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SUPREME COURT OF THE UNITED STATES

No. 07–1356

KANSAS, PETITIONER *v.* DONNIE RAY VENTRIS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

[April 29, 2009]

JUSTICE SCALIA delivered the opinion of the Court.

We address in this case the question whether a defendant's incriminating statement to a jailhouse informant, concededly elicited in violation of Sixth Amendment strictures, is admissible at trial to impeach the defendant's conflicting statement.

I

In the early hours of January 7, 2004, after two days of no sleep and some drug use, Rhonda Theel and respondent Donnie Ray Ventris reached an ill-conceived agreement to confront Ernest Hicks in his home. The couple testified that the aim of the visit was simply to investigate rumors that Hicks abused children, but the couple may have been inspired by the potential for financial gain: Theel had recently learned that Hicks carried large amounts of cash.

The encounter did not end well. One or both of the pair shot and killed Hicks with shots from a .38-caliber revolver, and the companions drove off in Hicks's truck with approximately $300 of his money and his cell phone. On receiving a tip from two friends of the couple who had helped transport them to Hicks's home, officers arrested Ventris and Theel and charged them with various crimes,

chief among them murder and aggravated robbery. The State dropped the murder charge against Theel in exchange for her guilty plea to the robbery charge and her testimony identifying Ventris as the shooter.

Prior to trial, officers planted an informant in Ventris's holding cell, instructing him to "keep [his] ear open and listen" for incriminating statements. App. 146. According to the informant, in response to his statement that Ventris appeared to have "something more serious weighing in on his mind," Ventris divulged that "[h]e'd shot this man in his head and in his chest" and taken "his keys, his wallet, about $350.00, and . . . a vehicle." *Id.,* at 154, 150.

At trial, Ventris took the stand and blamed the robbery and shooting entirely on Theel. The government sought to call the informant, to testify to Ventris's prior contradictory statement; Ventris objected. The State conceded that there was "probably a violation" of Ventris's Sixth Amendment right to counsel but nonetheless argued that the statement was admissible for impeachment purposes because the violation "doesn't give the Defendant . . . a license to just get on the stand and lie." *Id.,* at 143. The trial court agreed and allowed the informant's testimony, but instructed the jury to "consider with caution" all testimony given in exchange for benefits from the State. *Id.,* at 30. The jury ultimately acquitted Ventris of felony murder and misdemeanor theft but returned a guilty verdict on the aggravated burglary and aggravated robbery counts.

The Kansas Supreme Court reversed the conviction, holding that "[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." 285 Kan. 595, 606, 176 P. 3d 920, 928 (2008). Chief Justice McFarland dissented, *id.,* at 611, 176 P. 3d, at 930. We

granted the State's petition for certiorari, 554 U. S. ___ (2008).

II

The Sixth Amendment, applied to the States through the Fourteenth Amendment, guarantees that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." The core of this right has historically been, and remains today, "the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial." *Michigan* v. *Harvey*, 494 U. S. 344, 348 (1990). We have held, however, that the right extends to having counsel present at various pretrial "critical" interactions between the defendant and the State, *United States* v. *Wade*, 388 U. S. 218, 224 (1967), including the deliberate elicitation by law enforcement officers (and their agents) of statements pertaining to the charge, *Massiah* v. *United States*, 377 U. S. 201, 206 (1964). The State has conceded throughout these proceedings that Ventris's confession was taken in violation of *Massiah*'s dictates and was therefore not admissible in the prosecution's case in chief. Without affirming that this concession was necessary, see *Kuhlmann* v. *Wilson*, 477 U. S. 436, 459–460 (1986), we accept it as the law of the case. The only question we answer today is whether the State must bear the additional consequence of inability to counter Ventris's contradictory testimony by placing the informant on the stand.

A

Whether otherwise excluded evidence can be admitted for purposes of impeachment depends upon the nature of the constitutional guarantee that is violated. Sometimes that explicitly mandates exclusion from trial, and sometimes it does not. The Fifth Amendment guarantees that no person shall be compelled to give evidence against himself, and so is violated whenever a truly coerced con-

fession is introduced at trial, whether by way of impeachment or otherwise. *New Jersey* v. *Portash*, 440 U. S. 450, 458–459 (1979). The Fourth Amendment, on the other hand, guarantees that no person shall be subjected to unreasonable searches or seizures, and says nothing about excluding their fruits from evidence; exclusion comes by way of deterrent sanction rather than to avoid violation of the substantive guarantee. Inadmissibility has not been automatic, therefore, but we have instead applied an exclusionary-rule balancing test. See *Walder* v. *United States*, 347 U. S. 62, 65 (1954). The same is true for violations of the Fifth and Sixth Amendment prophylactic rules forbidding certain pretrial police conduct. See *Harris* v. *New York*, 401 U. S. 222, 225–226 (1971); *Harvey, supra*, at 348–350.

Respondent argues that the Sixth Amendment's right to counsel is a "right an accused is to enjoy a[t] trial." Brief for Respondent 11. The core of the right to counsel is indeed a trial right, ensuring that the prosecution's case is subjected to "the crucible of meaningful adversarial testing." *United States* v. *Cronic*, 466 U. S. 648, 656 (1984). See also *Powell* v. *Alabama*, 287 U. S. 45, 57–58 (1932). But our opinions under the Sixth Amendment, as under the Fifth, have held that the right covers pretrial interrogations to ensure that police manipulation does not render counsel entirely impotent—depriving the defendant of "'effective representation by counsel at the only stage when legal aid and advice would help him.'" *Massiah, supra,* at 204 (quoting *Spano* v. *New York*, 360 U. S. 315, 326 (1959) (Douglas, J., concurring)). See also *Miranda* v. *Arizona*, 384 U. S. 436, 468–469 (1966).

Our opinion in *Massiah*, to be sure, was equivocal on what precisely constituted the violation. It quoted various authorities indicating that the violation occurred at the moment of the postindictment interrogation because such questioning "'contravenes the basic dictates of fairness in

the conduct of criminal causes.'" 377 U. S., at 205 (quoting *People* v. *Waterman*, 9 N. Y. 2d 561, 565, 175 N. E. 2d 445, 448 (1961)). But the opinion later suggested that the violation occurred only when the improperly obtained evidence was "used against [the defendant] at his trial." 377 U. S., at 206–207. That question was irrelevant to the decision in *Massiah* in any event. Now that we are confronted with the question, we conclude that the *Massiah* right is a right to be free of uncounseled interrogation, and is infringed at the time of the interrogation. That, we think, is when the "Assistance of Counsel" is denied.

It is illogical to say that the right is not violated until trial counsel's task of opposing conviction has been undermined by the statement's admission into evidence. A defendant is not denied counsel merely because the prosecution has been permitted to introduce evidence of guilt—even evidence so overwhelming that the attorney's job of gaining an acquittal is rendered impossible. In such circumstances the accused continues to enjoy the assistance of counsel; the assistance is simply not worth much. The assistance of counsel has been denied, however, at the prior critical stage which produced the inculpatory evidence. Our cases acknowledge that reality in holding that the stringency of the warnings necessary for a waiver of the assistance of counsel varies according to "the usefulness of counsel to the accused at the particular [pretrial] proceeding." *Patterson* v. *Illinois*, 487 U. S. 285, 298 (1988). It is *that* deprivation which demands a remedy.

The United States insists that "post-charge deliberate elicitation of statements without the defendant's counsel or a valid waiver of counsel is not intrinsically unlawful." Brief for United States as *Amicus Curiae* 17, n. 4. That is true when the questioning is unrelated to charged crimes—the Sixth Amendment right is "offense specific," *McNeil* v. *Wisconsin*, 501 U. S. 171, 175 (1991). We have never said, however, that officers may badger counseled

defendants about charged crimes so long as they do not use information they gain. The constitutional violation occurs when the uncounseled interrogation is conducted.

B

This case does not involve, therefore, the prevention of a constitutional violation, but rather the scope of the remedy for a violation that has already occurred. Our precedents make clear that the game of excluding tainted evidence for impeachment purposes is not worth the candle. The interests safeguarded by such exclusion are "outweighed by the need to prevent perjury and to assure the integrity of the trial process." *Stone* v. *Powell*, 428 U. S. 465, 488 (1976). "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 . . . provide himself with a shield against contradiction of his untruths." *Walder, supra*, at 65. Once the defendant testifies in a way that contradicts prior statements, denying the prosecution use of "the traditional truth-testing devices of the adversary process," *Harris, supra*, at 225, is a high price to pay for vindication of the right to counsel at the prior stage.

On the other side of the scale, preventing impeachment use of statements taken in violation of *Massiah* would add little appreciable deterrence. Officers have significant incentive to ensure that they and their informants comply with the Constitution's demands, since statements lawfully obtained can be used for all purposes rather than simply for impeachment. And the *ex ante* probability that evidence gained in violation of *Massiah* would be of use for impeachment is exceedingly small. An investigator would have to anticipate both that the defendant would choose to testify at trial (an unusual occurrence to begin with) *and* that he would testify inconsistently despite the admissibility of his prior statement for impeachment. Not likely to

happen—or at least not likely enough to risk squandering the opportunity of using a properly obtained statement for the prosecution's case in chief.

In any event, even if "the officer may be said to have little to lose and perhaps something to gain by way of possibly uncovering impeachment material," we have multiple times rejected the argument that this "speculative possibility" can trump the costs of allowing perjurious statements to go unchallenged. *Oregon* v. *Hass*, 420 U. S. 714, 723 (1975). We have held in every other context that tainted evidence—evidence whose very introduction does not constitute the constitutional violation, but whose obtaining was constitutionally invalid—is admissible for impeachment. See *ibid.; Walder*, 347 U. S., at 65; *Harris*, 401 U. S., at 226; *Harvey*, 494 U. S., at 348. We see no distinction that would alter the balance here.*

* * *

We hold that the informant's testimony, concededly elicited in violation of the Sixth Amendment, was admissible to challenge Ventris's inconsistent testimony at trial. The judgment of the Kansas Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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*Respondent's *amicus* insists that jailhouse snitches are so inherently unreliable that this Court should craft a broader exclusionary rule for uncorroborated statements obtained by that means. Brief for National Association of Criminal Defense Lawyers 25–26. Our legal system, however, is built on the premise that it is the province of the jury to weigh the credibility of competing witnesses, and we have long purported to avoid "establish[ing] this Court as a rule-making organ for the promulgation of state rules of criminal procedure." *Spencer* v. *Texas*, 385 U. S. 554, 564 (1967). It would be especially inappropriate to fabricate such a rule in this case, where it appears the jury took to heart the trial judge's cautionary instruction on the unreliability of rewarded informant testimony by acquitting Ventris of felony murder.