitting the use of deliberately elicited statements for impeachment, because the government is only able to use those statements once the defendant decides to testify and does so inconsistently with his prior statements.

In contrast, the purposes of the Sixth Amendment right to counsel would not be furthered by prohibiting use of voluntary, deliberately elicited statements for impeachment. Indeed, prohibiting the prosecution from using such statements would hinder the goal of a fair trial that the right to counsel is designed to protect. When a defendant takes the stand, he puts his credibility in issue, and keeping probative, reliable evidence from the jury would make it difficult for the jury to evaluate

credibility, thus impairing the fairness of the trial. Moreover, a bar on impeachment cannot be justified on the theory that incremental deterrence is warranted. The government already cannot use the statements to prove its own case. And police officers have significant disincentives to disregard a suspect's right to counsel, including possible suppression of fruits, the increasing professionalism of the police force, and the possibility of internal discipline.

In the context of statements deliberately elicited from an uncounseled criminal defendant, therefore, the costs of making the statements unavailable for impeachment greatly outweigh any benefits to the protection of the right to counsel. In this case, then, the trial court properly admitted respondent's statements for impeachment.

ARGUMENT

A VOLUNTARY OUT-OF-COURT STATEMENT DELIBERATELY ELICITED IN THE ABSENCE OF A VALID WAIVER OF THE RIGHT TO COUNSEL IS ADMISSIBLE TO IMPEACH A CRIMINAL DEFENDANT WHO TESTIFIES AT TRIAL

While respondent was awaiting trial in this case, law enforcement officials placed an informant in his jail cell to listen for any incriminating statements he might make. The State conceded that the informant deliberately elicited statements from respondent in violation of Sixth Amendment standards, and it did not seek to use those statements in its case in chief at trial. Respondent then took the stand and testified in a manner that directly conflicted with what he had told the informant. The question presented is whether the Sixth Amendment permitted the prosecution to use respondent's statements to impeach his credibility. The answer is yes.

A. This Court Has, In Numerous Contexts, Permitted Evidence Improperly Obtained From A Criminal Defendant To Be Used For Impeachment Purposes

The Fourth, Fifth, and Sixth Amendments provide a variety of limitations on the government's ability to collect and use evidence from a criminal defendant to prove the government's case. But the Court has not required that the evidence be excluded for all purposes. In particular, when a defendant testifies, the Court has permitted the evidence to be used for the limited purpose of impeachment, so long as the evidence was not obtained through coercion or compulsion.

1. This Court has long held that evidence obtained in violation of the Fourth Amendment may be used to impeach a defendant's testimony at trial. In *Walder* v. *United States*, 347 U.S. 62 (1954), the Court determined that the Fourth Amendment exclusionary rule should not be extended to bar the use of illegally seized evidence for impeachment. The Court explained that the consequence of an illegal search is exclusion of the evidence from the government's case in chief. *Id.* at 64-65 (the government cannot "use the fruits of such unlawful conduct to secure a conviction"). But, the Court continued, the fact of the violation does not require the evidence to be excluded for all purposes: "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained," but "[i]t 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. That, in the Court's view, "would be a perversion of the Fourth Amendment." *Ibid.*

The Court came to the same conclusion in *United States* v. *Havens*, 446 U.S. 620 (1980), where it permitted the use of illegally seized drugs in rebuttal in order to impeach the defendant's testimony that he had not been involved in drug smuggling. *Id.* at 622. The Court again weighed the deterrence value of excluding the evidence against the costs of permitting the defendant's testimony to go unchecked. It determined that the need to deter police illegality is served "by denying the government the use of the challenged evidence to make out its case in chief," and that the "incremental furthering" of that goal that might be achieved by prohibiting the use of the evidence for impeachment is outweighed by the costs of such a rule. *Id.* at 627. The Court explained that "arriving at the truth is a fundamental goal of our legal system," *id.* at 626, and that goal would be substantially impaired by permitting a criminal defendant's "false testimony [to] go unchallenged," *id.* at 627.

2. This Court employed the same analysis, and came to the same conclusion, with respect to evidence obtained in violation of the Fifth Amendment protections afforded by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). In *Harris* v. *New York*, 401 U.S. 222 (1971), the Court concluded that statements a defendant made immediately following his arrest, but before he was given the warnings required by *Miranda*, could be used for impeachment purposes at trial. *Id.* at 223-226. Although "*Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel," the Court explained, "[i]t does not follow" that evidence obtained "is barred for all purposes." *Id.* at 224. Instead, the Court weighed the deterrence benefits and societal costs of completely excluding the statements. It determined that "[t]he impeach-

ment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility," and "the benefits of this process should not be lost * * * because of the speculative possibility that impermissible police conduct will be encouraged thereby." *Id.* at 225. And it concluded that admission of the statements for impeachment was justified so that "[t]he shield provided by *Miranda*" is not "perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Id.* at 226.

The same principles guided the Court in *Oregon* v. *Hass*, 420 U.S. 714 (1975), where it permitted the impeachment use of statements that a criminal defendant made to police after receiving *Miranda* warnings and requesting counsel. "As in *Harris*," the Court explained, the violation of *Miranda* rendered the illegally obtained evidence unavailable in the government's case in chief, but it did not mean the evidence "is barred for all purposes." *Id.* at 722. Barring the evidence for impeachment, the Court concluded, "would pervert the constitutional right into a right to falsify free from the embarrassment of impeachment evidence from the defendant's own mouth." *Id.* at 723.

3. The same approach has governed under the Sixth Amendment. In *Michigan* v. *Harvey*, 494 U.S. 344 (1990), the Court held that statements taken from a defendant in police-initiated interrogation, after the defendant was charged and counsel was appointed for him, violated the rule in *Michigan* v. *Jackson*, 475 U.S. 625 (1986), but the Court concluded that the defendant's statements made after a knowing and voluntary waiver of the right to counsel were admissible to impeach his trial testimony. "[O]nce formal criminal proceedings begin," the Court explained, "the Sixth Amendment ren-

ders inadmissible in the prosecution's case in chief statements deliberately elicited from a defendant without an express waiver of the right to counsel." 494 U.S. at 348 (internal quotation marks omitted). Under *Jackson*, the Court added, even an express waiver of the right to counsel is "presumed invalid"—and the evidence therefore unavailable in the government's case in chief—when, after the defendant "requests assistance of counsel," police initiate the discussion. *Id.* at 349-350.

Relying on its decisions in *Harris* and *Hass*, however, the Court held that the costs of precluding impeachment with such evidence outweighed the deterrence benefits of such a rule: "[T]he search for truth in a criminal case outweighs the speculative possibility that exclusion of evidence might deter future violations." 494 U.S. at 351-352 (internal quotation marks omitted). In particular, the Court observed, "[i]f a defendant exercises his right to testify on his own behalf, he assumes a reciprocal obligation to speak truthfully and accurately," and he should not be allowed to use the fact of the government's improper action to "provide himself with a shield against contradiction of his untruths." *Id.* at 351 (quoting *Harris*, 401 U.S. at 225).

4. This Court's decisions in *Walder*, *Havens*, *Harris*, *Hass*, and *Harvey* reflect the general principle that the rules that constrain the government in its direct case do not necessarily apply to matters of rebuttal and impeachment. That is because of the reality that, when a defendant becomes a witness, the paramount interest in preventing the distortion of the fact-finding process generally dictates that the jury be afforded the opportunity to hear evidence that may cast doubt upon the credibility of his testimony. Particularly in light of the great costs it exacts on the truth-seeking function of a criminal trial,

complete exclusion of the improperly obtained evidence has not generally been deemed warranted or necessary to protect the underlying constitutional rights at stake.[3]

B. The Admissibility For Impeachment Of Voluntary Statements Deliberately Elicited In Violation Of Sixth Amendment Standards Turns On A Balance Of The Costs Of Exclusion Against Its Benefits

1. The Sixth Amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. As this Court has repeatedly noted, "the core purpose of the [Sixth Amendment] counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States* v. *Cronic*, 466 U.S. 648, 654 (1984) (quoting *United States* v. *Ash*, 413 U.S. 300, 309 (1973)).

The Sixth Amendment guarantee of counsel exists "not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Cronic*,

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[3] In a number of other cases, this Court has implicitly struck the same balance, permitting the government to use evidence for impeachment purposes even if the government would not be permitted to use the same evidence affirmatively. See, *e.g.*, *Tennessee* v. *Street*, 471 U.S. 409, 413-416 (1985) (government may offer into evidence a co-defendant's confession, otherwise inadmissible under *Bruton* v. *United States*, 391 U.S. 123 (1968), to correct a potentially misleading impression created by the defendant's testimony); *Jenkins* v. *Anderson*, 447 U.S. 231, 235-238 (1980) (government may impeach a testifying defendant with his failure to tell his exculpatory story before his arrest); *Doyle* v. *Ohio*, 426 U.S. 610, 619 n.11 (1976) (government may impeach a defendant with his failure to tell his exculpatory story after receiving *Miranda* warnings if the defendant testifies that he did tell that story to the police after his arrest).

466 U.S. at 658. The "fair trial" that the right to counsel seeks to ensure is a trial in which "a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Strickland* v. *Washington*, 466 U.S. 668, 692 (1984). Thus, the Sixth Amendment guarantees the right to counsel "because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Id.* at 685.

2. In order to protect the adversary process leading to criminal punishment, the Court has extended the right to the assistance of counsel to "certain critical pretrial proceedings," in which "the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both." *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984) (internal quotation marks omitted; brackets in original). The purpose of the extension is to provide the assistance of counsel in situations "where the results might well settle the accused's fate and reduce the trial itself to a mere formality." *United States* v. *Wade*, 388 U.S. 218, 224 (1967).

In a line of cases beginning with *Massiah* v. *United States*, 377 U.S. 201 (1964), this Court has held that, once formal criminal proceedings have begun, the Sixth Amendment "renders inadmissible in the prosecution's case in chief statements 'deliberately elicited' from a defendant," unless the defendant has voluntarily, knowingly, and intelligently waived the right to counsel. *Harvey*, 494 U.S. at 348-349; see *Fellers* v. *United States*, 540 U.S. 519, 523-524 (2004); *Kuhlmann* v. *Wilson*, 477 U.S. 436, 457 (1986); *Maine* v. *Moulton*, 474 U.S. 159, 172-173 (1985); *United States* v. *Henry*, 447 U.S. 264, 270 (1980); *Brewer* v. *Williams*, 430 U.S. 387, 400-401 (1977). That rule rests on the view that the introduction at trial of such statements undermines the ability of counsel to ren-

der assistance that contributes to a fair trial. See *Harvey*, 494 U.S. at 348.

Statements may be "deliberately elicited" in violation of Sixth Amendment standards by government informants acting undercover or by law enforcement officials in overt encounters with the defendant.[4] For a defendant to establish a violation in the acquisition of statements obtained by a jailhouse informant, he must show that "the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Kuhlmann*, 477 U.S. at 459. "[S]imply * * * showing that an informant, either through prior arrangement or voluntarily, reported [the defendant's] incriminating statements to the police" is not enough. *Ibid.* But an informant's seeking out information through questioning may create Sixth Amendment issues.[5]

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[4] The post-charge deliberate elicitation of statements without the defendant's counsel or a valid waiver of counsel is not intrinsically unlawful, nor must evidence of such statements be excluded from *uncharged* cases. The Sixth Amendment is "offense specific," *McNeil* v. *Wisconsin*, 501 U.S. 171, 175 (1991), and "[t]he police have an interest . . . in investigating new or additional crimes [after an individual is formally charged with one crime]." *Id.* at 175-176 (quoting *Moulton*, 474 U.S. at 179-180 (punctuation altered)). Thus, the police often act entirely properly in acquiring statements pertaining to such new crimes, even if the statements are also incriminating on charged crimes, and the Sixth Amendment does not bar use of those statements in a trial on those new offenses. *Id.* at 176.

[5] In light of those standards, the record in this case suggests that the State did not deliberately elicit respondent's statements. See Pet. App. 35a-37a (McFarland, C.J., dissenting). Doser testified without contradiction that he was told "[j]ust to keep [his] ear open and listen," J.A. 146, and that he did not "push" respondent "for any information" and "didn't ask anything that wasn't volunteered." J.A. 155. Doser did at one point say to respondent "that [he] could tell by the look in [respon-

3. When statements are deliberately elicited from a criminal defendant in the absence of counsel or a valid waiver of the right to counsel, the Court has determined that the statements must be excluded from the government's case in chief at trial. The theory behind the exclusion is that, if the government could gather evidence from the defendant before trial through circumvention of the defendant's right to counsel, the availability of counsel at the trial itself would be an illusory protection. The exclusion of statements obtained in the absence of a valid waiver of counsel is thus thought to further the fundamental goal of the right to counsel, which is to protect "the integrity or fairness of [the] criminal trial." *Nix* v. *Williams*, 467 U.S. 431, 446 (1984).

It does not follow, however, that statements obtained in violation of Sixth Amendment standards are unavailable to impeach a criminal defendant once he testifies at trial. The Sixth Amendment right to counsel is not a textual prohibition against the introduction of evidence at trial. Instead, it requires that counsel must be afforded to the accused, and it leaves to the courts the question of the appropriate means of enforcing that guarantee. In that respect, the Sixth Amendment is like the Fourth

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dent's] eyes that he had something more serious weighing in on his mind." J.A. 154. But that statement is roughly equivalent to the statement of the informant in *Kuhlmann* that the defendant's explanation of his role in the charged offenses "didn't sound too good"—a statement that did not convert the informant's interactions with the defendant into deliberate elicitation. 477 U.S. at 460-461. Thus, while the question is not presented by this case because the State "does not challenge the concession below that there was a Sixth Amendment right to counsel violation," Pet. Br. 18-19 & n.*, the better view appears to be that Doser did not function as anything other than a permissible listening post, and accordingly, there was no threshold violation of Sixth Amendment standards. See Pet. App. 35a-37a (McFarland, C.J., dissenting).

Amendment, which prohibits unreasonable searches and seizures, but does not explicitly provide a remedy for its violation. U.S. Const. Amend. IV. Just as this Court has fashioned the exclusionary rule "as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights," *Arizona* v. *Evans*, 514 U.S. 1, 10 (1995), so it has balanced the costs and benefits of the exclusion of evidence in the Sixth Amendment context as well. See *Nix* v. *Williams*, 467 U.S. at 442-448. The impeachment use of evidence obtained in violation of the Sixth Amendment, like that obtained in violation of the Fourth Amendment, does not violate the express terms of any constitutional provision, but simply brings into question whether to apply a court-made exclusionary rule.

4. As a general matter, the Court has explained, remedies for Sixth Amendment violations "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests," *United States* v. *Morrison*, 449 U.S. 361, 364 (1981), such as "the public interest in having the guilty brought to book," *id.* at 366 n.3 (quoting *United States* v. *Blue*, 384 U.S. 251, 255 (1966)). The Court has thus "tailor[ed] relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial." *Id.* at 365. When Sixth Amendment standards are violated, normally "[t]he remedy * * * is limited to denying the prosecution the fruits of its transgression." *Id.* at 366. The remedy does not extend, however, to exclusion for all purposes, because that "would do nothing whatever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of criminal justice." *Nix* v. *Williams*, 467 U.S. at 447.

Just as in *Michigan* v. *Harvey*, *supra*, where this Court permitted impeachment with statements taken in violation of *Michigan* v. *Jackson*, *supra*, the Sixth Amendment does not mandate complete exclusion of respondent's statements here. *Harvey* concerned a violation of the "prophylactic" rule announced in *Jackson*, 494 U.S. at 353, where the defendant waived his right to counsel but the waiver was invalid because it occurred in police-initiated questioning. The Court left open "the admissibility for impeachment purposes of a voluntary statement obtained in the absence of a knowing and voluntary waiver of the right to counsel." *Id.* at 354. But the same analysis applies in both contexts. While the rule at issue in *Jackson* may be described as "prophylactic," this Court has made clear in the Fifth Amendment context that rules described as "prophylactic" may be constitutional in nature. See *Dickerson* v. *United States*, 530 U.S. 428, 437-441 (2000) (explaining that, while the requirements of *Miranda* v. *Arizona*, *supra*, have been referred to as "prophylactic," *Miranda* is "constitutionally based"). Similarly, this Court's interpretations of the Sixth Amendment, whether they involve preclusion of the use of statements deliberately elicited without any waiver of counsel (*Massiah*) or preclusion of the use of statements obtained in police-initiated interrogation despite a waiver of counsel (*Jackson*), reflect constitutional rulings. In both contexts, the Sixth Amendment does not, by its terms, require the exclusion of certain evidence at trial. Rather, the determination whether to bar the use of evidence turns on the purposes that would be served by exclusion, balanced against its costs.[6]

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[6] The distinction between prophylactic rules and underlying rights can lead to different results under the Fifth Amendment, where the

In this respect, the Sixth Amendment differs from the Fifth Amendment. Only the Fifth Amendment prohibits the admission of certain evidence by its text. See U.S. Const. Amend. V (prohibiting a defendant from being "compelled * * * to be a witness against himself"). The Court has accordingly held that evidence that is compelled in violation of the Fifth Amendment is inadmissible for any purpose. See, *e.g.*, *New Jersey* v. *Portash*, 440 U.S. 450, 458-459 (1979) (any use at trial of grand jury testimony compelled under a grant of immunity would violate the Fifth Amendment prohibition against compelled self-incrimination). The Court has similarly held that evidence that is coerced in violation of the Due Process Clause may not be used for any purpose. See *Mincey* v. *Arizona*, 437 U.S. 385, 398-399 (1978) ("*any* criminal trial use" of statements coerced from a seriously wounded criminal defendant would violate the Due Process Clause). In the case of a coerced confession, the balancing of costs and benefits always favors exclusion of the evidence, because coerced confessions are generally thought inherently unreliable, see, *e.g.*, *Jackson* v. *Denno*, 378 U.S. 368, 385-386 (1964), and strong interests support deterring coercive police practices, see, *e.g.*,

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constitutional text explicitly excludes "compelled" statements. See pp. 21-22, *infra*. But that distinction does not necessarily lead to different results under the Sixth Amendment, where the constitutional text does not speak to exclusion. The *Jackson* and *Massiah* rules share a common purpose: safeguarding the right to the assistance of counsel at trial. In each case, the goal is to prevent the government from exploiting uncounseled encounters, after the right to counsel has attached, in order to obtain statements to prove its case. But in both contexts, these rules are subject to limitations to prevent defendants from undermining the truth-seeking process—as would transpire if defendants could testify without impeachment with their own prior, inconsistent voluntary statements.

Blackburn v. *Alabama*, 361 U.S. 199, 206-207 (1960). Those reasons do not apply to deliberately elicited statements from an uncounseled defendant: statements may be deliberately elicited without any coercion, and the probative value of the defendant's own voluntary statements is generally quite high. Here, for example, a defendant's jailhouse statements made to a trusted informant may be entirely free of coercive influence, entirely voluntary, and highly reliable.

5. The Kansas Supreme Court's proffered reasons also do not justify a per se rule of exclusion. The state supreme court believed that complete exclusion is required unless the defendant has voluntarily, knowingly, and intelligently waived the right to counsel. Pet. App. 19a-21a. But the absence of a valid waiver affects whether the defendant's statements were obtained in contravention of Sixth Amendment standards; it does not answer the separate question whether those statements are inadmissible for all purposes. See *Harvey*, 494 U.S. at 351; Pet. App. 37a-39a (McFarland, C.J., dissenting). That question is answered by weighing the costs and benefits of exclusion, except where the constitutional right itself guarantees the exclusion of evidence. The state supreme court also suggested that complete exclusion was warranted because respondent's statements were obtained surreptitiously. Pet. App. 19a-22a. But the Sixth Amendment right to counsel does not prohibit the use of undercover investigative techniques; it protects a represented defendant against the use of statements deliberately elicited, whether the elicitor is an undercover operative or a uniformed law enforcement official. *Kuhlmann*, 477 U.S. at 458. In both contexts, the Sixth Amendment is implicated because of the government's interaction with the accused without the adversarial

protections afforded by counsel. And the remedial question must be answered by determining whether the underlying purposes of the adversarial system that the Counsel guarantee protects necessitate excluding evidence, even at a high cost to the trial's ability to ferret out the truth.

C. The Costs Of Precluding Impeachment With Voluntary But Uncounseled Statements Substantially Outweigh Any Benefits

Because the Sixth Amendment does not mandate the exclusion of the statements at issue here for all purposes, the appropriate inquiry is whether the costs that excluding respondent's statements would impose on the truth-seeking function of the criminal trial are outweighed by any benefits. Here, as in each of the other Fourth, Fifth, and Sixth Amendment cases where the Court has considered that question, that weighing strongly favors admission of the statements for impeachment.

1. The costs of precluding impeachment with voluntary, deliberately elicited statements would be great. "[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986); accord *Havens*, 446 U.S. at 626; *Stone* v. *Powell*, 428 U.S. 465, 490 (1976). Society has a weighty public interest in "prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman* v. *United States*, 394 U.S. 165, 175 (1969). Thus, as this Court has observed repeatedly, a constitutional violation warrants the exclusion of evidence only if the benefits from exclusion are worth "the enormous societal cost of excluding truth in the search for truth in the administration of justice." *Nix* v. *Williams*, 467 U.S. at 445; see *Hudson* v. *Michi-*

gan, 547 U.S. 586, 591 (2006); *Pennsylvania Bd. of Prob. & Parole* v. *Scott*, 524 U.S. 357, 363 (1998); *Oregon* v. *Elstad*, 470 U.S. 298, 312 (1985); *Solem* v. *Stumes*, 465 U.S. 638, 650 (1984); *Havens*, 446 U.S. at 626-628; *Hass*, 420 U.S. at 722; *Harris*, 401 U.S. at 224-226; *Alderman*, 394 U.S. at 174-175.

The societal cost of excluding evidence is particularly great when the evidence is intended to aid the jury in assessing the credibility of a defendant's testimony. In that setting, the general interest in promoting accurate factfinding is enhanced by the special need to guard against perjury. This Court has long recognized that a defendant's right to testify in his own defense includes the obligation to testify truthfully. *Harvey*, 494 U.S. 351; *Havens*, 446 U.S. at 626; *Hass*, 420 U.S. at 723; *Harris*, 401 U.S. at 225; *Walder*, 347 U.S. at 65. The introduction of evidence for impeachment enforces that obligation by allowing the contradiction of "seemingly false statements" that the defendant makes on the stand. *Havens*, 446 U.S. at 627. The right to assistance of counsel, which exists "to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution," *Wade*, 388 U.S. at 227, does not justify barring the prosecution from using the "traditional truth-testing devices of the adversary process," *Harris*, 401 U.S. at 225, to root out perjury. When a defendant makes false statements on the witness stand, he jeopardizes the "ability of the adversarial system to produce just results." *Strickland*, 466 U.S. at 685.

The use of prior inconsistent statements is one of the most effective techniques available to the advocate to expose perjury. See *Havens*, 446 U.S. at 627. The admissibility of prior inconsistent statements for impeachment no doubt prevents much perjured testimony from

ever being offered, by dissuading witnesses who would otherwise be tempted to fabricate or shade their testimony.

A defendant has no valid interest in avoiding impeachment with probative evidence that might expose perjury. Although "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so," "that privilege cannot be construed to include the right to commit perjury." *Harris*, 401 U.S. at 225; see *Nix* v. *Whiteside*, 475 U.S. 157, 174-175 (1986) (trial counsel may not assist his client in presenting perjured testimony). As this Court noted many years ago, the advantages that a defendant enjoys in a criminal case must be "counterweighted with * * * conditions to keep the advantage from becoming an unfair and unreasonable one"; "[t]he price a defendant must pay for attempting to prove [a fact] * * * is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." *Michelson* v. *United States*, 335 U.S. 469, 479 (1948); see *Havens*, 446 U.S. at 626-627 ("It is essential * * * to the proper functioning of the adversary system that when a defendant takes the stand, the government must be permitted proper and effective cross-examination in an attempt to elicit the truth.").

The defendant has substantial control over the ability of the prosecution to make use of pre-trial statements for impeachment. The prosecution can offer such prior statements only after the defendant, with the assistance of counsel, makes a voluntary decision to testify. Moreover, impeachment is permissible only if the defendant gives testimony that contradicts his previous statements. In addition, the defendant has the ability to explain the circumstances under which he made the impeaching

statements, and defense counsel can ensure that defendant's explanation of any inconsistency is fully aired. Presumably, the jury will be able to recognize honest inconsistencies and appropriately discount the prosecution's reliance on minor discrepancies among the defendant's statements. There would thus be substantial societal costs to making reliable, probative evidence unavailable for impeachment purposes.

2. On the other side of the balance, the purposes of the Sixth Amendment right to counsel would not be served by preventing impeachment with evidence deliberately elicited from an uncounseled defendant, just as they are not served by preventing impeachment with statements obtained in violation of *Jackson*. Exclusion of the evidence obtained in violation of Sixth Amendment standards from the government's case in chief serves to "assure fairness in the adversary criminal process." *Morrison*, 449 U.S. at 364; see *Harvey*, 494 U.S. at 351 ("evidence acquired in contravention of" both "constitutional guarantees" and "their corresponding judicially created protections" is inadmissible in the government's case in chief). But prohibiting the prosecution from using such evidence for impeachment would hinder, rather than further, that goal by permitting a defendant to testify falsely without fear of contradiction by his own prior inconsistent statements. The jury would thus be deprived of a full picture needed to assess the defendant's credibility. *Harvey,* 494 U.S. at 351-352; see *Cronic*, 466 U.S. at 655-656 (right to counsel relies on the premise that "partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free" (quoting *Herring* v. *New York*, 422 U.S. 853, 862 (1975)).

When a defendant takes the stand, and thus places his credibility in issue, the defendant is often exposed to the admission of evidence that would otherwise be inadmissible. For example, the Fifth Amendment protects the defendant against being compelled to testify, but once a defendant elects to testify, he cannot bar relevant cross-examination. See *Brown* v. *United States*, 356 U.S. 148, 154-155 (1958); *Rogers* v. *United States*, 340 U.S. 367, 373 (1951). The paramount interest in exposing the truth, once a defendant decides to testify, dictates that the jury be entitled to learn of facts that it otherwise would not hear. See *Mitchell* v. *United States*, 526 U.S. 314, 322 (1999); *Brown*, 356 U.S. at 156. The same principle applies when a defendant takes the stand and testifies contrary to previous voluntary statements made in violation of Sixth Amendment standards. "[A] criminal defendant's right to testify does not include the right to commit perjury." *LaChance* v. *Erickson*, 522 U.S. 262, 266 (1998). And the defendant's testimony "open[s] the door, solely for the purpose of attacking the defendant's credibility," *Walder*, 347 U.S. at 64, to the admission of his prior statements. While a defendant deciding whether to testify may thereby face a difficult choice, such choices are common in the criminal justice system, and the Constitution does not inherently forbid them. See *Jenkins* v. *Anderson*, 447 U.S. 231, 236-238 (1980).

Nor would any incremental deterrent effect from barring the impeachment use of statements deliberately elicited from an uncounseled criminal defendant justify the damage to the truth-seeking function of the trial. The statements are already unavailable to prove the government's case. Here, as in this Court's previous decisions, there is only a "speculative possibility" that police officers may have some incentive to disregard a suspect's

right to counsel in order to gain impeachment material, *Hass*, 420 U.S. at 723, and officers have significant disincentives to obtaining evidence in that fashion. To the extent that the Court requires the exclusion of "fruits" of such uncounseled statements, see *Nix* v. *Williams*, 467 U.S. at 442, officers risk the suppression of physical evidence that might otherwise have come to light by lawful means. And officers cannot reliably anticipate that such evidence would be admissible on inevitable discovery principles. *Id.* at 445.

The increasing professionalism of the police force and the possibility of internal discipline—which may limit police officers' careers and salary—will have an additional deterrent effect. See *Hudson*, 547 U.S. at 598-599. And prosecutors, who are bound by ethical obligations that limit contacts with indicted defendants in the absence of counsel, will be deterred from such conduct by the prospect of discipline by their employer and state bar. See, *e.g.*, Kan. Rules of Prof'l Conduct 4.2 (prohibiting attorneys from knowingly contacting a represented party without counsel's presence or valid consent); Model Rules of Prof'l Conduct 4.2 (same); see also 28 U.S.C. 530B(a) (federal government attorneys are subject to State rules of professional conduct); 28 C.F.R. 77.4(f) (2007) (Department of Justice attorneys may not direct an investigative agent under their supervision to engage in conduct that would violate the attorney's own ethical obligations). That array of disincentives lessens the likelihood that the impeachment exception will promote misconduct. See *Hudson*, 547 U.S. at 596-599.[7]

[7] Because the Sixth Amendment is not violated absent the improper use of evidence at trial, see *Harvey*, 494 U.S. at 363 (Stevens, J., dissenting), a defendant could not seek damages under 42 U.S.C. 1983 based on a claim of alleged improper deliberate elicitation, standing

3. In the context of statements deliberately elicited from an uncounseled defendant, then, the cost of barring impeachment use of the defendant's statements substantially outweighs any benefit to the protection of Sixth Amendment rights. Sixth Amendment interests are adequately protected by excluding the defendant's statements from the government's case in chief. It is unnecessary to go further and impair the ability of a trial to disclose the truth by testing a defendant's testimony against his own contradictory, voluntary words. Accordingly, such statements may be introduced at trial for the limited purpose of impeaching the defendant once he testifies. In this case, there is no question that respondent's statements were voluntary, see J.A. 164, and the trial court therefore properly admitted those statements for impeachment.

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alone. If, however, a court allowed a damages action based solely on deliberate elicitation in violation of "Sixth Amendment standards," *Fellers*, 540 U.S. at 525, then Section 1983 actions (and related actions under *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)) would provide an additional deterrent.

CONCLUSION

The judgment of the Kansas Supreme Court should be reversed.

Respectfully submitted.

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