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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MANUEL DE JESUS VALENCIA, Defendant and Appellant.	B283588 (Los Angeles County Super. Ct. No. YA091677)

APPEAL from a judgment of the Superior Court of Los Angeles County, LaRonda J. McCoy, Judge. Affirmed in part and remanded with directions.

Stephen Michael Vasil, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General of California, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, J. Michael Lehmann, Deputy Attorney General, for Plaintiff and Respondent.

Gustavo Jaimes spoke disrespectfully to Manuel de Jesus Valencia, so Valencia shot him to death. In jail, Valencia described the murder to an undercover deputy. We affirm the admission of this confession and a gang sentencing enhancement. We remand for resentencing under Senate Bill No. 620 (2017–2018 Reg. Sess.), which we abbreviate as SB 620, and direct the trial court to credit Valencia with an additional day of presentence custody. All code references are to the Penal Code.

I

We recount facts favorably to the side that won at trial.

Valencia is in a gang called Evil Klan. Evil Klan's territory is in Los Angeles County. Its southern border is Century Boulevard.

The morning of the murder, Valencia was on Century Boulevard with fellow Evil Klan member Little Looney. Jaimes was standing at a bus stop on Century Boulevard. Little Looney told Valencia to check out Jaimes. Valencia walked over to Jaimes, who began "talking shit" to Valencia. Valencia felt he had no choice but to shoot Jaimes. Valencia fired seven times, killing Jaimes.

Police arrested Valencia, read Valencia his *Miranda* rights, and interrogated him. (*Miranda v. Arizona* (1966) 384 U.S. 436, 444 (*Miranda*).) After answering some questions, Valencia requested a lawyer. The detectives left.

The next day, police put Valencia in a holding cell with an undercover sheriff's deputy dressed like an inmate and wearing a recording device. The deputy and Valencia spoke for nearly 40 minutes.

Police removed Valencia from the cell and put him in a line-up. Police planned to tell Valencia the witness identified him,

whether or not the witness did. The witness did not identify Valencia.

After police returned Valencia to the cell with the undercover deputy, Valencia asked a uniformed deputy, "Are you gonna let me know if I got picked?" The uniformed deputy responded, "I'm running, running solo right now, so give me a couple seconds." A few minutes later, the following dialogue was recorded:

> Uniformed deputy: Uh, you did get picked. And, uh, [the detectives] gonna talk to you. [unintelligible]
> Undercover deputy: Who's gonna talk to me?
> Uniformed deputy: Detectives.
> Undercover deputy: Detectives?
> Uniformed deputy: Yeah.
> Undercover deputy: Alright.
> Uniformed deputy: As a matter of fact, probably pretty quick. Not sure how long it's gonna take for you. You already have a house?
> Valencia: Nah. [unintelligible]
> Undercover deputy: Sit there and just no matter what they tell you, you don't have to open your mouth. Just sit there [unintelligible]
> Valencia: What if they ask questions?
> Undercover deputy: Just because they ask a question don't mean you gotta answer it right?
> Valencia: Yeah. I have the right to remain silent.
> Undercover deputy: You just sit there and you just let them talk. Let them feed you what they have, so you know. You're playing chess now homie. You need to know what their game [unintelligible] I'm

almost positive they have [unintelligible] They probably have more, something else [unintelligible] So you really need to start playing back everything now. [unintelligible] It's gonna be a rough ride for you, you know.

Valencia: [unintelligible]

Undercover deputy: You gotta start [. . .] They got you? Straight up, they got you?

Valencia: They got me.

Then Valencia told the undercover deputy he murdered Jaimes and described the details. No one appears to dispute that the uniformed deputy left the cell before Valencia told the undercover deputy, "They got me," and described the details of the crimes.

At trial, the prosecution introduced evidence about Valencia's gang, Evil Klan. That evidence included Evil Klan member Elvin Mundo's conviction for grand theft from the person. Detective Albert Arevalo was the prosecution's gang expert. Arevalo said he was familiar with Mundo, Mundo's membership in Evil Klan, and Mundo's conviction.

Arevalo testified the "primary criminal activity of Evil Klan range from vandalism, felony vandalism, narcotic possession, narcotic possession for sale, illegal firearm possession, robbery, theft and assaults." Arevalo also testified the gang's primary activity include "assaults with firearms or deadly weapons."

The jury convicted Valencia of murder. It found true a firearm enhancement under section 12022.53, subdivision (d) and a gang enhancement under section 186.22, subdivision (b)(1)(C).

The trial court sentenced Valencia to 50 years to life: 25 years to life for murder and 25 years to life for the firearm enhancement. The trial court did not impose any time under the

gang enhancement. However, the enhancement made Valencia ineligible for parole for 15 years.

II

The trial court did not violate Valencia's Fifth Amendment rights by allowing the jury to hear his confession to the undercover deputy.

We defer to factual findings that are supported by substantial evidence. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 642.) We independently review legal determinations. (*Ibid.*)

Valencia's confession was voluntary and was not the result of coercion. There was no *Miranda* problem. (*Miranda*, *supra*, 384 U.S. at p. 478 [statements given freely and voluntarily without any compelling influences are admissible].)

Miranda forbids coercion, not strategic deception that tricks suspects into trusting someone they see as a fellow prisoner. (*Illinois v. Perkins* (1990) 496 U.S. 292, 297.) The atmosphere is not coercive when a suspect considers himself in the company of cellmates and not law enforcement. (*Id.* at pp. 296–297.) Because Valencia confessed to a man he believed was not with the government, there is no reason to assume coercion. (*Id.* at pp. 297–298.) Ploys to mislead suspects or to lull them into a false sense of security are not within *Miranda*'s concerns. (*Ibid.*)

Miranda is inapplicable because Valencia 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. (See *People v. Davis* (2005) 36 Cal.4th 510, 554.)

Under these principles, the trial court was right to overrule Valencia's objection to admitting his confession. Voluntary confessions are a proper element in law enforcement and an

unmitigated good. They are essential to society's compelling interest in finding, convicting, and punishing criminals. (*Maryland v. Shatzer* (2010) 559 U.S. 98, 108 (*Shatzer*).)

Valencia objects a uniformed deputy subjected him to a custodial interrogation by lying to him that the lineup witness had picked him. We assume this lie was a custodial interrogation for purposes of argument. Valencia, however, said nothing to this deputy, who departed before Valencia spoke. The deputy was playing a role in a planned ruse to prompt Valencia to speak to someone Valencia did *not* believe was an officer. Valencia fell for the ploy. When the uniformed deputy left, Valencia thought he was alone with his trusted confidant, not in a police-dominated environment. Valencia spoke freely and voluntarily and not in response to his perception of official coercion. His confession was admissible.

Relying on *Shatzer*, Valencia incorrectly argues a coercive effect lingered after the uniformed deputy left Valencia. *Shatzer* does not help Valencia. Justice Scalia's opinion in *Shatzer* concerned statements to people the defendant knew were police. (*Shatzer*, *supra*, 559 U.S. at pp. 101–102.) Valencia's statements were not to people Valencia thought were police.

Valencia also invokes *Edwards v. Arizona*, but it, like *Shatzer*, involved statements to people the defendant knew were from the government. (See *Edwards v. Arizona* (1981) 451 U.S. 477, 479 (*Edwards*) [after Edwards asked for a lawyer and officers left, other officers returned to cell and identified themselves].)

The same holds for Valencia's reliance on *Missouri v. Seibert* (2004) 542 U.S. 600, 604–605, which again concerned statements by a defendant to people she knew were police.

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*. Valencia was free of this intimidating power, so the opposite holds for him: no coercion, no *Miranda*. (Accord, *People v. Orozco* (2019) 32 Cal.App.5th 802, 811-818.)

In sum, Valencia confessed to satisfy his own desire to tell the truth, not to satisfy the will of a person Valencia thought was from the government. Because Valencia spoke only to an undercover officer, *Miranda* and the Fifth Amendment do not apply. His voluntary confession was admissible.

III

The jury had enough evidence to find true the gang sentencing enhancement provided by section 186.22, subdivision (b)(1)(C).

We review the record in the light most favorable to the prosecution to determine whether a reasonable jury could find the facts required for the enhancement. (*People v. Garcia* (2014) 224 Cal.App.4th 519, 522-523.)

Section 186.22, subdivision (b)(1)(c) increases the sentences of defendants who commit a violent felony for the benefit of a gang. (§ 186.22, subd. (f).) The increase does not apply unless the gang's primary activities include at least one of 28 enumerated crimes. (§ 186.22, subd. (f).)

Here, the trial court did not identify each of those 28 enumerated crimes for the jury. Instead, it gave an instruction identifying just three: murder, burglary and grand theft. When reviewing for sufficiency of the evidence, we assess the evidence against the theory presented to the jury. (*People v. Garcia*, *supra*, 224 Cal.App.4th at p. 525.) Thus, we must determine

whether sufficient evidence showed Evil Klan's primary activities include murder, burglary, or grand theft.

The prosecution concedes the jury had insufficient evidence to find Evil Klan's primary activities include murder or burglary, but argues the jury had sufficient evidence to find the gang's primary activities include grand theft.

Only some types of grand theft are among the 28 enumerated crimes that count as a primary activity for the purposes of the enhancement. The enumerated crimes do not include grand theft as defined in section 487, subdivision (b), or felony theft of an access card, which can be grand theft. (§§ 186.22, subds. (e) & (f); 484e, subd. (d).) The enumerated crimes do include grand theft from the person. (§ 186.22, subds. (e)(9) & (f).)

There was enough evidence for the jury to find Evil Klan's primary activities include grand theft from the person. The prosecution's gang expert testified Evil Klan's primary activities include "theft." The jury could infer the sort of "theft" referred to by the expert included "grand theft from the person" because (1) the prosecution introduced Evil Klan member Elvin Mundo's conviction for grand theft from the person, and (2) the gang expert testified he was familiar with Mundo's conviction.

Valencia argues the expert's testimony was "insolubly ambiguous" because "theft" encompasses grand theft and petty theft, so the jury could not find Evil Klan's primary activities include grand theft much less a type of grand theft that counts for section 186.22. (See § 486 [delineating grand and petty theft]). Valencia's argument fails because we review the evidence in the light most favorable to the prosecution. (See *People v. Garcia* (2014) 224 Cal.App.4th 519, 522–523.) Any ambiguity in

the expert's testimony did not preclude this jury's finding because the jury could use Mundo's conviction to make sense of the expert's testimony.

When the expert discussed the Evil Klan member's conviction, he noted the gang member "took a deal for theft. 487 theft." This testimony appears to refer to section 487, which defines grand theft, including grand theft from the person. Valencia argues this testimony shows the expert knew how to specify types of thefts, and "when the expert meant to specify a certain type of theft, he did so." But the testimony could also show that when the gang expert used the word "theft," he meant the term to include grand theft and specifically grand theft from the person. We again favor the inference that supports the prosecution.

Even if we assume the jury was unable to infer Evil Klan's primary activities include "grand theft from the person," we would affirm because the jury would find the sentencing enhancement true if the trial court gave a more complete jury instruction. A complete instruction would have informed the jury that a gang qualifies for the sentencing enhancement if its primary activities include assault with a deadly weapon, robbery, felony vandalism, or illegal firearm possession. (§ 186.22, subds. (f), (e)(1), (e)(2), (e)(20, (e)(31)).) The prosecution's expert testified Evil Klan's primary activities include each of these crimes. Sufficient evidence supported the jury finding true the gang sentencing enhancement provided by section 186.22, subdivision (b)(1)(C).

IV

The trial court properly found no police personnel records were discoverable under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

We review for abuse of discretion. (*People v. Samayoa* (1997) 15 Cal.4th 795, 827.)

Valencia moved the trial court for disclosure of the personnel records of two sheriff's deputies. On appeal, Valencia requests we review the trial court's in camera proceedings to determine whether it abused its discretion in finding no discoverable documents. The prosecution does not object.

We have reviewed the transcript of the proceedings as well as the trial court's notes and findings. The trial court placed the custodian of records under oath, a court reporter transcribed the proceedings, and the court made a record of the material it reviewed. This procedure was proper. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1229 [holding the trial court should make a record of the documents it examined before ruling on a *Pitchess* motion, and can do so by describing the documents on the record].) The court did not abuse its discretion in holding there was no evidence to be disclosed.

V

Valencia's case must be remanded so the trial court can exercise the sentencing discretion created by SB 620.

SB 620 gives a court discretion to strike or dismiss a firearm enhancement imposed under section 12022.53. Although SB 620 did not take effect until after Valencia was sentenced, it applies retroactively to convictions that are not final. (*People v. K.P.* (2018) 30 Cal.App.5th 331, 339.)

Valencia and the government agree the case should be remanded so the trial court can exercise the discretion created by SB 620. Remand is required unless the trial court clearly shows it would not not have stricken the firearm enhancement if it did have discretion. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) Here, the trial court did not clearly show it would not have stricken the firearm enhancement. It implied the opposite, saying it imposed the sentence it did "because the court has no discretion."

On remand, the trial court may determine whether to admit evidence that could be relevant to Valencia's future youth offender parole hearing. The government's arguments to the contrary are not on point because they address whether a remand is *required* under *People v. Franklin* (2016) 63 Cal.4th 261, 284 (*Franklin*). *Franklin* remanded a case because it was unclear whether the defendant had a sufficient opportunity to present evidence for his future parole hearing. (*Ibid.*) Valencia does not dispute he had a sufficient opportunity, so *Franklin* is inapposite.

This case is like *People v. Woods* (2018) 19 Cal.App.5th 1080, 1091, fn. 3, where a defendant already had the "opportunity and incentive" to put forth information related to a future youth offender parole hearing. (*Id.* at pp. 1088–1089.) The *Woods* court nonetheless allowed the trial court to determine how the record could be supplemented on remand. (*Id.* at p. 1091, fn. 3.) We follow suit.

VI

We direct the trial court to amend the abstract of judgment to credit Valencia with an additional day of presentence custody. The trial court awarded Valencia 883 days of presentence custody

credits, but all parties agree Valencia should have been awarded 884 days.

DISPOSITION

We remand so the trial court can exercise the sentencing discretion created by SB 620. We direct the trial court to credit Valencia with an additional day of presentence custody. The judgment is otherwise affirmed.

WILEY, J.

We concur:

BIGELOW, P. J.

GRIMES, J.

Court of Appeal, Second Appellate District, Division Eight - No. B283588

S258038

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

MANUEL DE JESUS VALENCIA, Defendant and Appellant.

The petition for review is denied.

Liu, J., is of the opinion the petition should be granted.

CANTIL-SAKAUYE

Chief Justice

DISSENTING STATEMENT BY LIU, J.

Among the individual rights guaranteed by the United States Constitution, perhaps none is more familiar than the Fifth Amendment right of a criminal suspect to remain silent in the face of police questioning. (*Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*); see *Dickerson v. United States* (2000) 530 U.S. 428, 443 ["*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."].) As the high court explained half a century ago, the *Miranda* warnings set the ground rules for interactions between citizens and the police: "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. . . . If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent." (*Miranda*, at pp. 473–474, fn. omitted.)

As it turns out, however, courts have understood this clear procedure to contain a caveat: Although a suspect's invocation of the right to silence or right to counsel cuts off questioning by the police in uniform, it does not stop the police from going undercover to continue questioning the suspect until he confesses. That is what happened in this case, and the Court of Appeal found "no *Miranda* problem" on the ground that "*Miranda* forbids coercion, not strategic deception that tricks suspects into trusting someone" whom they do not know is a government agent. (*People v. Valencia* (Aug. 5, 2019, B283588) 2019 WL 3542872, p. *2 [nonpub. opn.] (*Valencia*).)

The use of deceptive schemes to continue questioning a suspect who has invoked *Miranda* rights appears to be a common police practice throughout California. How is it

possible, one might ask, that the protections of *Miranda* are so easily evaded? I wonder the same thing. I would grant review to decide whether this practice — what one court recently called a "deplorable" and "deliberate circumvention of *Miranda*'s protections" (*People v. Orozco* (2019) 32 Cal.App.5th 802, 816, 819 (*Orozco*)) — is lawful under the Fifth Amendment. But because this court has declined several opportunities to address the issue, I urge the Legislature to examine whether additional safeguards are necessary to restore *Miranda*'s core purpose of ensuring that any statement made by a suspect to the police is "truly . . . the product of his free choice." (*Miranda, supra*, 384 U.S. at p. 458.) Compliance with *Miranda* is not a game, and the Legislature, if not this court, should make that clear.

I.

In this case, the police arrested defendant Manuel de Jesus Valencia for murder. Valencia, then 18 years old, was taken to the police station, where an officer advised him of his *Miranda* rights and began interrogating him. After answering some questions, Valencia said he did not want to talk anymore and requested counsel. No one disputes that Valencia validly invoked his *Miranda* rights.

The next day, in the face of Valencia's invocation of his *Miranda* rights, the police devised a scheme to extract a confession from him. First, the police placed Valencia in the same holding cell as undercover Deputy Sheriff Anthony Castro, who wore a recording device. Posing as a gang affiliate, Officer Castro sought to gain Valencia's trust. After he noticed that Valencia was shaking, Officer Castro told Valencia that he remembered what it was like to be 18, "scared," and "nervous." He told Valencia to "try not to let [his] voice crack" when he talked and to alter the way he walked and talked so it would be more difficult for a witness to identify him in a lineup.

In accordance with the plan, a uniformed officer then came to the holding cell to take Valencia to a lineup. Although the witness did not identify Valencia as the

perpetrator in the lineup, the uniformed officer lied to Valencia and told him that "[he] did get picked."

After Valencia returned to his cell, Officer Castro, still undercover, told him that he did not have to tell the detectives anything. Officer Castro said: "Sit there and just no matter what they tell you, you don't have to open your mouth. . . . Just because they ask a question don't mean you gotta answer it right?" Valencia replied: "Yeah. I have the right to remain silent." Officer Castro then advised Valencia that he should "start playing back everything now" because the police probably had other incriminating evidence. At that point, Valencia said, "They got me," and divulged his involvement in the crime. His statements were admitted at trial, comprising pivotal evidence in the prosecution's case. Valencia was convicted of murder and sentenced to 50 years to life in prison.

If Officer Castro had worn his uniform while eliciting Valencia's confession, this scheme would have clearly violated *Miranda*. Valencia invoked his right to silence and right to counsel, and any further questioning by police outside the presence of counsel was unlawful. (See *Edwards v. Arizona* (1981) 451 U.S. 477, 485 (*Edwards*); *Miranda*, *supra*, 384 U.S. at pp. 473–474.) But the Court of Appeal held that because Officer Castro impersonated an inmate, the protections of *Miranda* did not apply to his jail cell conversation with Valencia. (*Valencia*, *supra*, 2019 WL 3542872 at pp. *2–*3.)

What happened in Valencia's case is not an isolated incident. The use of deceptive schemes to elicit confessions from suspects who have invoked their *Miranda* rights appears to be a pervasive police practice in California. This year alone, there were five other cases in the courts of appeal presenting this issue. (See *People v. Bolivar* (Sept. 24, 2019, B284882) 2019 WL 4638899, p. *4 [nonpub. opn.] (*Bolivar*); *People v. Robbins* (July 31, 2019, B283582) 2019 WL 3451312, p. *3 [nonpub. opn.] (*Robbins*), review den. Nov. 20, 2019; *People v. Herrera* (July 15, 2019, B286907) 2019 WL 3071747, p. *2 [nonpub. opn.] (*Herrera*), review den. Nov. 20, 2019; *Orozco*, *supra*, 32

Cal.App.5th at pp. 807–809, review den. June 12, 2019; *People v. Arzate* (Feb. 27, 2019, B286532) 2019 WL 948963, p. *3 [nonpub. opn.] (*Arzate*), review den. June 12, 2019.) And there have been many cases beyond those. (See *People v. Tauch* (Sept. 16, 2015, B257033) 2015 WL 5445202, p. *2 [nonpub. opn.] (*Tauch*), review den. Dec. 16, 2015; *People v. Olivares* (Nov. 20, 2014, B248543) 2014 WL 6480341, p. *3 [nonpub. opn.] (*Olivares*), review den. Mar. 11, 2015; *People v. Jackson* (June 28, 2005, B169059) 2005 WL 1515390, p. *6 [nonpub. opn.] (*Jackson*), review den. Oct. 12, 2005; *People v. Schinkel* (Aug. 27, 2002, C036877) 2002 WL 1970197, p. *4 [nonpub. opn.] (*Schinkel*), review den. Nov. 20, 2002; *People v. Lolohea* (Mar. 22, 2002, A091821) 2002 WL 443398, p. *6 [nonpub. opn.] (*Lolohea*), review den. June 19, 2002; *People v. Plyler* (1993) 18 Cal.App.4th 535, 544 (*Plyler*), review den. Nov. 23, 1993; *People v. Guilmette* (1991) 1 Cal.App.4th 1534, 1538–1539 (*Guilmette*), review den. Mar. 19, 1992.) These cases, which come from multiple counties up and down the state, are just the tip of the iceberg. Because courts have consistently rejected challenges to such practices, and because this court has declined multiple opportunities to take up the issue, it is likely that many defendants do not raise this issue on appeal. And such practices go unchallenged when applied to suspects who provide no self-incriminating statements or turn out to be wrongly detained, never charged, or eventually acquitted.

The police tactics used to circumvent a clear *Miranda* invocation are varied. There are many cases like Valencia's, where officers disguised as inmates continue questioning a suspect in the holding cell after he has invoked his rights. (See *Valencia*, *supra*, 2019 WL 3542872 at pp. *1–*2; *Bolivar*, *supra*, 2019 WL 4638899 at p. *4; *Robbins*, *supra*, 2019 WL 3451312 at p. *3; *Tauch*, *supra*, 2015 WL 5445202 at p. *2; *Olivares*, *supra*, 2014 WL 6480341 at p. *3.) In one scheme called "stimulation," officers in a custodial interrogation deceitfully tell the suspect that they have enough evidence to convict him in order " 'to get him wound up when he [is] placed back in the

cell with . . . undercover deputies.' " (*Olivares*, *supra*, 2014 WL 6480341 at p. *4; see also *Valencia*, *supra*, 2019 WL 3542872 at p. *1; *Orozco*, *supra*, 32 Cal.App.5th at p. 809.) This tactic integrates official questioning and surreptitious questioning into a single coordinated scheme to exhaust defendants into confessing, extending the coercive effects of official interrogation beyond the interrogation room. After Salvador Olivares stated five times during an interrogation that he had nothing to say and that he wanted a lawyer (*Olivares*, at p. *3, fn. 6), officers followed him back to his holding cell and "yelled" that they had witnesses and DNA evidence tying him to murder. Two undercover deputies continued questioning him in his cell for two and a half hours, pretending to commiserate with him and to offer advice about his case in order to coax incriminating statements out of him. (*Id.* at p. *4.) At one point during the questioning, when Olivares expressed concern that the conversation might be recorded — indeed, it was — the officers "dismissed the idea." (*Ibid.*)

In other scenarios, the police have enlisted other agents to conduct the questioning, including inmate informants (*Herrera*, *supra*, 2019 WL 3071747 at p. *2; *Arzate*, *supra*, 2019 WL 948963 at p. *3; *Schinkel*, *supra*, 2002 WL 1970197, p. *4), family members of the defendant (*Orozco*, *supra*, 32 Cal.App.5th at p. 809), coconspirators (*Jackson*, *supra*, 2005 WL 1515390 at p. *6; *Lolohea*, *supra*, 2002 WL 443398 at p. *6), and victims (*Plyler*, *supra*, 18 Cal.App.4th at p. 544; *Guilmette*, *supra*, 1 Cal.App.4th at p. 1538–1539).

Twenty-four hours after Arturo Herrera refused to speak with interrogators, the police recruited another inmate by promising him leniency and placed the inmate in Herrera's cell. At the police's direction, the inmate questioned Herrera for one and a half hours, during which Herrera gave self-incriminating statements. (*Herrera*, *supra*, 2019 WL 3071747.) The following exchange is representative of the conversation:

"INFORMANT: Did you get rid of, what did you use?

"HERRERA: (Silent)

"INFORMANT: Arturo?

"INFORMANT: I mean you're already here for that dog so there is no point in not knowing what you used, you know.

"HERRERA: (Silent)

"INFORMANT: Did you use a gun?

"HERRERA: (Silent)

"INFORMANT: Arturo?

"HERRERA: Yeah

"INFORMANT: Did you use a gun?

"HERRERA: (Silent)

"INFORMANT: Or did you use a knife?

"HERRERA: (Silent)

"INFORMANT: You ain't got to worry dog, we are on the same situation.

"HERRERA: (Silent)

"INFORMANT: My case, I used a gun, you know what I am saying. I am not much of a knife person, I am more like, I get a thrill out of shooting you know.

"HERRERA: Yeah.

"INFORMANT: So I don't know how you did yours that's why I am trying to understand, how did you do yours? Obviously we['re] busted, we['re] both here for something similar. Did you beat him up?

"HERRERA: (Silent)

"INFORMANT: Arturo?

"HERRERA: Yeah.

"INFORMANT: What did you use dog, I am trying to help you, you know.

"HERRERA: I understand but . . .

"INFORMANT: I mean you say you understand but I am trying to help you understand you know, because on my case, like I told you, I shot the dude but they didn't find my weapon, see what I am saying.

"HERRERA: (Silent)."

This manner of police-directed questioning — one day after Herrera invoked his right to silence and right to counsel — goes on for 49 transcript pages.

In Eduardo Orozco's case, officers finally stopped interrogating him about the death of his child after he requested a lawyer six times. (*Orozco*, *supra*, 32 Cal.App.5th at p. 807.) The police then allowed Orozco and his girlfriend to meet alone in an interrogation room at the police station. Before she entered, the officers directed her to " 'get the full explanation out of [Orozco].' " (*Id.* at p. 808.) The subsequent conversation was recorded. After several minutes in which Orozco would not admit to killing his child, an officer entered the room and threatened to charge both Orozco and his girlfriend with murder. At that point, Orozco told his girlfriend that he did not want " 'them to take' " her, and he eventually confessed. (*Id.* at p. 809.)

In Dalton Lolohea's case, officers first extracted a confession from Lolohea's accomplice and then directed the accomplice to try and pressure Lolohea into confessing as well. (*Lolohea*, *supra*, 2002 WL 443398 at p. *6.) When Lolohea asked to speak with a lawyer during his interrogation, officers instead left him in the interrogation room with his accomplice, who said that "the police knew everything." (*Ibid.*) Only then did Lolohea confess.

After Victor Arzate invoked his right to counsel, officers sent an undercover agent posing as a " 'seasoned gang member' " into his holding cell to secure a confession. (*Arzate*, *supra*, 2019 WL 948963 at p. *3.) When Arzate did not reveal anything incriminating, officers moved him and the undercover agent to another area in the jail. After some more questioning, an officer interrupted the conversation to remind Arzate

that the DNA evidence they had against him " 'doesn't lie,' " even though nothing in the record indicated that the police had any such evidence. (*Id.* at p. *4.) Only after more questioning did Arzate ultimately make self-incriminating statements. (*Ibid.*)

II.

It may come as a surprise to many citizens that these police practices, deliberately designed to circumvent *Miranda*'s protections, have been consistently upheld by our courts. Indeed, I suspect 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.

Miranda protects the Fifth Amendment right against self-incrimination by requiring certain safeguards to be met before a criminal suspect's statements during custodial interrogation can be admitted at trial. *Miranda*'s familiar warnings inform a suspect that "he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." (*Miranda*, *supra*, 384 U.S. at p. 444.) A suspect can waive these rights if he does so voluntarily, knowingly, and intelligently. (*Ibid.*; see *Moran v. Burbine* (1986) 475 U.S. 412, 421 (*Moran*).) "If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking[,] there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him." (*Miranda*, at pp. 444–445; see *Edwards*, *supra*, 451 U.S. at p. 485 [*Miranda* created a " 'rigid rule . . . requiring that all interrogation cease' " when a suspect has requested an attorney].)

Although *Miranda* discussed the "inherently compelling pressures" of an official interrogation (*Miranda*, *supra*, 384 U.S. at p. 467), its holding was grounded in a broader recognition that "the constitutional foundation underlying the privilege [against self-

incrimination] is the respect a government — state or federal — must accord to the dignity and integrity of its citizens" (*id.* at p. 460). This dignity is violated when a police officer extracts a statement from a suspect that is not "the product of his free choice." (*Id.* at p. 458.) It is because the atmosphere of official interrogation undermines the accused's free and knowing decision to speak with the police that *Miranda*'s warnings are required. (*Id.* at p. 457.)

The high court has recognized that if the invocation of *Miranda* rights is to serve its protective purpose, it must not only stop officers from continuing an interrogation at the moment of invocation, but also restrict their ability to resume interrogation later on. Thus, if a suspect invokes his right to silence, the police must "scrupulously honor" that right and can "resume[] questioning only after the passage of a significant period of time and the provision of a fresh set of warnings." (*Michigan v. Mosley* (1975) 423 U.S. 96, 106.) Similarly, the police may not reinitiate interrogation after a suspect has requested counsel unless there has been a break in custody for at least 14 days, at which point any renewed questioning must be preceded by new *Miranda* warnings. (See *Maryland v. Shatzer* (2010) 559 U.S. 98, 110 (*Shatzer*); *Edwards*, *supra*, 451 U.S. at p. 485.) Such rules " '[p]reserv[e] the integrity of an accused's choice to communicate with police only through counsel,' [citation], by 'prevent[ing] police from badgering a defendant into waiving his previously asserted *Miranda* rights.' " (*Shatzer*, at p. 106.)

At the same time, some cases have placed limits on *Miranda*'s applicability. For our purposes, the key case is *Illinois v. Perkins* (1990) 496 U.S. 292 (*Perkins*), which held that "[c]onversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*." (*Id.* at p. 296.) The defendant in *Perkins* confessed to committing murder during a conversation with an undercover officer posing as an inmate while in custody. *Perkins* concluded that no *Miranda* warnings were necessary because such warnings are limited to protecting against the inherently coercive pressures of a

" 'police-dominated atmosphere.' " (*Perkins*, at p. 296.) When a suspect is unaware that he is speaking with the police, the high court said, that coercive atmosphere is lacking. (*Ibid.*) According to *Perkins*, "[t]here is no empirical basis for the assumption that a suspect speaking to those whom he assumes are not officers will feel compelled to speak by the fear of reprisal for remaining silent or in the hope of more lenient treatment should he confess." (*Id.* at pp. 296–297.)

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. As Justice Brennan observed in *Perkins*: "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. If respondent had invoked either right, the inquiry would focus on whether he subsequently waived the particular right. [Citations.] As the Court made clear in *Moran* v. *Burbine*, 475 U. S. 412, 421 (1986), the waiver of *Miranda* rights 'must [be] voluntary in the sense that it [must be] the product of a free and deliberate choice rather than *intimidation, coercion or deception.*' (Emphasis added.) Since respondent was in custody on an unrelated charge when he was questioned, he may be able to challenge the admission of these statements if he previously had invoked his *Miranda* rights with respect to that charge." (*Perkins*, *supra*, 496 U.S. at pp. 300–301, fn. * (conc. opn. of Brennan, J.).)

Nevertheless, our courts of appeal have extended *Perkins* to hold that surreptitious questioning of a suspect is permissible even after the suspect has invoked *Miranda* rights and remains in custody. The Court of Appeal's opinion in this case encapsulates the reasoning in the case law: "*Miranda* forbids coercion, not strategic deception . . . . Because Valencia confessed to a man he believed was not with the government, there is no reason to assume coercion. ([*Perkins*, *supra*, 496 U.S.] at pp. 297–298.) Ploys to mislead suspects or to lull them into a false sense of security are not within *Miranda*'s

concerns. (*Ibid.*)" (*Valencia, supra*, 2019 WL 3542872 at p. *2.) Simply put: "no coercion, no *Miranda*." (*Id.* at p. *3; accord, *Orozco*, *supra*, 32 Cal.App.5th at pp. 813–815; *Guilmette*, *supra*, 1 Cal.App.4th at pp. 1540–1541; *Plyler*, *supra*, 18 Cal.App.4th at pp. 544–545.) Other courts that have addressed this issue have mostly held the same. (See *State v. Anderson* (Alaska Ct.App. 2005) 117 P.3d 762, 763; *State v. Hall* (2003) 204 Ariz. 442, 452; *Halm v. State* (Fla.Dist.Ct.App. 2007) 958 So.2d 392, 395; *State v. Fitzpatrick* (Mo.Ct.App. 2006) 193 S.W.3d 280, 288; *People v. Hunt* (Ill. 2012) 969 N.E.2d 819, 827.)

Nevada appears to be the only state that has prohibited this practice. In *Boehm v. State* (Nev. 1997) 944 P.2d 269, 271, the police sought to extract a confession from Stephen Boehm after he refused to speak with interrogators by recruiting an inmate who had a reputation for being a "legal advisor" in the jail. The Nevada Supreme Court held that such questioning without *Miranda* warnings violated the Nevada Constitution because it was the "functional equivalent of express custodial interrogation." (*Ibid.*; see *Miranda*, *supra*, 384 U.S. at p. 444 ["By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."].) The court based its reasoning on the fact that the police specifically approached the inmate to set up a "sting," that Boehm knew the inmate, that the inmate questioned Boehm extensively, and that the police knew the inmate's reputation as a legal advisor would allow him to ask Boehm questions about the crime without drawing suspicion. (*Boehm*, at p. 271.)

Like the Nevada high court, 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. A suspect who has invoked *Miranda* rights has made a choice not to speak with the police. It is one thing if the suspect then chooses to make incriminating statements to someone who is not acting at

the behest of the police. (See *People v. Tate* (2010) 49 Cal.4th 635, 686.) But it is difficult to see how the use of deceptive schemes *by the police* to continue questioning the suspect can be compatible with " '[p]reserv[ing] the integrity of an accused's choice to communicate with police only through counsel.' " (*Shatzer*, *supra*, 559 U.S. at p. 106.) As noted, the *Miranda* warnings are widely understood to set the ground rules for interactions between citizens and the police. 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. Such tactics hollow out the substance of *Miranda*'s protections and flout any ordinary understanding of what it means to invoke *Miranda* rights.

It is true that *Miranda* established mandatory warnings as a means of counteracting the coercive atmosphere of custodial interrogation. But the high court made clear that the ultimate purpose of "dispel[ling] the compulsion inherent in custodial surroundings" is to ensure that any statement made by the accused to the police is "truly . . . the product of his free choice." (*Miranda*, *supra*, 384 U.S. at p. 458.) Even if surreptitious questioning of a suspect before he has invoked any *Miranda* rights does not negate the voluntariness of his choice to speak (*Perkins*, *supra*, 496 U.S. at p. 298), police-directed questioning of a suspect *in the face of* his invocation of *Miranda* rights plainly does negate the suspect's explicit choice not to speak with the police. The fact that the suspect's statements are elicited not by formal interrogation but by a police-concocted scheme of trickery or deceit does not support an inference that the suspect has waived his previously asserted *Miranda* rights. (See *Moran*, *supra*, 475 U.S. at p. 421 [valid *Miranda* waiver must be "the product of a free and deliberate choice rather than intimidation, coercion, *or* deception"], italics added.) Such deliberate disregard for the exercise of constitutional rights is hard to square with "the respect a government — state or federal — must accord to the dignity and integrity of its citizens," which *Miranda*

understood to be "the constitutional foundation underlying the privilege" against self-incrimination. (*Miranda*, at p. 460.)

The high court has said that the Fifth Amendment right against self-incrimination and the Fourth Amendment right against unreasonable searches and seizures "enjoy an 'intimate relation' in their perpetuation of 'principles of humanity and civil liberty . . . .' [Citation.] They express 'supplementing phases of the same constitutional purpose — to maintain inviolate large areas of personal privacy.' " (*Mapp v. Ohio* (1961) 367 U.S. 643, 657, fn. omitted.) It is noteworthy, then, that courts have not tolerated similar forms of deception when it comes to obtaining consent to police searches and seizures.

In *People v. Reyes* (2000) 83 Cal.App.4th 7, for example, police officers untruthfully told a suspect that they had accidentally backed into his car in a ruse to get him to come outside of his home. When the suspect came outside, officers searched him without a warrant or probable cause and found controlled substances. The Court of Appeal held that the search was unconstitutional because police "lured him outside with a trick unrelated to criminal activity, one that undermined the voluntariness of the consent." (*Id.* at p. 13.) Another example is *People v. Reeves* (1964) 61 Cal.2d 268, a case where police officers enlisted a hotel manager to falsely tell a guest there was a letter for him at the front desk. When the guest left his room to pick up the letter, the officers were waiting by the door and observed marijuana inside. We held that the subterfuge made the search and seizure invalid. (*Id.* at p. 273.)

Other courts have similarly invalidated searches or seizures when consent was induced by police deception. (See *State v. Pi Kappa Alpha Fraternity* (1986) 23 Ohio St.3d 141, 141 [police gained entry to fraternity house by posing as fraternity alumni]; *State v. Ahart* (Iowa 1982) 324 N.W.2d 317, 318 [police gained entry to house by pretending that their car broke down and requesting to make a phone call]; *Pagan-Gonzalez v. Moreno* (1st Cir. 2019) 919 F.3d 582, 597 [FBI agents gained entry to

dwelling and computer by lying that the computer was sending viruses to government computers]; *U.S. v. Hardin* (8th Cir. 2008) 539 F.3d 404, 407–408 [manager of apartment, acting as government agent, entered apartment under guise of checking for a water leak]; *U.S. v. Wei Seng Phua* (D.Nev. 2015) 100 F.Supp.3d 1040, 1047 [police disconnected internet and then posed as repairmen to gain entry to hotel room]; *U.S. v. Boyd* (W.D.Mich. 2011) 910 F.Supp.2d 995, 998 [police gained entry to apartment by posing as maintenance workers]; *U.S. v. Giraldo* (E.D.N.Y. 1990) 743 F.Supp. 152, 153 [police gained entry to dwelling by posing as utility worker checking for a gas leak].) If such practices cannot produce valid consent to a search or seizure, how can they produce a valid confession after a suspect has invoked *Miranda* rights?

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. And I would be willing to consider, in an appropriate case, whether such tactics independently violate the due process clause of the Fourteenth Amendment. (See *Perkins*, *supra*, 496 U.S. at pp. 301–303 (conc. opn. of Brennan, J.), citing *Miller v. Fenton* (1985) 474 U.S. 104, 109–110, 116; *People v. Benson* (1990) 52 Cal.3d 754, 778.)

III.

As a practical matter, because this court has declined several opportunities to address the issue, the restoration of *Miranda* rights in the face of restrictive court decisions is a task that falls to the Legislature. (Cal. Const., art. I, § 28, subd. (f)(2).) In recent years, the Legislature has acknowledged problems with the use of police-directed informants. In 2011, Governor Brown signed Senate Bill No. 687 (2011–2012 Reg. Sess.) to require prosecutors to provide corroborating evidence when a jailhouse informant alleges that his cellmate confessed to a crime. (Pen. Code, § 1111.5.) In 2017,

the Assembly passed Assembly Bill 359 (2017–2018 Reg. Sess.), which sought to further regulate the use of jailhouse informants (*id.*, § 2), but the bill was held in the Senate and did not become law. In addition, the Legislature has passed other laws to strengthen the efficacy of *Miranda*'s protections. (See Welf. & Inst. Code, § 625.6, added by Stats. 2017, ch. 681, § 2 [establishing a statutory right to consultation with an attorney before a child 15 years of age or younger may waive *Miranda* rights]; see also Gov. Code, § 3303 [prescribing detailed guidelines for discipline-related interrogation of public safety officers].)

A number of law enforcement jurisdictions throughout California have official guidelines or trainings for conducting so-called "*Perkins* operations" or "*Perkins* interrogations." (See, e.g., Alameda County District Attorney's Office, Recording Staged Communications (2016) <https://le.alcoda.org/publications/point_of_view/files/SS16_RECORDING_STAGED_COMMUNICATIONS.pdf> [as of Dec. 11, 2019]; Riverside County District Attorney's Office, Biennial Report: 2016–2017 (2017) p. 19 <rivcoda.org/opencms/resources/Brochures/Biennial_final_small.pdf> [as of Dec. 11, 2019].) The Legislature can hold hearings on the extent to which such guidelines or trainings authorize *Perkins* interrogations in the face of a suspect's invocation of *Miranda* rights. In this regard, it is notable that one of the largest prosecutors' offices in California has a policy manual that explicitly states: "A *Perkins* Operation should not be conducted after the suspect has invoked his/her *Miranda* rights." (Orange County District Attorney's Office, Informant Policy Manual (Jan. 2017) p. 28 <orangecountyda.org/civicax/filebank/blobdload.aspx?BlobID=23499> [as of Dec. 11, 2019]; see *id.* at p. 11 ["A ***PERKINS* OPERATION** is conducted before the suspect has invoked his or her *Miranda* rights and before charges have been filed against the suspect for the specific crime under investigation."].)

The Legislature could require police departments and prosecutors' offices to follow Orange County's example and prohibit surreptitious questioning after a suspect has invoked *Miranda* rights. Other reform options include: directing the Office of the Attorney General to publish model guidelines for *Perkins* operations that forbid post-invocation surreptitious questioning; prohibiting surreptitious questioning for a specified period of time after a *Miranda* invocation or until there has been a significant break in custody; requiring any post-invocation, police-initiated questioning of a suspect to be preceded by fresh *Miranda* warnings; requiring any post-invocation, police-directed questioning to be preceded by a disclosure to the suspect that the questioning is in fact police-directed; and imposing civil liability on police officers and departments for surreptitiously questioning a suspect after he has invoked *Miranda* rights.

It is a hard lesson of history that public cynicism and distrust of legal institutions take root when constitutional rights are honored in theory but violated in practice. 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. The time is ripe for the Legislature to address this issue in light of this court's reluctance to intervene.

LIU, J.