

In the
Supreme Court of the United States

DANIEL FLORES,

Petitioner,

v.

CHRISTIAN PFEIFFER, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Daniel Flores is an innocent young man indefinitely incarcerated for murder. The government purposely charged Flores with a low-level drug crime in order to place him in an adjoining cell to a highly paid and experienced confidential informant. The informant claimed to be a high-ranking member of the Mexican Mafia—a well-organized, ruthless prison gang—in order to coercively elicit a confession from Flores for a murder case in which Flores was a major suspect. By alternating Mexican Mafia threats to assassinate Flores with promises to rescind the assassination order only if Flores confessed to murder, the informant induced a false confession from Flores, which formed the entire structure of the prosecution’s case.

In allowing the Government to place a jailhouse informant in an adjacent cell to that of Flores, and by directing the informant to threaten Flores with assassination, this decision moves the California courts and the Ninth Circuit Court of Appeals into conflict with this Court’s decisions in *Arizona. v. Fulminante*, 499 U.S. 279, 282 (1991), along with related Supreme Court and Circuit Court cases. Further, a contradiction specifically arises with the California courts from their own law in *Dominguez v. Stainer*, No. CV 12-8280 AG, 2014 WL 1779546 (C.D. Cal. Apr. 30, 2014); where a confession induced by the same informant as in Flores was deemed to be involuntarily and the case remanded for retrial without the confession. The Questions Presented are:

1. Are a defendant’s Fifth and Fourteenth Amendment due process rights violated by the placement of a paid confidential informant in an adjacent cell who is

directed to threaten the defendant with assassination by the Mexican Mafia in order to elicit a confession?

2. Are a defendant's Sixth and Fourteenth Amendment right to counsel violated and circumvented where the state charges and holds a defendant in custody for a minor crime in order to position a paid, confidential informant posing as a high-ranking Mexican Mafia member, adjacent to the defendants' cell for the purpose of eliciting a confession on an uncharged major crime?

Note: The Other Supreme Court and Circuit cases in conflict with this decision include *Maine v. Moulton*, 474 U.S. 159 (1985), *United States v. Henry*, 447 U.S. 264 (1980), *Choi Chun Lam v. Kelchner*, 304 F.3d 256 (3d Cir. 2002).

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit were:

Petitioner

- Daniel Flores

Respondent

- Christian Pfeiffer, Warden

LIST OF PROCEEDINGS

United States Court of Appeals for the Ninth Circuit
No. 18-55344

Daniel Flores v. Christian Pfeiffer

Date of Final Judgement: March 17, 2020

Denial of Rehearing: April 23, 2020

United States District Court,
Central District of California

No: CV 13-03934 JLS (AFM)

Daniel Flores v. R. Barnes

Date of Final Judgement: March 6, 2018

California Supreme Court

No. S207728

People v. Flores

Petition for Review Denied: February 13, 2013

Court of Appeal of the State of California,
California Second Appellate District Division Six

No. B231789

People v. Flores

Date of Final Judgement: November 29, 2012

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PETITION FOR A WRIT OF CERTIORARI

Mr. Daniel Flores (hereinafter “Flores”), an inmate incarcerated at Kern Valley State Prison in Delano, California, by and through Orly Ahrony, Ahrony Appeals Law Group, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.



OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals, unpublished No. 18-55344 (March 17, 2020), is reprinted in the Appendix (App.) at 1a-3a. The district court’s opinion, CV 13-03934-JLS (AFM) (March 6, 2018) and magistrate report and recommendation (September 18, 2017) are reprinted at App.4a-35a. Further, the decision of the California Court of appeals opinion, B231789 is reprinted at App.38a-51a.



JURISDICTION

The judgment of the Court of Appeals was entered on March 17, 2020. A timely petition for rehearing and rehearing en banc was denied on April 23, 2020. App.36a-37a. Flores invokes this Court’s jurisdiction under 28 U.S.C. § 1254(1), having timely filed this petition for a writ of certiorari.



CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.



INTRODUCTION

Petitioner Flores is an innocent man indefinitely incarcerated for murder because a mercenary, highly experienced confidential informant posed as a high-ranking Mexican Mafia member to threaten petitioner Flores with death to obtain a false, coerced confession from him. Settled case law and our Constitution establish that such statements are inadmissible.

Here, the informant was placed in adjacent cell and accused Flores of performing a drive-by shooting, a grave violation of Mexican Mafia rules. The gang's penalty for such a violation is death. The informant also ominously told Flores the victim was a nephew of a high-ranking Mexican Mafia member. The informant promised to rescind an attack on Flores by Mexican Mafia members only if Flores convinced him that he did not commit a drive-by shooting and divulged details of the shooting. To save his life and appease the informant, Flores made a false statement to him.

This informant used the same coercive tactics on Flores' codefendant Jose Velasquez. Both confessions were improperly admitted at trial over defense objection. At trial, no physical evidence linked Flores to the crime. Further, none of the eight prosecution witnesses

identified Flores as the culprit. The prosecution heavily relied on the confessions in their opening and closing statements and Flores was convicted.

While Flores was being prosecuted, similarly situated defendant Dominguez faced murder charges in a different case. The same informant from Flores' case used identical techniques to obtain a coerced confession from Dominguez. Despite overwhelming evidence against Dominguez, the Central District of California overturned the conviction because Dominguez's confession was coerced pursuant to *Arizona v. Fulminante*. *Arizona. v. Fulminante*, 499 U.S. 279, 282 (1991). *Fulminante* held that a defendant's confession to a confidential informant that he committed an uncharged murder was coerced, where the informant, a fellow inmate, promised to protect Fulminante from other inmates who suspected him of killing his stepdaughter, but only if the defendant shared the details of the crimes with the informant. *Ibid*. To preserve uniformity among the courts, this Court should reverse Flores' conviction and remand the matter to the trial court.

After Flores made a coerced confession to avoid assassination by the Mexican Mafia, he was charged with murder and two attempted murders. The prosecution deliberately charged Flores with an unrelated low-level drug charge for the sole purpose of eliciting a confession to murder through threats made by the paid informant. This was a deliberate circumvention of Flores' right to counsel. Such a premeditated violation by the government makes a mockery of our Constitution, as the government has an obligation not to circumvent the protection afforded by the Sixth Amendment right to counsel. Thus, Flores due process

rights have been violated and this Court should grant relief in order to alleviate the injustice.



STATEMENT OF THE CASE

Flores was charged in 2008 in Ventura County Superior Court. In December of 2010 he was convicted by jury of one count of first-degree murder ((Cal. Pen. Code, §§ 187, subd. (a)/189), and two counts of attempted murder (§§ 664/187, subd. (a)), with gang and firearm allegations found true. Flores was sentenced to prison for life without the possibility of parole. Flores appealed to the California Court of Appeal, arguing that the confession should have been suppressed. In an unpublished decision filed November 29, 2012, the appellate court affirmed the judgment. App.38a-51a. On February 13, 2013, the California Supreme Court summarily denied Flores' Petition for Review.

On May 8, 2013, Flores filed a pro se 28 U.S.C. § 2254 habeas corpus petition with the Central District Court of California. The petition argued that his conviction was obtained by his involuntary confession. Flores, through the undersigned, amended his petition to also argue that his codefendant's virtually identical confession was illegally obtained and raised a *Massiah* violation. On March 6, 2018, the District Court relied on the California Court of Appeal's opinion to deny relief with prejudice. App.22a-24a.

Flores' request to the Ninth Circuit Court of Appeals for a certificate of appealability was granted on September 27, 2018. Upon submission of the briefs,

the court set oral argument for March 6, 2020, but then cancelled the order. The court denied relief on March 17, 2020. It held that Flores' confession was not coerced. The Circuit Court failed to examine the correct decision in *Dominguez v. Stainer*, which was the basis of Flores' argument. Citing *Texas v. Cobb*, it rejected the argument that Flores' right to counsel was violated. A timely petition for rehearing and rehearing en banc was denied on April 23, 2020.



STATEMENT OF THE FACTS

Flores respectfully incorporates the facts of the counts of conviction set forth in the California Court of Appeal Opinion, case number B231789.

A. Pre-Trial/ Arrest

In February of 2008, shortly after the attempted murders of Rafael and Jesus R., and the murder of Armando Sepulveda Jr., Detective Dan Hawes wiretapped Flores' phone calls. There were over 9,000 calls caught in the tap, none of which referenced the murder and attempted murders. Flores, Jose Velasquez, and Brandon Arauz were the main suspects. Law enforcement arrested Flores on March 1, 2008, for a misdemeanor drug charge unrelated to the homicide investigation.

B. Flores' Confession

Flores, who was twenty-two years old at the time of his arrest, had previously been incarcerated in the California Youth Authority, but had never been held

in county jail. Unbeknownst to Flores, officers placed an experienced informant in the cell next to Flores' and instructed the informant to initiate police monitored conversation with Flores about the homicide and attempted homicide. The two men were separated by a cell wall, but were able to converse through the toilets.

The informant claimed to be a high-level Mexican Mafia member. He told Flores that he was aware Flores had shot a few people, one of whom was related to another high-ranking Mexican Mafia member and that the Mexican Mafia believed the shooting may have been a drive-by shooting. The informant told Flores that the Mexican Mafia had prohibited drive-by shootings and retaliated against anyone who committed one. Flores understood that the retaliation was death.

The informant warned Flores that he was on the Mexican Mafia's [hit] "list" and that a group of Mexican Mafia members "were waiting for him." The informant told Flores that the Mexican Mafia had assigned him to "run court" on Flores to determine if Flores had committed a drive-by shooting. Specifically, the informant stated that he was the was the one who could "clear his name" and call off the attack if Flores divulged the details of the shooting.

Confronted with this threat, Flores denied committing a drive-by, but said that he exited the vehicle where suspect Arauz shot the victim. The informant promised to call off the attack on Flores if Flores described the shooting in detail. The informant admonished Flores not to lie and reminded Flores that he was "playing with the big boys now." In response, Flores provided additional details about the shooting and explained why he had targeted his victim.

Acknowledging that Flores was being forthcoming, the informant replied that he was going to rescind the planned attack on Flores. The informant then continued to press for details, reminding Flores of the consequences if he refused to “be straight” about the shooting. The informant then proceeded to ask pointed questions, and Flores answered each question. The informant continually reminded Flores that the informant was “run[ning] court” on Flores, that everything had been put “on the table” and that Flores would be safe as long as he told the truth about the shooting. The informant stressed that he was the keyholder, and that he would “send a kite up” absolving Flores to the other Mexican Mafia members awaiting Flores’ arrival. Flores answered each question.

Once the informant obtained the coerced confession, he thanked Flores for “being straight” with him. He then promised to send a signal to the Mexican Mafia that Flores had been truthful, and assured Flores that, because of his honesty, he would be safe.

During the conversation, Flores exhibited palpable signs of fear. He stated that he was panicked and inquired on multiple occasions, “How bad his name really was” and when the “kite” would be sent to the higher-ups. Flores worried that the guards could hear their conversation. The informant, demonstrating his ostensible experience and expertise in the system, assured Flores that the “guards can’t hear because that would be entrapment.” After Flores was convinced that he should not fear for his life, he and the informant shared stories about people they knew in common.

During trial, the recording of the conversation between Flores and the informant was played to the

jury and a transcript of the conversation was admitted into evidence.

C. Velasquez's Confession

The same illegal tactics were used by the same informant on Flores' co-defendant Velasquez. Out of fear that the Mexican Mafia were "waiting for him" and that "there was a green light" on him, Velasquez denied the drive-by and divulged details of the shooting.

D. The Evidence at Trial

The prosecution relied almost exclusively on the confessions and played them in their opening and closing statements. Besides the "confessions," there was little or no evidence to suggest Flores had any connection with the murder or attempted murders. Flores was never identified by any of the eight prosecution witnesses as the culprit. Nor did DNA or other forensic evidence link Flores to the crimes.

The prosecution demonstrated that Flores was a Colonia Chiques gang member and that the murder weapon was found at a Colonia Chiques "hangout." However, dozens of other gang members besides Flores were at the hangout on the night it was found.

The prosecution showed that Flores was a passenger in Velasquez's vehicle, which may have been used in the shooting. However, the vehicle was never positively identified as such. During another traffic stop, Flores was a passenger in the vehicle on February 18, 2008. There was a gun found in the vehicle, but it was not the murder weapon.

E. California Court of Appeal Opinion

The California Court of Appeal opined that the confession was “voluntarily made.” App.46a. It accepted the trial court’s ruling that that the confession resulted from an “acceptable law enforcement ruse,” not “coercion which caused the defendant’s will to be overborne.” *Id.* The Court also distinguished *Flores* from *Fulminante*. (*Arizona v. Fulminante, supra*, 499 U.S. 279, 288), claiming that Flores was in no immediate danger from the informant, and there was no evidence that Flores was in fear of physical harm.

The record contradicts the California Court of Appeal’s assertions that Flores was not in fear, was willing to speak about the shooting, defended his criminal conduct freely, and that his will was not overborne. In making these assertions, the court turned a blind eye to the context of the conversation between Flores and the informant. The informant credibly claimed to be a Mexican Mafia member and essentially stated that he alone would decide whether Flores lived or died. This was a terrifying threat to Flores’ life similar to the threat made in *Fulminante*. The informant also explained that he would call off the planned attack on Flores only if he came clean about the details of the shooting. Unsurprisingly, terrified Flores responded by supplying the requested details.

Further, Flores could not have placated the informant by denying any role in the shooting. Flores was not confronted with an objective fact-finder willing to give him the benefit of the doubt as to his innocence. Instead, he was confronted by whom he reasonably believed was a high-ranking member of the Mexican Mafia who told Flores that the Mexican Mafia understood Flores shot the victim in a “drive-by.” Indeed, the

informant made clear to Flores that he could cancel an imminent attack by Mexican Mafia members only if Flores convinced the informant that the homicide was not a drive-by shooting. As such, it is objectively unreasonable to believe that Flores could deny committing a drive by shooting, while simultaneously maintaining his innocence or withholding the fact that he exited the car to shoot the victim. To be sure, Flores did not shy away from admitting his role in the shooting, but he had no reason not to do so. He reasonably believed that his life was in peril because the Mexican Mafia understood that he committed, a drive-by shooting. Thus, Flores had been coerced to believe that he must admit a homicide and defend the manner in which it was committed. Explaining that he exited the car before shooting the victim was Flores' his only hope of averting assassination.

The California Court of Appeals' finding that there was no evidence of vulnerability on Flores' part is belied by the record. Previously, Flores had only been incarcerated in a juvenile facility, never in county jail. Flores' circumstances must be seen in sharp contrast with the defendant in *Fulminante*, who was an "experienced habitue of prisons." *Arizona v. Fulminante*, *supra*, 499 U.S. at pp 286 and 306. In this case, the informant successfully exploited Flores' inexperience in county jail by emphasizing that he was a veteran of the prison system and by admonishing Flores that he was "playing with the big boys now."

Flores continued to inquire when the informant would send a "kite" to clear his name and how bad his name was with the Mexican Mafia. He even stated he was "panicked." Thus, contrary to the California Court of Appeals' conclusion, Flores was vulnerable

to the informant's tactics and reasonably believed he was under a credible threat of mortal harm.

F. Central District Court of California Ruling

The Central District of California¹ erred in denying Flores' relief. App.5a. It improperly relied on the California Court of Appeal opinion. Further, the Magistrate unreasonably held that Flores' confession was not coerced by asserting that the informant's statements to Flores were ambiguous. App.28a. There was no ambiguity. It was well understood that a drive-by is a serious violation of Mexican Mafia dictates, that a "job" to assassinate Flores had been conditionally ordered, that the informant was "running court," and if Flores did not convince the informant that he did not commit a drive by, the higher ups will kill him.

There is no difference between the language the informant used in Dominguez and in this case. App. 52a, 65a. To save his own life, each of Flores and Dominguez immediately denied that he committed a drive-by and then described in detail how they exited the vehicle to shoot the victim. Thus, the Magistrate's reasoning was flawed.

G. Ninth Circuit Denial

The Ninth Circuit also erred in relying on the California Court of Appeal's finding that Flores' confession was voluntary. App.2a-3a. As thoroughly discussed above, the California Court of Appeal opinion that Flores' confession was voluntary was contrary to settled precedent in *Arizona v. Fulminante*.

¹ A different magistrate presided over the Flores matter than Dominguez in the Central District of California.



REASONS FOR GRANTING THE PETITION

- I. A CONFESSION TO MURDER HAS BEEN COERCED AND IS INADMISSIBLE UNDER THE FIFTH AND FOURTEENTH AMENDMENT WHERE A CONFIDENTIAL INFORMANT, WHO POSED AS A HIGH-RANKING MEXICAN MAFIA MEMBER, RESCINDS AN ASSASSINATION ORDER ONLY IF THE DEFENDANT CONFESSES TO THE MURDER.**

A. The Law

In determining whether a statement is voluntary, this Court requires consideration of “the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.” *Dickerson v. United States*, 530 U.S. 428, 434, (2000) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)). These circumstances include “not only the crucial element of police coercion, *Colorado v. Connelly*, 479 U.S. 157, 167 (1986),” but also “the length of the interrogation, its location, its continuity, the defendant’s maturity, education, physical condition, and mental health.” *Withrow v. Williams*, 507 U.S. 680, 693 (1992) (some internal citations omitted).

Taking an involuntary statement from a defendant violates the guarantee of substantive due process in the Fifth Amendment, applicable to the states through the Fourteenth Amendment. *See United States v. Miller*, 984 F.2d 1028, 1030 (9th Cir. 1993). A confession is involuntary if coerced “. . . by psychological pressure.” *See United States v. Crawford*, 372 F.3d 1048, 1060 (9th Cir. 2004). A credible threat of physical violence

is sufficient. *Arizona v. Fulminante, supra*, 499 U.S. 279, 287. Coercion can be applied by a confidential informant who is acting as a government agent. *See Fulminante*, 499 U.S. at 287. Threats of physical violence can be indirect. *Lam v. Kelchner*, 304 F.3d 256, 264 (3rd Cir. 2002).

1. *Dominguez v. Stainer*, No. CV 12-8280 AG, 2014 WL 1779546 (C.D. Cal. Apr. 30, 2014)

Approximately at the same time Flores was charged with his crime, a similarly situated defendant named Dominguez was charged in a different murder case. The same informant used the exact same tactics in obtaining a coerced confession in each case. Dominguez was also convicted and the judgment upheld on appeal. The Central District of California overturned Dominguez's conviction because his confession was coerced in violation of the Fifth Amendment, and thus inadmissible under *Arizona v. Fulminante*.²

In both cases, the same informant was intentionally placed in an adjacent jail cell and began speaking to each defendant through a toilet vent. After the informant made clear that he was "running court"³ as a high-ranking Mexican Mafia Politic, he accused each of committing a drive-by. The informant elicited

² The District court remanded the matter to the trial court where the prosecution declined to retry Dominguez for murder. Instead, Dominguez plead to a lesser count and agreed to serve a term of 12 years.

³ This a term of art used when a highly ranking gang member interrogates another individual in order to find out certain details to determine punishment with respect to life or death.

each illegal confession by asserting that he and the “big boys” from the “Mexican Mafia” understood that each defendant committed a drive by. A drive-by shooting is a severe violation of the Mexican Mafia rules, and their names could only be “cleared” if they admitted “that they got out of the vehicle” and explained in detail how the incident unfolded. App.52a, 64a. Flores and Dominguez knew that violating the rules of the Mexican Mafia meant death.

Not only did the conviction of each of Flores and Dominguez mirror the other, but each was similar to the other defendant in age, mental development, and educational capacity. They belonged to the same gang, had been previously held in the California Youth Authority, but never in county jail.

The only difference between the two cases is that in Dominguez an abundance of physical evidence was presented at trial, including gunshot residue and eyewitness testimony connecting the defendant to the crime. In stark contrast, there was no physical evidence connecting Flores to the crime. The prosecution essentially had nothing more than the coerced confession.

2. *Arizona. v. Fulminante*, 499 U.S. 279, 282 (1991)

The controlling case from this Court regarding confessions obtained through threats made by a confidential informant is *Arizona v. Fulminante*, *supra*, 499 U.S. 279, 282. Fulminante’s eleven-year-old step-daughter was brutally murdered in the desert. Fulminante came under suspicion, but no charges were filed against him. He left Arizona and was later convicted in New Jersey on a federal charge of possession of a firearm by a felon. While incarcerated

for that offense, he became friends with another inmate named Sarivola, a paid, confidential FBI informant. Sarivola learned that other inmates were treating Fulminante roughly because a rumor that he killed a child in Arizona. Sarivola, had been instructed to find out more about Fulminante's stepdaughter's death. Sarivola offered to protect Fulminante from the other inmates, but only if Fulminante would share the details about the crime. Fulminante confessed that he took his stepdaughter to the desert where he sexually assaulted and murdered her. After his release, Fulminante made a similar confession to Sarviola's fiancé.

Based on the confessions, Arizona prosecuted Fulminante for murder. At trial, Sarivola and Sarviola's then wife testified to the confessions. Fulminante was convicted and sentenced to death.

The Arizona Supreme Court ruled that the confession had been coerced because Fulminante faced a credible threat of severe physical violence unless he confessed, and thus both his Fifth and Fourteenth Amendment rights been violated. The government appealed.

On certiorari, this Court affirmed and found:

For the purposes of the Fourteenth Amendment's due process clause, the individual's will had been overborne in such a way as to render his first confession the product of coercion—that is, an involuntary confession—where (a) the parties agreed that the informant had acted as an agent of the government when the informant had questioned the individual, (b) the Arizona Supreme Court's finding would be accepted that there had been a

credible threat of physical violence, absent protection from the informant, unless the individual confessed, and (c) additional facts supported the finding of coercion, with respect to (i) the individual's intelligence, physical build, and problems in adapting to prison life, and (ii) the informant's position as the individual's friend . . . *Ibid.*

Although, Fulminante conceded that he never "indicate[d] that he was in fear of other inmates nor did he ever seek [the informant's] 'protection,'" he nevertheless argued that his confession was coerced. *Id.* at 306. This Court accepted the state court's conclusion that a credible threat of physical violence, absent protection from his friend, motivated the defendant to confess. Accordingly, the confession was inadmissible.

Fulminante is distinguishable from the facts of Flores' case only in that the nature of the threat here is more extreme than in *Fulminante*. Flores was presented with the following options: confess in detail about the shooting or face the wrath of Mexican Mafia members who were "waiting for [him]." While the informant in *Fulminante* only vaguely offered to protect Fulminante from others, the informant here declared that he could either halt the planned attack on Flores, or refuse to do so, thereby unleashing on Flores Mexican Mafia members who were waiting to kill him. In other words, the informant made it clear that he held Flores' life in his hands. Flores' only hope of safety was to convince the informant that Flores had not committed a drive-by shooting. Only in response to these threats did Flores admit that he had shot the victim after exiting the vehicle. Simply

put, the informant's statements to Flores constitute a direct and imminent threat of death. As such, they go far beyond the indirect threat of harm in *Fulminante*. (*Fulminante*, 499 U.S. at 306.)

3. *Meraz v. Pfeiffer*, No. CV 16-1955 KS, 2017 LEXIS 216304 (C.D. Cal. Dec. 12, 2017).

In 2007—a year prior to when Dominguez and Flores were charged—defendant Meraz was convicted in Ventura County Superior Court based largely on a confession obtained by the same confidential informant used in Dominguez' and Flores' cases. *Meraz v. Pfeiffer*, No. CV 16-1955 KS, 2017 LEXIS 216304 (C.D. Cal. Dec. 12, 2017).

As with Flores, while Meraz was a suspect in a murder investigation, he was charged with an unrelated crime and placed in a jail cell adjacent to that of the informant.⁴ The informant was instructed to discover the details of the shooting for which Meraz was under investigation. The informant introduced himself as a Mexican Mafia member. He offered to vouch for Meraz, thereby bolstering Meraz's reputation among other inmates, if he divulged details about the shooting. *Id.* at 32. Meraz admitted that he "knew what he was doing" when he killed the victim in retaliation for the shooting of one of his "homies." *Id.* at 47.

Meraz argued that his counsel was ineffective for failing to seek suppression of his confession as coerced. *Id.* at 32. The District Court found there was no coercion. It contrasted the facts in that case with

⁴ Meraz confessed to the shooting on multiple occasions including to his co-defendant.

those in *Dominguez* by stating that there was no language that the informant promised to call off an attack if Meraz revealed information regarding the shooting. *Id.* at 37-38.

Unlike Flores and Dominguez, Meraz was neither warned that a “job was happening,” nor that his “name was out there,” nor that the informant was “running court” as a Mexican Mafia politic. There was no contingency to call off an attack if Meraz confessed to the crime. On his own volition, Meraz shared details of how he committed the crime. *Id.* at 40. In contrast, Flores confessed on condition that the informant would call off a deadly attack. Flores’ confession was thus coerced. This Court must overturn Flores’ conviction.

4. *Choi Chun Lam v. Kelchner* 304 F.3d 256, 259 (3d Cir. 2002)

In *Lam*, at issue in the appeal of the denial of habeas relief was whether the Pennsylvania Superior Court was objectively unreasonable in ruling that Lam’s responses to undercover government agents were voluntary, and, thus, not in violation of Lam’s due process rights. Lam gave incriminating responses after the agents threatened her with violence. The agents had posed as Chinese gang members seeking to collect \$15,000 due in a murder-for-hire of Lam’s former husband’s wife. The district court overturned the conviction and held that Lam’s responses were involuntary because she was undeniably afraid of the agent’s threats. The court also suppressed the statements made by her alleged co-perpetrator Xie after he learned what the agents had told Lam. The court held that Xie’s statements were the poisoned fruit of Lam’s coerced statements. The 3rd Circuit Court of

Appeals affirmed the suppression of Lam's statements, but reversed the district court's decision to suppress Xie's statements as the fruits of her statements. *Choi Chun Lam v. Kelchner*, 304 F.3d 256, 259 (3d Cir. 2002).

The threat to Flores was more aggravated than the threat to Lam because the informant who coerced Flores was not merely a gang member; he was a high ranking Mexican mafia member. Flores was facing certain and imminent death for violating the Mexican mafia rules. In contrast, the threats to Lam were vague: the case would be exposed and Lam would be sorry. Lam's holding further supports the conclusion that Flores' statements should have been suppressed and his conviction reversed.

B. Flores' Conviction Must Be Overturned.

Here, the impact of Flores' confession was profound—his conviction for murder and the attempted murders. Flores confession was a detailed account of how and why he committed the charged crime. Moreover, the confession was not incriminating only when linked with other evidence; rather, if accepted as true, it was the sum and substance of the prosecution's case. And, because the confession was played for the jury during the prosecutor's opening statement and closing argument, Flores had no defense, other than to argue that the confession was unreliable because it was coerced. However, the coerced confession should have been suppressed and Flores never should have faced trial. As the error was of constitutional dimension, the state must prove beyond a reasonable doubt that the error was harmless. *Chapman v. California*, 386 U.S. 18, 36 (1967). That is certainly not possible.

Dominguez, Fulminante, Meraz, and Lam establish that coerced confessions should be suppressed as a violation of the right to due process. To maintain uniformity of decisions and to adhere to stare decisis, this Court should overturn Flores' conviction.

II. THE GOVERNMENT CIRCUMVENTS THE SIXTH AND FOURTEENTH AMENDMENT RIGHT TO COUNSEL WHERE IT CHARGES THE DEFENDANT, A MURDER SUSPECT, FOR AN UNRELATED MINOR OFFENSE TO ELICIT A MURDER CONFESSION BY PLACING A CONFIDENTIAL INFORMANT IN AN ADJACENT CELL WHO POSES AS A HIGH-RANKING MEXICAN MAFIA MEMBER AND THREATENS THE DEFENDANT WITH ASSASSINATION.

This Court has consistently held that “the Sixth Amendment right [to counsel] . . . is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.” *Texas v. Cobb*, 532 U.S. 162, 167-168 (2001), (quoting *McNeil v. Wisconsin*, 501 U.S. 171 (1991) internal quotation marks omitted.)

However, it is necessary to state a new rule for the right to counsel in the context of coerced confessions from criminal suspects who had no access to counsel. Law enforcement and prosecutors have learned to circumvent the standards set in *Massiah*⁵ and its

⁵ The relevant Sixth Amendment principle was first articulated in 1964 in *United States v. Massiah*; The defendant was accused of possession of narcotics, and released on bail. Unbeknownst to him, government agents had struck a deal with his co-defendant

progeny, depriving defendants of their right to counsel. Coercing a defendant's confession is a grave violation of foundational principles of decency, fairness and justice, and thus is a violation of substantive due process. “[Substantive] due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are “so rooted in the traditions and conscience of our people as to be ranked as fundamental, or are implicit in the concept of ordered liberty.” *Rochin v. California*, 342 U.S. 165, 169 (1952) (internal citations and quotation marks omitted) As such, this Court would not be expanding the right to counsel by reversing Flores’ conviction, but only confirming its intended application.

This Court has reasoned that since the ability to obtain uncoerced confessions is an unmitigated good, society would be harmed if uncoerced confessions are suppressed. “Admissions of guilt resulting from valid *Miranda* waivers” “are more than merely desirable; they are essential to society’s compelling interest in finding, convicting, and punishing those who violate the law.” *McNeil*, 501 U.S. at 181, quoting *Moran v. Burbine*, 475 U.S. 412, 426 (1986), (internal quotation marks omitted.)

However, when the defendant is coerced into confessing to an uncharged crime, the credibility of all

to allow them to install a radio transmitter in his car and listen in on their conversation. This court held that the defendant’s “Sixth Amendment rights were violated by the use in evidence against him of incriminating statements which Government agents had deliberately elicited from him after he had been indicted and in absence of his retained counsel.” *United States v. Massiah*, 377 U.S. 201 (1964).

confessions and the integrity of the criminal justice system is threatened and weakened. For example: The defendant is a main suspect in a murder investigation. The investigating officers charge a defendant with a low-level crime, with the sole intent of eliciting a confession for an uncharged offense. They place an experienced confidential informant posing as a high-ranking Mexican Mafia member in an adjoining cell. The informant warns the defendant that he has the power to call off his assassination only if the defendant confesses to a murder. The defendant does not know he can assert his right to counsel because he believes that he is speaking to a Mexican mafia member and not a government agent or officer. The defendant cannot ask anyone for help or guidance. The psychological pressure on this defendant is immense. The government has deliberately circumvented the defendant's right to counsel by purposely choosing not to file charges in order to obtain a coerced confession. This was not intended by our Constitution and is outside the bounds of substantive due process.

While this Court has slightly touched upon this scenario in *Moulton*, a more concrete rule is necessary to avoid future injustice. *Maine v. Moulton*, 474 U.S. 159 (1985). Where the police coerce confessions for uncharged offenses through credible threats of death, such that defendants cannot exercise or invoke their right to counsel? The Constitution compels that such confessions be suppressed.

Relevant case law is discussed below:

1. ***Texas v. Cobb*, 532 U.S. 162 (2001)**

While Raymond Cobb was under arrest for an unrelated offense, he confessed to officers that he

committed a home burglary. However, he denied knowing about a woman and child who had disappeared from the burgled home. Cobb was indicted for burglary, and counsel appointed to represent him. He later confessed to his father that he had killed the woman and child during the burglary, and his father then contacted the police. While in custody, Cobb waived his Miranda rights and confessed to the murders. He was convicted of capital murder and sentenced to death. On appeal to the Texas Court of Criminal Appeals, he argued that his confession should have been suppressed because it was obtained in violation of his Sixth Amendment right to counsel. Specifically, he argued his right to counsel attached when counsel was appointed in the burglary case. The court reversed and remanded, holding that once the right to counsel attaches to the offense charged, it also attaches to any other offense that is very closely related factually to the offense charged. This Court reversed that holding and held that the Sixth Amendment right to counsel is offense specific and therefore did not bar police from interrogating Cobb regarding the murders, making his confession admissible. *Texas v. Cobb*, 532 U.S. 162, 167-168 (2001).

a) Ninth Circuit Denial in this Case

In denying Flores relief in this case, The Court of Appeals' cited *Texas v. Cobb*. The court held that Flores' Sixth Amendment right to counsel on the murder and attempted murder charges did not attach, as the informant questioned Flores regarding uncharged conduct which was unrelated to the drug charge for which he was charged and detained. App.3a.

Unlike Cobb, Flores did not waive his *Miranda* rights and voluntarily confess. Flores was not questioned pursuant to well-understood rules and procedures, he was threatened! Flores choices were: to confess or die.

Further, Flores reasonably believed he was being threatened by a high-ranking Mexican Mafia member, not a government agent. Before Cobb confessed, officers informed him of his rights to counsel and to stay silent. The striking differences between this case and *Cobb* establishes that Flores' conviction must be reversed to maintain the integrity of our Constitution.

Flores had no reason or desire to voluntarily confess to the crime. He was concerned that the officers might hear their conversation. App.62a. The informant assured Flores that the officers could not hear their conversation and even stated that it would be "entrapment" if they did so, thereby displaying his knowledge and experience as a Mexican Mafia politic. *Ibid.*

There is clearly a yawning gap between *Cobb* and the other cases in the *Massiah* line that must be closed. That gap can be closed where this Court finds that the offense specific rule of Cobb can be applied if the defendant's confession to an uncharged crime was voluntarily made within the rules of the *Miranda* line of cases.

The government should not intentionally evade a defendant's right to counsel and due process by charging him with a minor crime, holding him in jail, and then inserting an informant to threaten his life to elicit a confession on a more serious crime for which he is the main suspect. Flores would have never

provided a falsified confessed to the crime if he believed that he was speaking to a government agent. He confessed to the crime for which he had not been charged only because his alternative was assassination by the Mexican Mafia. The greater good theory cannot apply where the government obtains a conviction through coercing a defendant to confess. This offends all ethical notions of public policy and violates the rights to due process and counsel. This Court should correct the Ninth Circuit's error and remand the case to the trial court.

2. *United States v. Henry*, 447 U.S. 264 (1980)

In 1980, this Court applied *Massiah* to jailhouse informants. *United States v. Henry* held that the government's use of an informant who knowingly elicits incriminating information from a jail inmate after the inmate had been indicted violates the Sixth Amendment.

Henry was arrested, indicted and held in custody for bank robbery. Counsel was appointed for him on that charge. A paid informant was placed in custody with Henry, but expressly instructed not to initiate any conversations with him. The informant and Henry engaged in conversations during which Henry divulged facts about the robbery. The informant testified about these conversations at Henry's trial, and Henry was convicted.

This Court reversed, finding that the Government had "deliberately elicited" incriminating statements from Henry within the meaning of *Massiah*. *Id.* at 270. The decision emphasized several facts: the informant was acting for the Government and therefore had an incentive to produce useful information; Henry

was unaware of the informant's role as an informant; and, Henry and the informant were incarcerated together at the time of the conversations. With respect to this last fact, the Court reasoned that “confinement may bring into play subtle influences that will make [an individual] particularly susceptible to the ploys of undercover Government agents . . .” These influences include an informant’s “apparent status as a person sharing a common plight.” *Id.* at 274.

In *Henry*, this Court declared this new standard: that the government is responsible for acts that it “must have known” will lead to rights violations. Consequently, the Court held, “[By] intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry’s Sixth Amendment right to counsel.” *Ibid.*

It is critical in analyzing *Henry* to recognize that the police and prosecutor cleverly sought to avoid the rules of *Massiah* by telling the informant not to directly question Henry about the robbery. Applying *Cobb* far too broadly has allowed police and prosecutors to make a mockery of the protections and strictures described in *Massiah*. Police and prosecutors will continue to use crafty charging practices that may be technically be within the bounds of *Massiah*, but that deprive defendants of a meaningful right to counsel and justice.

The Government selected the informant in this case knowing he would obtain a coerced confession from Flores. The informant was not only effective in this case and *Dominguez*, but in many other cases. This informant is highly experienced, has earned over two hundred and fifty thousand dollars, and has

avoided twenty-one years of imprisonment for his services. The informant's placement in a cell adjacent to Flores' deliberately created a situation where Flores would make incriminating statements about the uncharged act.

Flores, like Henry, could not have known or suspected that he was speaking with a government agent, not another inmate. The stratagem used against Flores was much more sophisticated than that used against Henry. Flores reasonably believed he was negotiating with a high-ranking Mexican Mafia member who credibly threatened Flores with death if he did not confess. Further, Flores' was young and had previously only been held in juvenile facilities, never a county jail. This made him especially susceptible to the manipulative wiles of a paid police informant *Id.* at 274.

Flores was a confirmed suspect in a murder investigation. Why should the police and prosecution be allowed to circumvent Flores' right to counsel and substantive due process on that crime by charging him with an unrelated drug crime and confining him to a cell with an experienced informant who threatened Flores with assassination, with the sole intention of coercing incriminating statements from him about the murder? These actions violate rights which were intended by the constitution.

3. *Maine v. Moulton*, 474 U.S. 159 (1985)

In *Moulton*, two defendants were indicted for a series of thefts. Moulton's codefendant had secretly agreed to become an informant. The informant recorded conversations with Moulton in which the two discussed their criminal exploits and possible alibis. Moulton

made various incriminating statements regarding both the thefts for which he had been charged and additional crimes. In a superseding indictment, Moulton was charged with the original crimes and the additional crimes Moulton discussed with the informant. At trial, the State introduced portions of the conversations, and Moulton was convicted of three of the originally charged thefts and one count of burglary. Moulton appealed to the Supreme Judicial Court of Maine, arguing that introduction of the recorded conversation violated his Sixth Amendment right to counsel.

This Court quoted the decision of the Maine high court:

Those statements may be admissible in the investigation or prosecution of charges for which, at the time the recordings were made, adversary proceedings had not yet commenced. But as to the charges for which Moulton's right to counsel had already attached, his incriminating statements should have been ruled inadmissible at trial, given the circumstances in which they were acquired. *Moulton*, 474 U.S. at 168 (quoting *State v. Moulton*, 481 A.2d 155, 161 (1984)).

This Court affirmed the Maine Supreme Judicial Court's exclusion of Moulton's statements. This Court specifically held that the police intentionally circumvented *Moulton*'s Sixth Amendment right to counsel by using Moulton's co-defendant as an informant, as they knew that Moulton would make incriminating statements to him. In seeking evidence pertaining to pending charges, the Government's investigative powers are constrained by the accused's Sixth Amendment rights. "The "express purpose" of their meeting

was to discuss the pending charges” *Id.* at 177. Further, by concealing the fact that the informant was an agent of the State, the police denied Moulton the opportunity to avail himself of the assistance of counsel guaranteed by the Sixth Amendment. *Id.* Thus, the government has an affirmative obligation not to circumvent the protection afforded by the right to counsel. *Id.* at 171.

Moulton noted that the primary concern of the *Massiah* line of decisions is abuse of undisclosed interrogation by a police surrogate who uses techniques that are the equivalent of direct police interrogation. Since the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached, a defendant does not establish a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant did not merely listen to the defendant, but intentionally and actively elicited incriminating remarks. *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986).

There is no significant difference between the Sixth Amendment violation in this case and *Moulton*, other than that the defendant in *Moulton* had “pending charges.” However, this difference is technical or apparent, not substantive. For all intents and purposes, Flores was in custody only because he was a murder suspect. Charges were merely formality. Allowing the police and prosecutors to easily circumvent the Sixth Amendment by postponing the filing of charges that will almost certainly be filed eviscerates the right.

The police and prosecutors know that a defendant only has the right to counsel after the state has cleverly violated that right by manipulating the time of incarcerating and charging a defendant for a crime.

Moulton, like Flores, confessed to crimes for which he had not been formally charged. Moulton felt comfortable, was not threatened, and divulged details of the charged and uncharged crimes he committed with his co-defendant. In stark contrast, Flores was credibly threatened with death if he did not confess to the informant. Flores was not speaking with a confidant, or even a co-defendant. Flores was speaking with a stranger in an adjacent cell whom he reasonably believed was a high-ranking Mexican Mafia member. This apparent Mexican Mafia member threatened Flores' life if he refused to confess to the murders. The Mexican Mafia were "waiting for" Flores. Adding markedly Flores' fear, the informant told him that the shooting victim was the nephew of a high-ranking Mexican mafia member who was housed in the Pelican Bay supermax prison. App.61a. Flores was frightened enough to say that he hoped that the victim's uncle would not "use his power" and position to kill him. *Ibid.*

Although Moulton spoke to his friend and was not coerced, this Court found that Moulton's right to counsel had vested for the pending/uncharged crimes because the government used unethical tactics to obtain incriminating statements about crimes for which charges were obviously pending. The government thereby stripped Moulton of his rights. An equivalent analysis must be applied to Flores.

The severity of the government's manipulation of Flores clearly violated his Sixth Amendment right

to counsel and his Fourteenth Amendment substantive due process.] The plan of the police and prosecutors was fully calculated, as each word the informant used was hand-picked. The officers placed the informant in an adjacent cell for the express purpose of obtaining a confession from Flores to the pending charges of the murder, not the drug case for which Flores had been charged and jailed. Flores' Sixth Amendment rights were violated because the State obtained incriminating statements by circumventing the Flores' right to have counsel present in a confrontation between him and the informant, a state agent.

4. *Kuhlmann v. Wilson*, 477 U.S. 436 (1986)

In *Kuhlmann*, this Court held that the government does not offend the Sixth Amendment by using a passive informant who asks no questions of the accused, settling the "listening post" question that *Henry* had left open. *Kuhlmann* was arraigned and confined in a jail cell with another prisoner who, unknown to him, had agreed to act as a police informant. *Kuhlmann* made incriminating statements which the informant reported. *Kuhlmann* held that an informant's behavior must constitute active elicitation of incriminating statements to violate the Sixth Amendment right to counsel (*Henry*, 447 U.S. at 271; *Massiah*, 377 U.S. at 204.)

How can we logically and legally differentiate between the conflicting rules from *Moulton* and *Kuhlmann*? In one case the government violates the Sixth Amendment by using an informant to elicit a confession after the right to counsel has attached, while in another the government intentionally focuses suspicion on a defendant for major crime, but charges

and jails the defendant only for a minor crime, and then places an informant with the defendant to elicit a confession on the major crime in circumvention of the right to counsel?

As noted above, *Moulton* and *Kuhlman* establish that a Sixth Amendment violation requires the defendant to demonstrate that the police and their informant did not merely listen to the defendant, but actively elicit incriminating remarks. *See, Kuhlman*, 477 U.S. at 459. (citations omitted).

Here, the informant certainly actively obtained incriminating statements from Flores. He did so by credibly threatening that the Mexican Mafia—the deadliest organized gang in California—would assassinate Flores if he did not confess to murder. Dominguez's conviction was properly overturned because his confession was coerced and inadmissible, and Flores' conviction should be reversed as well.

5. Flores' Sixth Amendment Right to Counsel and His Fourteenth Amendment Due Process Rights Were Violated.

This case reveals the need for this Court to fully review and reconcile the *Massiah* line of cases in the context of confessions coerced from criminal defendants by mercenary confidential informants. This critical need arises because police and prosecutors have learned to circumvent the right to counsel and the right to substantive due process by appearing to technically stay within the bounds of this Court's decisions, while blatantly violating the spirit of justice and the specific constitutional provisions. Application of the following simple test will conform the technical provisions of the law with the principles that must guide the law.

If the answer to each of the following questions is yes, then the right to counsel attaches immediately to the uncharged act.

1. Is the informant a government agent?
2. Was the defendant conscious that the informant was a government agent?
3. If there are pending/uncharged offenses, was the sole purpose of the interrogation to use unethical methods to deliberately elicit a confession for the uncharged act in order to circumvent the sixth amendment right to counsel?
4. Was the informant actively participating in eliciting a confession by using coercion and/or threatening the defendant's life?
5. Was the defendant confined in a cell while speaking to the (jailed) informant thereby making them more susceptible to the ploys?

The answer to all of these questions in *Flores* is, "Yes." Flores was coerced into providing a confession to save own life. In a case where the police and prosecution have determined that an in-custody defendant is the suspect in a crime, but intentionally do not charge the defendant, use of an active informant is a deliberate violation of substantive due process and the defendant's right to counsel. This type of police interrogation fully violates principles at the core of our Constitution and liberty generally. Where police can circumvent a defendant's rights as they did in this case, Sixth Amendment and Fourteenth Amendment rights are illusory.

Regard for the requirements of the Due Process Clause “inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.” *Malinski v. New York*, *supra*, at 416-417. These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are “so rooted in the traditions and conscience of our people as to be ranked as fundamental,” *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), or are “implicit in the concept of ordered liberty.” *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). *Rochin v. California*, *supra*, 342 U.S. 165, 169.

Police and prosecutors cannot be given power to determine when a defendant’s right to counsel is violated. This Court must overturn Flores’ conviction in order to uphold our Constitution.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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