No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

EDUARDO OROZCO,
Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May law enforcement use an undercover agent to elicit a confession from a suspect before charges have been filed but after a suspect has already invoked his right to counsel during a custodial interrogation?

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Eduardo Orozco respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the defendant and petitioner, Eduardo Orozco, and respondent, the People of the State of California.

OPINION BELOW

The opinion of the California Court of Appeal, Second Appellate District, Division Two, which was issued on February 28, 2019 and published at *People v. Orozco*, 32 Cal.App.5th (2019), is attached as Appendix A. The opinion was twice modified without any change in judgment as set forth in appendices B and C. The California Supreme Court's one-page order denying a petition for review was issued on June 12, 2019, and is attached as Appendix D.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The decision of the California Court of Appeal for which petitioner seeks review was issued on February 28, 2019. The California Supreme Court order denying petitioner's timely petition for discretionary review was filed on June 12, 2019. This petition is filed within 90 days of the California Supreme Court's denial of discretionary review, under Rules 13.1 and 29.2 of this Court.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides, in relevant part, that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Fourteenth Amendment, section one, provides, in relevant part, that no "state shall deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

Petitioner was convicted of murdering his six-month-old baby (Cal. Pen. Code § 187(a)) and of assault on a child causing death (Cal. Pen. Code § 273ab(a)) for the same incident. App. A at 2, 8. Petitioner was sentenced to 25 years to life. App. A at 8.

Petitioner was interrogated shortly after the baby's death. App. A at 3. Petitioner offered an explanation of the baby's death that did not include any culpability on his part. App. A at 3. He then requested an attorney. App. A at 4. Detectives questioned why he needed an attorney and then placed him under arrest. App. A at 4. Petitioner again requested an attorney. App. A at 4. Although his request for an attorney continued to be ignored, the detectives eventually ceased the interrogation. App. A at 4.

Detectives then arranged the same day for petitioner's girlfriend – the mother of the deceased baby – to question petitioner. App. A at 4-5. Both the trial court and the California Court of Appeal determined the girlfriend was acting as a police agent. App. A at 7, 12.

The girlfriend questioned petitioner and petitioner continued to deny culpability. App. A at 5. At some point during the conversation, a detective interrupted to say that the autopsy report showed the baby did not suffocate and that the bruises on the baby

were the result of a beating. App. A at 5. The detective told both petitioner and his girlfriend they were looking at going to jail and asked if either of them had anything to say to him. App. A at 5. The girlfriend answered, "No," while petitioner remained silent. App. A at 5.

At another point during the conversation, as petitioner continued to deny culpability to his girlfriend, the detective pulled the girlfriend out of the conversation. App. A at 6. The detective told the girlfriend that petitioner had refused to take a polygraph exam. App. A at p. 6. The detective admitted he told the girlfriend this fact in order to "stimulate conversation" between petitioner and his girlfriend. App. A at 6.

The girlfriend returned to the conversation with petitioner and confronted him about his refusal to take the polygraph exam. App. A at 6. She urged him to tell her what happened. App. A at 6. Petitioner eventually admitted to hitting and killing their baby. App. A at 6.

On appeal, petitioner argued that his confession to his girlfriend should have been suppressed, as the use of an undercover agent (his girlfriend) – after he had already invoked his right to counsel – violated both his Fifth Amendment right to counsel and his federal due process rights. App. A at 2. On February 28, 2019, the California Court of Appeal agreed that petitioner's girlfriend

operated as an undercover agent (App. A at 12), but found no violations of petitioner's Fifth Amendment right to counsel and accordingly affirmed the judgment against petitioner. App. A at 11-19, 21-25. Petitioner sought discretionary review in the California Supreme Court on the same federal constitutional issues. App. D at 31-34. On June 12, 2019, the California Supreme Court denied review. App. E at 37.

REASONS FOR GRANTING THE PETITION

I. The Petition Should Be Granted to Address a Gap in This Court's Jurisprudence – Between *Edwards* and *Perkins* – on an Important Federal Constitutional Issue

The petition should be granted as the California Court of Appeal "decided an important question of federal law that has not been, but should be, settled by this Court" – whether invocation of the Fifth Amendment right to counsel precludes the use of an undercover agent on a newly arrested suspect[1] – and because it "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c).

[1] This Court has previously held that once a suspect's right to counsel under the *Sixth* Amendment has attached, law enforcement may not use an undercover agent to obtain statements from the suspect. *Massiah v. United States*, 377 U.S. 201, 205-206 (1964).

In *Miranda v. Arizona*, 384 U.S. 436 (1965), this Court held that, in light of the coercive nature of custodial interrogations, a suspect must be advised of his rights to silence and to counsel.

In *Edwards v. Arizona*, 451 U.S. 477 (1981), this Court, relying on *Miranda*, held that interrogation of a suspect by law enforcement must cease when a suspect invokes his right to counsel, and may not be resumed unless a suspect voluntarily, knowingly and intelligently waives his right to counsel. *Edwards*, 451 U.S. at 482. Thus, while *Miranda*'s concern was limited to coercion, *Edwards*' concern included deception. *See Moran v. Burbine*, 475 U.S. 412, 421 (1986) (waiver of right to counsel "must have been voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception").

In *Illinois v. Perkins*, 496 U.S. 292 (1990), this Court held that an undercover agent need not provide *Miranda* warnings to a suspect who has not yet been charged.

Law enforcement now regularly uses undercover agents to elicit confessions from defendants prior to the filing of charges. The question presented herein is whether *Edwards* or *Perkins* controls where an undercover agent is utilized prior to the filing of charges but *after* the Fifth Amendment right to counsel has already been invoked. The California Court of Appeal determined *Perkins*

controls. App. A at 12. As set forth herein, the California Court of Appeal's conclusion erroneously broadened *Perkins* and undercut *Edwards*' protection of the Fifth Amendment right to counsel.

A. Questioning of a Suspect Recently Taken Into Custody by an Undercover Agent Qualifies as a Custodial Interrogation for Purposes of Edwards Because While Miranda Was Only Concerned With Coercive Interrogation, Edwards Was Also Concerned With Deceptive Interrogation

Under *Edwards*, the Fifth Amendment right to counsel, once invoked, may only be waived if the waiver is voluntary, *knowing* and *intelligent*. *Edwards*, 451 U.S. at 483. As a result, the waiver cannot be overborne through deception. *Moran*, 475 U.S. at 421 ("the relinquishment of the right [to counsel] must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or **deception**" (emphasis added)).

As *Perkins* explained, however, *Miranda* only applies in the context of a *coercive* interrogation and not in the context of "mere strategic deception." *Perkins*, 496 U.S. at 297. Importantly, *Perkins* did not find that no custodial interrogation had taken place in the case before it, but rather that no *coercion* had arisen in this

particular type of custodial interrogation. *Perkins* acknowledged the suspect was "in custody in a technical sense" (*id.* at 297) and that the questioning amounted to interrogation. *Id.* at 299 ("no charges had been filed on the subject of the interrogation"). Rather, this Court found that the *coercion* that arises from the " 'interplay' " of custody and interrogation was simply not present, and, therefore, no *Miranda* advisements were required. *Id.* at 297.

Accordingly, while *Miranda* and subsequently *Perkins* were only concerned with *coercive* interrogations, *Edwards* was also concerned with *deceptive* interrogations. The reconciliation of these cases demonstrates, therefore*, that while a defendant need only be advised of his Fifth Amendment right to counsel when the interrogation is coercive, the invocation of that right precludes even a deceptive interrogation.*

This reading of *Perkins* is consistent with Justice Brennan's understanding of the majority opinion in *Perkins*, as set forth in his concurrence: "Nothing in the Court's opinion suggests that, had respondent previously invoked his Fifth Amendment right to counsel or right to silence, his statements would be admissible." *Perkins*, 496 U.S. at 300, fn. * (conc. opn. of Brennan, J.); see *United States v. Holness*, 706 F.3d 579, 596 (4th Cir. 2013) (noting that this

comment by Justice Brennan was not contradicted by the majority opinion).

Indeed, when *Perkins* returned to the Appellate Court of Illinois, Fifth District, it was determined the defendant had actually invoked his right to counsel *prior* to questioning by undercover agents. *People v. Perkins*, 248 Ill.App.3d 762, 618 N.E.2d 1275, 1277 (1993). The Illinois appellate court, applying *Edwards*, held that "the surreptitious questioning by undercover government agents violated defendant's fifth amendment privilege against self-incrimination." *People v. Perkins*, 248 Ill.App.3d 762 (618 N.E.2d at 1277), citing U.S. Const. Amend. V. A petition for writ of certiorari was pursued with this Court and denied (*Illinois v. Perkins* 512 U.S. 1213 (1994)), thereby lending further weight to Justin Brennan's comment that the analysis would be different had the defendant invoked his right to counsel prior to the questioning by an undercover agent.[2]

Because *Edwards* precludes the use of a deceptive interrogation *after* a suspect has invoked his right to counsel, the use of an undercover agent is prohibited under such circumstances.

[2] The California Court of Appeal here found the Illinois appellate decision "simply incorrect." App. A at 16.

B. *Innis* Lends Support to an Understanding That *Edwards* Was Not Only Concerned With Coercive Interrogation

A determination that questioning by an undercover agent qualifies as interrogation is consistent with this Court's definition of interrogation as set forth in *Rhode Island v. Innis*, 446 U.S. 291 (1980). *Innis* explained that "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Innis*, 446 U.S. at 301 (footnotes omitted). As an illustration, *Innis* noted that *Miranda* described "the use of line-ups in which a coached witness would pick the defendant as the perpetrator. This was designed to establish that the defendant was in fact guilty as a predicate for further interrogation." *Innis*, 446 U.S. at 299, citing *Miranda*, 384 U.S. at 453.

Like a coached lineup, use of an undercover agent is a police action that the police know will reasonably likely elicit an incriminating response, and thereby qualifies as an interrogation under *Innis*. Given that *Innis* was decided only one year and six days

prior to *Edwards*,[3] *Edwards* must be read in the context of *Innis*' characterization of interrogation.

C. Applying *Edwards*, and not *Perkins*, to Use of an Undercover Agent After the Invocation of the Right to Counsel Is Consistent With the United States Supreme Court's Disapproval of Intentional Circumvention of the *Miranda* Rights as Set Forth in *Seibert*

In *Missouri v. Seibert*, 542 U.S. 600, 617 (2004), this Court held that interrogating a suspect, obtaining a confession, *and then* giving the *Miranda* advisements and obtaining the confession again, violated *Miranda*. *Seibert* distinguished the case before it from *Oregan v. Elstad*, 470 U.S. 298 (1984). In *Elstad*, the suspect, while being arrested at his home, made an incriminating statement in response to a brief comment by an officer. *Elstad*, 470 at 314. The officer's comment in *Elstad* was simply "to notify [the suspect's] mother of the reason for his arrest." *Id.* at 315. Accordingly, *Elstad* held that a subsequent confession by the suspect after he received the *Miranda* advisements was admissible. *Id.* at 314, 318. While *Elstad* effectively "treat[ed] the [initial] conversation as a good-faith *Miranda* mistake," the interrogation prior to *Miranda* advisements

[3] *Innis* was decided on May 12, 1980; *Edwards* was decided on May 18, 1981.

in *Seibert* was an **intentional** "strategy … promoted … by a national police training organization and other departments." *Seibert*, 542 U.S. at 609, 615.

Like in *Seibert*, the record here reflects an intentional effort to circumvent petitioner's invocation of his right to counsel. Even prior to the use of petitioner's girlfriend as an undercover agent, the officers initially refused to recognize petitioner's invocation of his right to counsel and questioned him as to why he was invoking that right – conduct that the California Court of Appeal characterized as "deplorable." App. A at 4, 18. The officers then arranged for the girlfriend, acting as a police agent, to question petitioner, and fed the girlfriend information that she could use against petitioner. This was a deliberate action to circumvent petitioner's invocation of his right to counsel, and this widespread practice is incompatible with the spirit and law of *Miranda* and *Edwards*. Accordingly, *Edwards* must be read to preclude the use of an undercover agent after a suspect has invoked his Fifth Amendment right to counsel.

D. Alternatively, the Use of Petitioner's Girlfriend as an Undercover Agent Was Coercive

Even if coercion is deemed necessary for *Edwards* to apply, *Miranda* was concerned primarily with psychological coercion. *Miranda*, 384 U.S. at 448 ("Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented").

Similarly, the Fourth Circuit has recognized "the *personal dynamic* between" a suspect and an undercover agent may " 'generate[ ] 'inherently compelling pressures which work[ ] to undermine [a suspect's] will to resist and to compel him to speak where he would not otherwise do so freely." ' " *Holness*, 706 F.3d at 598, quoting *Perkins*, 496 U.S. at 296 (quoting *Miranda*, 386 U.S. at 467), emphasis added.

The record here demonstrates the type of compelling pressures resulting from a personal dynamic with which the above authorities were concerned. The girlfriend emotionally pled with petitioner to tell her what happened; she begged and begged and begged him to tell her what happened despite his assertions of innocence. App. F at 39-42. Eventually, petitioner caved to those pressures and confessed. Under these circumstances, the use of an

undercover agent was coercive and therefore in violation of both *Miranda* and *Edwards*.

E. Alternatively, the Admission of Petitioner's Statement Violated Petitioner's Federal Due Process Rights as Law Enforcement Deliberately Sought to Circumvent Petitioner's Invocation of His Right to Counsel

Quoting *Miller v. Fenton*, 474 U.S. 104 (1985), Justice Brennan, in *Perkins*, set out the following standards to continue to evaluate a due process claim in these circumstances:

> "This Court has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment .... Although these decisions framed the legal inquiry in a variety of different ways, usually through the 'convenient shorthand' of asking whether the confession was 'involuntary,' [citation], the Court's analysis has consistently been animated by the view that 'ours is an accusatorial and not an inquisitorial system,' [citation], and that, accordingly, tactics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness."
>
> That the right is derived from the Due Process Clause "is significant because it reflects the Court's consistently held view that the admissibility of a confession turns as much on whether the techniques for extracting the

> statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne."

Perkins, 496 U.S. at 301-302 (conc. opn. of Brennan, J.), quoting *Miller v. Fenton*, 474 U.S. at 109-110, 116.

The Court of Appeal in this case noted that claims should not be evaluated under procedural or substantive due process where there already exists an explicit and specific constitutional protection. App. A at 23, citations omitted. But due process concerns have already been applied to prevent a prosecutor's use of a defendant's post-arrest silence, following *Miranda* warnings, to impeach a defendant. *Doyle v. Ohio*, 426 U.S. 610 (1976). In the same manner, due process concerns may prevent a prosecutor's use of a defendant's statement following the invocation of the right to counsel.

Here, law enforcement continually and deliberately sought to ignore petitioner's invocation of his right to counsel. Law enforcement continued to pressure petitioner to speak at the police station after he invoked his right to counsel. App. A at 4. Law enforcement then sent in petitioner's girlfriend to obtain a confession. When her initial attempts were unfruitful, a detective

entered the room, told them they were both "looking at going to jail" and again asked if either of them wanted to make a statement. App. A at 5. When the conversation resumed after the detective left but remained unfruitful, the detective pulled the girlfriend out of the conversation and told her that petitioner had refused to undergo a polygraph exam. App. A at 5. The detective then sent the girlfriend back in, at which point she incessantly pressed petitioner to reveal what happened, until he admitted hitting and thereby killing their baby. App. A at 6; App. F at 39-32.

This persistent, underhanded attempt by law enforcement to obtain a confession from petitioner *after* he had invoked his right to counsel fell outside " 'the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness.' " *Perkins,* 496 U.S. at 301 (conc. opn. of Brennan, J.). In other words, law enforcement's method of eliciting a confession in this case was *not* "compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means." *Id.* at 302 (conc. opn. of Brennan, J.). In fact, given the girlfriend's persistent badgering of petitioner to tell her what happened – at law enforcement's direction – the interrogation could not be construed as anything *but* inquisitorial. The girlfriend questioned him over and over again, demanding to know what

happened, until petitioner finally was psychologically beaten down to the point that he admitted his culpability.

The due process concerns were aggravated by law enforcement's threats to jail petitioner *and* his girlfriend if no confession was forthcoming. While the Court of Appeal noted that "[l]aw enforcement does not violate due process by informing a suspect of the likely consequences of the suspected crimes" (App. A at 24, citations omitted), here, law enforcement used threats against petitioner's girlfriend's freedom to manipulate petitioner.

Federal due process mandates that an involuntary statement is inadmissible for any purpose. *Hutto v. Ross*, 429 U.S. 28, 30 (1976). To be voluntary, an admission or confession must be "the product of a rational intellect and a free will." (*Blackburn v. Alabama*, 361 U.S. 199, 208 (1960). A confession induced by " ' "any sort of threats or violence, (or) ... any direct or implied promises, however slight, (or) ... the exertion of any improper influence" ' " is involuntary and inadmissible. *Hutto*, 429 U.S. at 30, quoting *Bram v. United States*, 168 U.S. 532, 542-543 (1897).

Thus, the detective's persistent threats to jail petitioner and petitioner's girlfriend if petitioner did not give a statement – even after petitioner invoked his right to counsel – violated petitioner's

federal due process rights and rendered petitioner's subsequent statements to his girlfriend involuntary.

II. The Petition Should Be Granted Because There Is a Conflict Among the Circuit Courts as to *Perkins*' Application After the Invocation of the Right to Counsel

The petition should also be granted because there is a conflict among the circuit courts as to how *Perkins* should be interpreted to apply when a suspect previously invoked the right to counsel and because the California Court of Appeal's decision in this case conflicts with one of those interpretations. Rule 10(a), (b).

Some circuits have held that law enforcement may, pursuant to *Perkins*, still use an undercover agent after a suspect has invoked his right to counsel. *See*, *e.g.*, *United States v. Cook*, 599 F.3d 1208, 1213-1215 (2010); *United States v. Stubbs*, 944 F.2d 828, 831-832 (11th Cir. 1991).

The Fourth Circuit, however, has questioned this interpretation of *Perkins*. In *Holness*, the Fourth Circuit noted that the defendant's "deliberate invocation of his Fifth Amendment rights distinguishe[d] his situation from that of the defendant in [*Perkins*]." *Holness*, 706 F.3d at 595. Although the court ultimately found any constitutional error harmless, the court explained, "[W]e

are unprepared to say that the Supreme Court in *Perkins* held for all time that suspects in prison can under no circumstances be in coercive custody in the presence of an unknown police agent. We are particularly reluctant to so conclude in a case where, as here, the authorities are fully aware that the suspect has invoked his Fifth Amendment rights." *Id.* at 597. The court also left open the possibility that the use of the undercover agent could qualify as an interrogation. *Id.* at 598.

III. The Petition Should Be Granted Because This Case Squarely Presents the Issue

There was no question that petitioner unambiguously invoked his right to counsel during the initial custodial interrogation. App. A at 4. Additionally, the California Court of Appeal agreed with the trial court's finding that petitioner's girlfriend was operating as a police agent. App. A at 12. Thus, this case squarely presents the issue of the use of an undercover agent after the Fifth Amendment right to counsel has been invoked.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for a writ of certiorari be granted.

Respectfully submitted,

Dated: August 19, 2019

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