No. _____

IN THE
Supreme Court of the United States

MANUEL DE JESUS VALENCIA,
Petitioner,

v.

STATE OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari
to the California Court of Appeal,
Second Appellate District, Division Eight

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth and Fourteenth Amendments permit a deceptive ploy in which uniformed and undercover officers work together to extract a confession from a suspect who has invoked his Fifth Amendment rights to silence and to counsel.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Manuel de Jesus Valencia. Respondent is the State of California. No party is a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Manuel de Jesus Valencia respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal, Second Appellate District, Division Eight, in Case No. B283588.

OPINIONS BELOW

The opinion of the California Court of Appeal (Pet. App. 1a) is unpublished but can be found at 2019 WL 6869128. The order of the California Supreme Court denying review (Pet. App. 13a) is also unpublished but can be found appended to the California Court of Appeal's opinion at 2019 WL 6869128. The California Supreme Court's order denying review included a dissenting statement by Justice Liu, who thought that review should have been granted. Pet. App. 14a. The relevant trial court proceedings and order are unpublished.

JURISDICTION

The California Supreme Court denied review on December 11, 2019. Pet. App. 13a. This Court has jurisdiction under 28 U.S.C. § 1257(a). Petitioner's case falls under the second exceptional category of cases that this Court has considered as "final" despite the ordering of further proceedings in lower state courts. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480-481 (1975). The California Court of Appeal rejected petitioner's federal constitutional challenges to his murder conviction and the gang sentence enhancement, but remanded the case so that the trial court could correct an error in presentence custody credits and decide whether

to exercise its discretion to strike the firearm enhancement under a change in the law that occurred after petitioner's sentencing. Pet. App. 2a, 12a. In denying petitioner's petition for discretionary review, the California Supreme Court affirmed the Court of Appeal's decision. Pet. App. 13a. Hence, "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480; *see also Brady v. Maryland*, 373 U.S. 83, 85 n.1 (1963) (finding federal issue that challenged defendant's conviction was separate from and would not be mooted by lower state court's new trial on punishment).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment states in relevant part, "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

Section 1 of the Fourteenth Amendment states in relevant part, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1.

STATEMENT OF THE CASE

On the morning of November 25, 2014, a young man was shot and killed at a Los Angeles bus stop. Although two witnesses saw the shooting suspect just before and after the shooting, neither could describe his features. After reviewing 17 photographs of members of a local criminal street gang, one of the witnesses initially eliminated all but four or five photos, then narrowed it down to two, and finally selected petitioner's photo, based on his age and skin complexion.

Nearly two weeks later, petitioner, then 18 years old, was arrested for the shooting. He was taken to the sheriff's station, where detectives advised him of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and began interrogating him. Pet. App. 2a, 15a. In response to detectives' questioning, petitioner changed his account of what he was doing at the time of the murder, but he consistently denied his involvement. Then he invoked his Fifth Amendment rights to silence and to counsel. Pet. App. 2a, 15a.

After the interview, a detective devised a ploy: An undercover sheriff's deputy would be put in a holding cell with petitioner and pose as a fellow inmate. Pet. App. 2a-3a, 15a-16a. Then petitioner would be placed in a lineup for a witness to identify him, and, regardless of whether she actually identified him, another sheriff's deputy would tell petitioner that he had been identified. Pet. App. 2a-3a, 15a-16a.

The following evening petitioner was placed in a holding cell with undercover Deputy Sheriff Anthony Castro. In response to Deputy Castro's questions, petitioner said he had been arrested for murder but denied having anything to do with it.

Petitioner was taken to the lineup, where the witness was asked to pick out the shooter from among six or seven people. She did not identify petitioner as the shooter. Pet. App. 3a, 15a-16a.

Soon after petitioner was returned to the holding cell, a uniformed deputy entered and told him that he had been picked out of the lineup. Pet. App. 3a, 15a-16a. Then Deputy Castro asked, "They got you? Straight up, they got you?" Pet. App. 4a. "They got me," replied petitioner. Pet. App. 4a. In response to Deputy

Castro's further questions, petitioner confessed to the murder and disclosed details about the shooting. Pet. App. 4a.

The State charged petitioner with murder. The State also alleged that petitioner committed the murder for the benefit of a criminal street gang and personally discharged a handgun, causing great bodily injury and death.

Both before the preliminary hearing and again before trial, petitioner moved to exclude the statements he made to Deputy Castro on the grounds that their admission would violate his Fifth and Fourteenth Amendment rights to counsel. At a hearing before the preliminary hearing, the court denied the motion, and ruled that petitioner's statements were admissible. At a hearing before trial, a different judge, who presided over the trial, denied the renewed motion, after finding that defendant's confession was admissible under *Illinois v. Perkins*, 496 U.S. 292 (1990). The court interpreted *Perkins* to mean that *Miranda* applied only to suspects in a police-dominated, coercive environment. It did not apply to petitioner's conversation with someone he mistakenly believed to be a fellow inmate, even if his mistaken belief was induced by a deceptive ploy orchestrated after he had invoked his *Miranda* rights.

At trial, the prosecution played the recording of Deputy Castro and petitioner's conversation in the holding cell. Deputy Castro also testified about his conversation with petitioner. A jury convicted petitioner of premeditated first-degree murder and found true the gang and firearm allegations. Pet. App. 4a. The trial court sentenced petitioner to prison for 50 years to life. Pet. App. 4a.

On appeal, the California Court of Appeal affirmed petitioner's convictions. As is relevant here, the court concluded that, under *Perkins*, "*Miranda* forbids coercion, not strategic deception that tricks suspects into trusting someone they see as a fellow prisoner." Pet. App. 5a. Based on this interpretation of *Perkins*, the Court of Appeal held that "*Miranda* is inapplicable because [petitioner] did not know he was speaking to a sheriff's deputy. Police did not dominate the cell's atmosphere. The element of government coercion was missing." Pet. App. 5a. The court also found that neither *Edwards v. Arizona*, 451 U.S. 477 (1981), nor *Maryland v. Shatzer*, 559 U.S. 98 (2010), nor *Missouri v. Seibert*, 542 U.S. 600 (2004), applied. Pet. App. 6a-7a. According to the court, "There was coercion in *Shatzer*, *Edwards*, and *Missouri v. Seibert* because those defendants knew they were confronting the inquisitorial might of the government. The coercion in those cases triggered *Miranda*. [Petitioner] was free of this intimidating power, so the opposite holds for him: no coercion, no *Miranda*." Pet. App. 7a.

Petitioner sought discretionary review in the California Supreme Court. He renewed his arguments that the Fifth and Fourteenth Amendments required that his statements to Deputy Castro be excluded. The California Supreme Court denied review without comment. Pet. App. 13a.

Justice Liu issued a dissenting statement, concluding that review should have been granted. Pet. App. 14a. Justice Liu explained, "Although *Perkins* gave a green light to various undercover police operations, it did not address surreptitious questioning of a suspect *after* he has invoked *Miranda* rights." Pet. App. 23a. He

continued, "I find dubious the claim that it is lawful for the police to continue questioning a suspect who has invoked *Miranda* rights and remains in custody so long as the police disguise the interrogation." Pet. App. 24a. Justice Liu concluded, "In sum, the use of deceptive interrogation tactics to deliberately circumvent a suspect's invocation of *Miranda* rights appears to be a common police practice throughout California. I would grant review to decide whether such tactics are lawful under the Fifth Amendment." Pet. App. 27a.

REASONS FOR GRANTING THE WRIT

I. The petition should be granted to decide the important but unsettled question whether the Fifth and Fourteenth Amendments permit a deceptive ploy in which uniformed and undercover officers work together to extract a confession from a suspect who has invoked his Fifth Amendment rights to silence and to counsel.

A. This Court's *Miranda* jurisprudence has not addressed what limits the Fifth Amendment places on undercover operations after a suspect has invoked his Fifth Amendment rights to silence and to counsel.

This Court's *Miranda* jurisprudence has yet to address a situation in which police disregard a criminal suspect's invocation of his Fifth Amendment and Fourteenth Amendment[1] rights to silence and to counsel by having a uniformed officer make a statement amounting to custodial interrogation so that an undercover officer could exploit the statement's coercive effect on the suspect and induce a confession. This scenario involves an area of uncertainty in this Court's

[1] Although the Fifth Amendment right to remain silent and right to counsel do not apply to states directly, but rather indirectly, through the Fourteenth Amendment, for brevity, this petition refers to petitioner's Fifth Amendment rights. *Malloy v. Hogan*, 378 U.S. 1, 3 (1964).

Miranda jurisprudence because it implicates three different legal rules, none of which are controlling.

The first rule—announced in *Edwards* and affirmed in *Minnick v. Mississippi*, 498 U.S. 146 (1990)—prohibits authorities from continuing to interrogate a suspect who has invoked his or her Fifth Amendment right to counsel unless counsel is present. *Minnick*, 498 U.S. at 153; *Edwards*, 451 U.S. at 484-485. Because suspects who invoke their right to counsel signal to authorities that they consider themselves incapable of managing the coercive environment of custodial interrogation without the assistance of counsel, any subsequent waiver of their right to counsel is presumed to be involuntary, and to have resulted from "inherently compelling pressures." *Shatzer*, 559 U.S. at 104-105 (quoting *Arizona v. Roberson*, 486 U.S. 675, 681 (1988)). Thus, the *Edwards* no-contact rule protects those who declare themselves to be vulnerable to custodial interrogation's coercive effects.

Yet these coercive effects do not immediately vanish upon a suspect's release from custody; they linger. *Shatzer*, 559 U.S. at 108-110. The recognition that the effects of custodial interrogation linger underlies the second rule, declared in *Shatzer*, which extends the *Edwards* no-contact rule for a period of 14 days following a suspect's release from custody. *Id*. at 110. After 14 days, authorities may obtain a *Miranda* waiver. *Id*. at 115. This extended no-contact period is designed to give a suspect sufficient time "to get reacclimated to his normal life, to consult with friends and counsel, and to shake off *any residual coercive effects* of his prior

custody." *Id*. at 110 (emphasis added). Under *Shatzer*, the *Edwards* no-contact rule ends only after *both* coercive custody *and* its lingering effects end. *Id*. at 109-111.

The third rule, announced in *Perkins*, states that *Edwards* applies only to suspects who are subjected to custodial interrogation. *Perkins*, 496 U.S. at 296-297, 300. The rationale underlying this rule is that the *Miranda* warnings were designed to counteract "the danger of coercion result[ing] from the interaction of custody and official interrogation." *Id*. at p. 297. The suspect in *Perkins* was in custody on an unrelated charge when he told another inmate and an undercover police officer that he had committed an unsolved murder. *Id*. at 294-295. This Court held that the undercover officer was not required to give the suspect *Miranda* warnings because "[t]he essential ingredients of a 'police-dominated atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate." *Id*. at 296. Since the defendant did not know he was speaking to government agents, he was not subjected to the "mutually reinforcing pressures" that result from "[q]uestioning by captors, who appear to control the suspect's fate." *Id*. at 297. Hence, under *Perkins*, the *Edwards* rule is triggered only by custodial interrogation.

Although *Perkins* held that an undercover police officer need not give *Miranda* warnings to a suspect who has never been subjected to custodial interrogation, that decision did not address a situation in which a uniformed officer worked in tandem with an undercover officer to induce a confession from a suspect who had already invoked his Fifth Amendment rights to silence and to counsel. See *Perkins*, 496 U.S.

at 296-297, 300. The limits of *Perkins*' holding was pointed out by Justice Brennan in his concurring opinion: "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 n.* (Brennan, J., concurring in the judgment). Rather, if the suspect "had invoked either right," Justice Brennan explained, "the inquiry would focus on whether he subsequently waived the particular right." *Id*. (Brennan, J., concurring in the judgment).

Neither *Edwards* nor *Shatzer* nor *Perkins* addressed a situation like the one presented here: after a criminal suspect invoked his Fifth Amendment rights to silence and to counsel, law enforcement deliberately disregarded those rights by having a uniformed deputy sheriff make a statement to the suspect that amounted to custodial interrogation so that an undercover deputy could exploit the statement's lingering coercive effects to induce the suspect to confess.

B. The California Supreme Court and Fourth Circuit Court of Appeals disagree over whether *Miranda* applies to undercover operations involving suspects who have invoked their Fifth Amendment rights to silence and to counsel.

The California Supreme Court's interpretation of *Perkins*—adopted here by the California Court of Appeal—differs from the Fourth Circuit Court of Appeals' interpretation. Pet. App. 5a. The California Supreme Court has interpreted *Perkins* as creating a bright-line rule that statements to undercover government agents are *never* the product of coercive custody, even if those statements were in part elicited by a uniformed officer's improper interrogation of a suspect after he invoked his

Fifth Amendment right to counsel. *People v. Davis*, 115 P.3d 417, 448 (2005). In *Davis*, the California Supreme Court concluded that a detective's lie to an in-custody suspect, falsely telling him that his fingerprints were found on the murder weapon, was the functional equivalent of interrogation because it "indirectly accused defendant of personally shooting the victims," and therefore "was likely to elicit an incriminating response." *Id*. at 448. Yet *Davis* held that the defendant's subsequent incriminating statements to his cellmates, though provoked by the detective's lie, were nevertheless admissible, since "when he made these statements to his cellmates there was no longer a coercive, police-dominated atmosphere, and no official compulsion for him to speak." *Id*.

Here, the Court of Appeal applied *Davis*'s interpretation of *Perkins* to conclude that *Miranda* and *Edwards* did not apply because petitioner confessed to an undercover sheriff's deputy, not the uniformed deputy. Pet. App. 5a-7a; *Davis*, 115 P.3d at 448. The federal Courts of Appeals largely agree with *Davis*. *E.g.*, *United States v. Cook*, 599 F.3d 1208, 1213-1216 & n.2 (10th Cir. 2010); *United States v. Stubbs*, 944 F.2d 828, 831-832 (11th Cir. 1991).

The Fourth Circuit Court of Appeals, however, has not interpreted *Perkins* to cover all statements to undercover police agents under all circumstances. *United States v. Holness*, 706 F.3d 579, 597 (4th Cir. 2013). In *Holness*, after defendant Ryan Holness invoked his Fifth Amendment right to counsel, he was arrested, charged with murder under Maryland state law, and put in jail, where he made a series of incriminating statements to his cellmate. *Id*. at 585-586. The cellmate

divulged these statements to a prosecutor, and police encouraged the cellmate to contact authorities if Holness volunteered more information. *Id.* at 586. Later, the cellmate used a recording device furnished by authorities to dictate the contents of an incriminating letter composed by Holness. *Id*. That recording enabled police to obtain a search warrant for Holness's cell, and the subsequent search led to the discovery of another incriminating letter. *Id.*

Eventually, state charges were dismissed, and the United States Attorney's office in Baltimore charged Holness with several crimes, including interstate domestic violence. *Holness*, 706 F.3d at 587. Holness moved to suppress his statements to his cellmate and any evidence obtained as a result of those statements. *Id*. The district court denied the motion, Holness was convicted of three charges, and Holness appealed, arguing that his Sixth Amendment right to counsel had been violated. *Id*. at 587-588. Although the Fourth Circuit Court of Appeals rejected Holness's Sixth Amendment argument, it exercised its discretion to consider whether the State of Maryland's conduct violated his Fifth Amendment rights. *Id*. at 589-590, 592-593. After reviewing this Court's analyses in *Shatzer* and *Perkins*, the *Holness* court concluded, "In consideration of the views expressed by Justice Brennan in his separate opinion—left unchallenged by the majority—we 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." *Id*. at 597. The court noted that "further development of the record might reveal that the personal dynamic between Holness and [his cellmate]

'generate[d] "inherently compelling pressures which work[ed] to undermine [Holness's] will to resist and to compel him to speak where he would not otherwise do so freely."'" *Id*. at 597-598 (quoting *Perkins*, 496 U.S. at 296 (quoting *Miranda*, 384 U.S. at 467)) (first brackets added). Ultimately, the court decided a remand was unnecessary because any violation of Holness's Fifth Amendment rights was harmless beyond a reasonable doubt. *Id*. at 598-600.

II. *Miranda*'s application to undercover operations involving suspects who have invoked their Fifth Amendment rights to silence and to counsel should be resolved now.

Miranda is not a recondite concept known only to the bench and bar. It is "a household word in American popular culture." Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266, 286 (1996). Most Americans know about an arrested suspect's right to remain silent and right to an attorney. *See* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure: Two Audiences, Two Answers*, 94 Mich. L. Rev. 2466, 2538 n.336 (1996) (noting that first-year law students credit their knowledge of the *Miranda* warnings to police television programs). But, as Justice Liu emphasized in his dissenting statement to the California Supreme Court's denial of discretionary review, it is likely that "most Americans do not know and would not expect that the police may continue to question a person who remains in custody after invoking *Miranda* rights so long as the questioning occurs through trickery or deceit." Pet. App. 21a. Nor would they have reason to know or expect that the police may continue questioning: "The warnings are not stated in terms that would lead a reasonable person to believe

that invoking the right to silence or right to counsel leaves the police free to continue questioning through covert means." Pet. App. 25a.

This Court issued *Miranda* in part "to give concrete constitutional guidelines for law enforcement agencies and courts to follow." *Miranda*, 384 U.S. at 441-442. Those guidelines, however, remain incomplete, allowing police to disregard or circumvent *Miranda*'s protections for criminal suspects in ways that the American public would not expect. Although the public remains largely ignorant of how the police have exploited the unresolved issues in this Court's *Miranda* jurisprudence to continue questioning suspects even after they have invoked their Fifth Amendment rights to silence and to counsel, there is a grave danger that increasing public awareness of these kinds of police practices could engender "public cynicism and distrust of legal institutions." Pet. App. 29a. This Court should grant certiorari to ensure that both the police and the citizenry know what *Miranda* allows and what *Miranda* forbids.

III. A suspect's confession to an undercover officer that is induced by a uniformed officer's custodial interrogation after the suspect has invoked his Fifth Amendment rights to silence and to counsel is inadmissible.

The admission of petitioner's confession to an undercover sheriff's deputy violated his Fifth and Fourteenth Amendment privilege against self-incrimination because a uniformed deputy disregarded petitioner's invoked rights to silence and to counsel by making a statement that amounted to custodial interrogation. Once petitioner invoked his Fifth Amendment rights to silence and to counsel, he limited

authorities' subsequent conduct in two ways: First, after he invoked his right to remain silent, authorities could no longer interrogate him, and they could not reinitiate interrogation later, unless petitioner first knowingly, intelligently, and voluntarily waived his right to remain silent. *Miranda*, 384 U.S. at 473-475; *Michigan v. Mosley*, 423 U.S. 96, 103-106 (1975); *see also Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Second, after he invoked his right to counsel, authorities could no longer interrogate him in the absence of counsel, unless he himself initiated further communication. *Edwards*, 451 U.S. at 484-485; *Minnick*, 498 U.S. at 153.

When the uniformed deputy sheriff told petitioner that he had been identified in the lineup, the deputy violated petitioner's right to remain silent, because he did not first obtain petitioner's knowing, intelligent, and voluntary waiver of that right, and he violated petitioner's right to counsel, because counsel was not present. *Miranda*, 384 U.S. at 473-475; *Minnick*, 498 U.S. at 153. Even though the deputy did not ask a question, his lie that petitioner was identified as the shooter in the lineup was the functional equivalent of custodial interrogation because authorities should have known the lie was "reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). Falsely telling petitioner that he had been identified as the shooter was likely to pressure him either to defend himself by offering an excuse, alibi, or some other explanation, or to capitulate by confessing guilt. Any admissions or inconsistencies among petitioner's out-of-court statements could be used by the prosecution as evidence of his guilt. *See id.* at 301 n.5 ("By

'incriminating response' we refer to any response—whether inculpatory or exculpatory—that the *prosecution* may seek to introduce at trial.").

This kind of deception resembles one of the deceptive practices that *Miranda* considered to be equivalent to interrogation. *Innis*, 446 U.S. at 299. *Miranda* criticized the use of lineups in which a coached witness identifies a defendant as the culprit to prepare him for further interrogation. *Id*. (citing *Miranda*, 384 U.S. at 453). It also considered "psychological ploys" in which authorities posit a suspect's guilt as amounting to interrogation. *Innis*, 446 U.S. at 299 (citing *Miranda*, 384 U.S. at 450). These practices resemble the stratagem used here.

Authorities planned for petitioner to be told he was identified as the shooter at the lineup, even if he was not identified. There would be no reason to include this deception in the undercover operation unless law enforcement reasonably believed it would cause petitioner to incriminate himself. *Innis*, 446 U.S. at 301 n.7 ("In particular, where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect").

When the uniformed deputy sheriff violated the *Miranda* and *Edwards* rules by reinitiating interrogation without counsel present and without obtaining petitioner's knowing, intelligent, and voluntary waiver of his rights, the deputy injected custodial interrogation into the undercover operation. The coercive effects of that interrogation did not immediately dissipate when the uniformed deputy left the holding cell. They persisted. *See Shatzer*, 559 U.S. at 108-110. This allowed the

deputy's *Miranda* and *Edwards* violation to lay the groundwork for the undercover deputy's questions that induced petitioner to confess to the shooting. The resultant confession therefore was the product of the uniformed deputy's *Miranda* and *Edwards* violation.

Because the lingering, compelling influence of the uniformed deputy's custodial interrogation was exploited by the undercover deputy, petitioner's confession was not "the product of his free choice." *Miranda*, 384 U.S. at 458; see also *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (observing that a *Miranda* waiver should be "the product of a free and deliberate choice rather than intimidation, coercion, or deception"). Nor did the deputies' deceptive ploy "[p]reserv[e] the integrity of an accused's choice to communicate with police only through counsel." *Patterson v. Illinois*, 487 U.S. 285, 291 (1988). In short, law enforcement's stratagem undermined the *Miranda* and *Edwards* rules' core purpose: "preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." *Arizona v. Mauro*, 481 U.S. 520, 529-530 (1987). As Justice Liu explained in his dissenting statement, "The right to cut off questioning and seek assistance of counsel is deeply embedded in the consciousness of our citizenry as a fundamental protection against the formidable power of the police. It trivializes this protection to say it can be defeated by a simple ruse." Pet. App. 29a.

IV. In the alternative, confessions that result from an interrogation strategy deliberately designed to circumvent *Miranda* and *Edwards* should be suppressed.

Petitioner's statements to the undercover deputy should have been suppressed because they resulted from law enforcement officers' deliberate disregard of petitioner's rights to silence and to counsel. Although this remedy has never been ordered by this Court, it is supported by this Court's decision in *Missouri v. Seibert*. *Seibert*, 542 U.S. at 617 (plurality opinion); *id.* at 621-622 (Kennedy, J., concurring in the judgment). In *Seibert*, this Court held that a defendant's post-*Miranda* statement was inadmissible because it resulted from a deliberate two-step interrogation technique in which police gave the defendant *Miranda* warnings only after first eliciting unwarned incriminating statements. *Id.* at 617 (plurality opinion); *id.* at 621-622 (Kennedy, J., concurring in the judgment). Since Justice Kennedy concurred in the judgment on the narrowest grounds, his concurring opinion represents *Seibert*'s holding. *E.g. Reyes v. Lewis*, 833 F.3d 1001, 1002-1003, 1028 (9th Cir. 2016); *United States v. Street*, 472 F.3d 1298, 1313 (11th Cir. 2006); *see also Marks v. United States*, 430 U.S. 188, 193 (1977); *contra, e.g., United States v. Ray*, 803 F.3d 244, 270-272 (6th Cir. 2015) (Justice Souter's plurality opinion controls). Justice Kennedy concluded that all postwarning statements produced by this kind of deliberate two-step technique designed to circumvent *Miranda* must be suppressed unless curative measures are taken. *Seibert*, 542 U.S. at 621-622 (Kennedy, J., concurring in the judgment).

Here, authorities deliberately disregarded petitioner's requests that interrogation cease and that he be provided with counsel when they had a uniformed deputy make a statement amounting to custodial interrogation so that an undercover deputy could exploit the statement's effect on petitioner by questioning him further. Although the uniformed deputy made only a single statement, this stratagem could be developed to have a uniformed deputy repeatedly interrogate a suspect, only to retreat and allow an undercover deputy to mine the suspect for a confession. This kind of tandem questioning fails to honor a suspect's request that he only be questioned in the presence of counsel. See *Shatzer*, 559 U.S. at 104-105.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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