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 STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

In *Michigan* v. *Harvey*, 494 U. S. 344 (1990), the Court held that a statement obtained from a defendant in violation of the Sixth Amendment could be used to impeach his testimony at trial. As I explained in a dissent joined by three other Members of the Court, that holding eroded the principle that "those who are entrusted with the power of government have the same duty to respect and obey the law as the ordinary citizen." *Id.,* at 369. It was my view then, as it is now, that "the Sixth Amendment is violated when the fruits of the State's impermissible encounter with the represented defendant are used for impeachment just as it is when the fruits are used in the prosecutor's case in chief." *Id.*, at 355.

In this case, the State has conceded that it violated the Sixth Amendment as interpreted in *Massiah* v. *United States*, 377 U. S. 201, 206 (1964), when it used a jailhouse informant to elicit a statement from the defendant. No *Miranda* warnings were given to the defendant,[1] nor was he otherwise alerted to the fact that he was speaking to a state agent. Even though the jury apparently did not credit the informant's testimony, the Kansas Supreme Court correctly concluded that the prosecution should not

[1] See *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

be allowed to exploit its pretrial constitutional violation during the trial itself. The Kansas Court's judgment should be affirmed.

This Court's contrary holding relies on the view that a defendant's pretrial right to counsel is merely "prophylactic" in nature. See *ante*, at 4. The majority argues that any violation of this prophylactic right occurs solely at the time the State subjects a counseled defendant to an uncounseled interrogation, not when the fruits of the encounter are used against the defendant at trial. *Ante*, at 5. This reasoning is deeply flawed.

The pretrial right to counsel is not ancillary to, or of lesser importance than, the right to rely on counsel at trial. The Sixth Amendment grants the right to counsel "[i]n all criminal prosecutions," and we have long recognized that the right applies in periods before trial commences, see *United States* v. *Wade*, 388 U. S. 218, 224 (1967). We have never endorsed the notion that the pretrial right to counsel stands at the periphery of the Sixth Amendment. To the contrary, we have explained that the pretrial period is "perhaps the most critical period of the proceedings" during which a defendant "requires the guiding hand of counsel." *Powell* v. *Alabama*, 287 U. S. 45, 57, 69 (1932); see *Maine* v. *Moulton*, 474 U. S. 159, 176 (1985) (recognizing the defendant's "right to rely on counsel as a 'medium' between him and the State" in all critical stages of prosecution). Placing the prophylactic label on a core Sixth Amendment right mischaracterizes the sweep of the constitutional guarantee.

Treating the State's actions in this case as a violation of a prophylactic right, the Court concludes that introducing the illegally obtained evidence at trial does not itself violate the Constitution. I strongly disagree. While the constitutional breach began at the time of interrogation, the State's use of that evidence at trial compounded the violation. The logic that compels the exclusion of the

evidence during the State's case in chief extends to any attempt by the State to rely on the evidence, even for impeachment. The use of ill-gotten evidence during any phase of criminal prosecution does damage to the adversarial process—the fairness of which the Sixth Amendment was designed to protect. See *Strickland* v. *Washington*, 466 U. S. 668, 685 (1984); see also *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 276 (1942) ("[The] procedural devices rooted in experience were written into the Bill of Rights not as abstract rubrics in an elegant code but in order to assure fairness and justice before any person could be deprived of 'life, liberty, or property'").

When counsel is excluded from a critical pretrial interaction between the defendant and the State, she may be unable to effectively counter the potentially devastating, and potentially false,[2] evidence subsequently introduced at trial. Inexplicably, today's Court refuses to recognize that this is a constitutional harm.[3] Yet in *Massiah*, the Court forcefully explained that a defendant is "denied the basic protections of the [Sixth Amendment] guarantee when there [is] used against him at his trial evidence of his own incriminating words" that were "deliberately elicited from

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[2] The likelihood that evidence gathered by self-interested jailhouse informants may be false cannot be ignored. See generally Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae*. Indeed, by deciding to acquit respondent of felony murder, the jury seems to have dismissed the informant's trial testimony as unreliable.

[3] In the majority's telling, "simply" having counsel whose help is "not worth much" is not a Sixth Amendment concern. *Ante*, at 5. Of course, the Court points to no precedent for this stingy view of the Counsel Clause, for we have never held that the Sixth Amendment only protects a defendant from actual denials of counsel. Indeed our venerable ineffective-assistance-of-counsel jurisprudence is built on a more realistic understanding of what the Constitution guarantees. See *Strickland* v. *Washington*, 466 U. S. 668 (1984); *McMann* v. *Richardson*, 397 U. S. 759, 771, n. 14 (1970) ("[T]he right to counsel is the right to the effective assistance of counsel").

him after he had been indicted and in the absence of counsel." 377 U. S., at 206. Sadly, the majority has retreated from this robust understanding of the right to counsel.

Today's decision is lamentable not only because of its flawed underpinnings, but also because it is another occasion in which the Court has privileged the prosecution at the expense of the Constitution. Permitting the State to cut corners in criminal proceedings taxes the legitimacy of the entire criminal process. "The State's interest in truth-seeking is congruent with the defendant's interest in representation by counsel, for it is an elementary premise of our system of criminal justice '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.'" *Harvey*, 494 U. S., at 357 (STEVENS, J., dissenting) (quoting *United States* v. *Cronic*, 466 U. S. 648, 655 (1984)). Although the Court may not be concerned with the use of ill-gotten evidence in derogation of the right to counsel, I remain convinced that such shabby tactics are intolerable in all cases. I respectfully dissent.