

No. 20-350

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

**PETITIONER'S REPLY BRIEF TO
RESPONDENT'S OPPOSITION**

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INTRODUCTION

Respondent claims the informant did not threaten Flores with assassination. Prosecution gang expert Sergeant Williams explained that a “prison politic” has authority from the Mexican Mafia to “run court” to determine whether Flores violated a major Mexican Mafia rule by committing a drive-by shooting, punishable by “death.” RT 584-585; 612; 614.¹ Flores’ confession *was* the product of law enforcement coercion.

Flores was told that Mexican Mafia authorities suspected him of committing a drive-by shooting. They were “waiting for him;” not to converse, but to kill him, unless he convinced the informant that he did not commit a drive-by shooting. App.53a Essentially, Flores’ name would only be “cleared” in exchange for his coerced confession. App.55a; 57a.

Respondent argues that Flores’ confession was not coerced because the informant never “uttered explicit threats.” Opp.7.² The law doesn’t require explicit threats. Similar to *Dominguez*, the informant played on Flores’ vulnerabilities: he was young, inexperienced with jail and of low intelligence. Flores was distraught – on suicide

1. Reporter’s transcripts will hereinafter be referenced as “RT” lodged by Respondent with the Central District of California, Docket 91.

2. Respondent’s Opposition will hereinafter be referenced as “Opp.”

watch. 3 PER 108.³ Coercion of Flores was more egregious than the coercion of the defendants in *Fulminante* or *Lam*.

Respondent discusses federal habeas standards, which are inapplicable to a petition for a writ of certiorari. Respondent alleges procedural bars. Fundamental constitutional violations are never waived, since such a claim includes that a conflict exists between this Court's decisions and those of lower courts on constitutional principles. This case presents an important federal question of law incorrectly decided by the lower courts.

Respondent claims Flores requested that this Court create new standards for coerced confessions. Opp.15. To the contrary, *Massiah and its progeny* are consistent with Flores' arguments that the right to counsel is violated when the *government actively* elicits incriminating statements.

The government intentionally delayed charging Flores with murder, jailing him for a minor drug crime to coerce a murder confession in circumvention of the Sixth Amendment. Flores is asking this Court to find that obtaining confessions in this manner denies the Sixth Amendment right to counsel and substantive due process.

3. Flores' Excerpts of Record filed with the Ninth Circuit Court of appeals will hereinafter be referenced as "PER."

ARGUMENT

I. FLORES' CONFESSION IS INADMISSIBLE BECAUSE IT WAS COERCED IN VIOLATION OF HIS FIFTH AMENDMENT RIGHTS, IN DIRECT CONFLICT WITH ESTABLISHED LAW.

A. Flores Was Threatened with Death.

Respondent's claim that Flores chatted with the informant and decided to casually confess is delusional. The government selected Gilbert Bracknell as the informant to coerce Flores because he was remarkably skillful in coercing other defendants. *Dominguez v. Stainer*, No. CV 12-8280 AG, 2014 WL 1779546 (C.D. Cal. Apr. 30, 2014)

This informant avoided twenty-one years in prison for his "cooperation," received \$2,500 for obtaining Flores' confession and has obtained a total of \$250,000 from the FBI and DEA. RT 7, 869.

On October 16, 2008 the informant begins to play-out his well-practiced script. 2 PER 55. The scheme unfolds as follows:

Twenty-two-year-old Flores is placed in a cell adjacent to the informant who poses as a high-ranking Mexican Mafia "politic." He informs Flores the "higher ups" from the Mexican Mafia were "waiting for him" to arrive in jail. App.53a.

Flores, as did *Dominguez*, had limited experience in custody since both had been incarcerated primarily in a youth facility.

The informant notifies Flores:

- His “name is out there” because the Mexican Mafia believes he committed a prohibited drive-by shooting and that the “job” is “pretty serious.” App.52a-53a; 59a.
- The informant needs to “run court” to determine if he violated the rules.

The informant asks Flores if he knows “the rules.” App.53a. Flores affirms. The informant again asks, “if [he] knows the rules of EME” (referring to the Mexican Mafia). *Ibid.* The informant asks Flores for the *third time* if he “knows where he [the informant] is coming from” *Ibid.*

Exacerbating Flores’ fear, the informant tells him that the victim’s uncle is a high-powered Mexican Mafia member. 2 PER 91. Flores pleadingly tells the informant that he hopes that the victim’s uncle would “not use his power” to kill him. App.60a.

Initially, Flores makes no incriminating statement. The informant tells Flores, “All I need to know is you got out of the car.” App.55a. He tells Flores that he needs to “throw a jail letter” that “you’re down here.” The prosecution expert explained that the informant will send correspondence to inform the Mexican Mafia higher authority whether Flores had followed or violated their rules. RT 584. The expert explains that the violation is

punishable by death. RT 614. According to defense expert Vasquez, he would have been “scared to death” if he was in Flores’ position. RT 48.

Flores fearfully exclaims, “You got to [confirm there was no drive-by] man.” 2 PER 60. The informant asks again, “you got off?”... “out of your car?”, and Flores states, “All the way homie.” Subsequently, Flores pleads, “Can I send a letter?” *Ibid.* The informant reminds Flores that he was “*playing with the big boys now.*” 2 PER 77.

The informant assures Flores that he will send the letter to “*clear*” his name. App.58a. Flores’ fear is evident because he frequently asks whether his “*name is dirty,*” the “*status on his name*”, if the informant sent the letter, and *when* they would receive a response. App.59a;61a.

Later, Flores asks *what* the informant wrote in the letter. Flores’ inexperience with the jail system is shown where the informant explains that he wrote the letter in code, not words. Flores acknowledges that he is unfamiliar with this practice. App.63a. Flores admits he’s panicked. 2 PER 208.

Respondent takes the transcript out of context to fit a false narrative. Specifically, respondent claims that the informant did not threaten Flores because he was merely reassuring Flores that his name was “not dirty” and that he just wanted to talk. Opp. 8.

Flores reasonably understood that the informant had authority to “run court” and render a verdict on Flores’ fate. Flores was clearly coerced to make detailed incriminating statements to “clear” his name about

the shooting incident. Contrary to the court of appeal's conclusion and respondent's argument, Flores fell prey to the informant's skillful tactics.

B. Flores' Situation Was More Egregious Than *Fulminante*, *Lam*, *Dominguez*, And *Meraz*.

1. *Arizona v. Fulminante*

In *Fulminante*, the informant "vaguely" offered to protect Fulminante from other inmates. In contrast, Flores had to confess to the Mexican Mafia politic or be assassinated. Fulminante confessed to the informant about the details of killing his own stepdaughter, but also to the informant's wife upon his release from prison, when protection from inmates was not necessary. This Court still held that both confessions were inadmissible, as taken in violation of his Fifth Amendment rights. *Arizona. v. Fulminante*, 499 U.S. 279, 282 (1991).

Fulminante had spent a substantial part of his life in prison, while Flores had spent no time in an adult jail. *Id.* at 306. Moreover, Flores was increasingly vulnerable to coercion as he was confined in a jail cell alone while on suicide watch. 3 PER 108.

Although respondent contends that Flores strove to not show weakness to the informant, he was conspicuously concerned about his safety, unlike Fulminante. *Id.* at 304.⁴ This Court found that Fulminante's confession was

4. Respondent contends that Flores was "bolstering" himself. Opp.10 Young and inexperienced Flores wanted to appear tough and unafraid. Knowing that his safety was fragile, Flores wanted to curry favor with the informant. RT 588.

coerced by threat, despite that he stipulated that he was not fearful and did not request protection from other inmates. *Ibid.* Flores kept inquiring about the letter because he was afraid of assassination.

2. *Lam v. Kelchner*

Respondent attempts to distinguish *Lam* from this case. However, the facts in this case were *much more* egregious than in *Lam*. In *Lam*, the defendant was convicted of hiring a Fuk Ching gang member to kill Lam's ex-husband's wife. *Lam v. Kelchner*, 304 F.3d 256, 260 (3d Cir. 2002) Undercover officers posed as members of the gang and vaguely told Lam they "would not be so polite" if the money was not paid. It is unclear in *Lam* that the defendant knew anything about the Fuk Ching gang, while Flores certainly knew the violent reputation of the Mexican Mafia. Flores understood that he faced assassination if he violated a Mexican Mafia rule. If Lam was coerced, there is no doubt Flores was as well.

3. *Dominguez v. Stainer*

The same informant employed against Flores used identical tactics to coerce *Dominguez*. Recognizing that Dominguez' confession was coerced, The Central District Court overturned Dominguez's conviction.

Dominguez and Flores were equally vulnerable. They were similar in age, gang affiliation, and lack of jail experience. If Respondent concedes that Dominguez was vulnerable, it must concede that Flores was equally vulnerable. Opp.12.

Dominguez was overturned despite gunshot residue evidence and eyewitness testimony. Respondent claims that forensic analysis of DNA on a firearm found at a party that Flores attended identified him as one of the three possible contributors. For this assertion, respondent cites pages 1666-1667 of Volume 7 of the Reporter's Transcript. Opp.13. *This cite is nonexistent* and therefore Flores requests that respondent's claim be stricken from the record. The only circumstantial evidence in Flores' trial was that a gun was found at a party that Flores attended along with more than forty guests. RT 797-801; 803,804. Not one of eight prosecution witnesses identified Flores as the perpetrator. RT 539-782.

Respondent wrongfully contends that wiretaps establish that Flores was retaliating against El Rio members. Of 9,000 intercepted calls none establish that Flores was connected to any of the murders or any other retaliatory plans. RT 407-413.

4. *Meraz v. Pfeiffer*

The District Court correctly denied relief to *Meraz* because the informant did not tell Meraz that he was "running court," inform him the Mexican Mafia was "waiting for him," or say that "his name was out there." *Meraz v. Pfeiffer*, 2017 WL 7101154 (C.D. Cal. Dec. 12, 2017) Meraz truly *volunteered* details about the shooting in that case.

C. Respondent Misapplies The Law.

Respondent speciously argues that because the informant never "uttered explicit threats" to Flores, the

threats were not credible. Opp.7. Respondent asserts that the state appellate court concluded Flores' confession was not given in exchange for protection from "physical harm." Opp.10. Respondent and the state appellate court misapplied the law. A credible threat need not be explicit. *Lam v. Kelchner*, 304 F.3d 256, 264 (3rd Cir. 2002). Further, psychological threats can render a confession involuntary. See *United States v. Crawford*, 372 F.3d 1048, 1060 (9th Cir. 2004). "Running Court" is a threat.

Respondent's assertion that Flores was "street smart" confirms that he would have known of the ruthless nature of the Mexican Mafia, precisely what made the coercion so effective. Opp.8.

D. The Coercive Statements Were Not Harmless.

Respondent argues that if the government coerced Flores' confession, the violation was harmless. Opp.12. The prejudice of the coerced confession is apparent in the prosecutor's reliance on the confession in its opening statement and closing argument to the jury. The confession formed the foundation and structure of the prosecution's case. This Court has explained, "[a] confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.'" *Arizona v. Fulminante*, 499 U.S. 279, 296. A jury is unlikely to put a confession "out of mind even if told to do so." *Ibid.*

Here, the impact of Flores' confession - a detailed account of the offense - was profound. Flores had no feasible way to persuade the jury that the confession was not credible, except to argue that it was coerced - the very reason it should have been suppressed.

Finally, other evidence of Flores' guilt was weak. Respondent cannot prove beyond a reasonable doubt that without the confession Flores would have been convicted. *Chapman v. California* (1967) 386 U.S. 18, 36. Thus, this Court should grant Flores' petition and reverse his conviction.

II. FLORES IS NOT REQUESTING THIS COURT TO ADOPT A NEW STANDARD OF LAW; BUT RATHER TO SETTLE THE LAW CONCERNING CASES WHERE THE GOVERNMENT EMPLOYED UNETHICAL TACTICS TO OBTAIN CONFESSIONS IN CIRCUMVENTION OF THE RIGHT TO COUNSEL.

Had Flores been formally charged with murder, it is virtually inconceivable that he would have confessed to murder. The government's circumvention of Flores' right to counsel allowed the police to employ a highly-experienced informant to make credible death threats. To do so, the government purposefully charged Flores with a minor drug crime, *evading* his right to counsel for the murder charge.

If respondent were correct that the government had overwhelming evidence without Flores' confession, why did it not file murder charges without using an unethical scheme? The prosecution understood that without Flores' confession, a conviction would not be plausible.

The scheme in this case was:

- The prosecution is determined to prosecute young, inexperienced Flores for murder.

- The evidence is insufficient.
- Flores is arrested for a minor pretext drug crime.
- The prosecution holds Flores in custody for the minor charge.
- In an adjoining cell, the prosecution places a professional informant posing as a Mexican Mafia official to coerce a murder confession from Flores.
- Flores has no access to counsel and is alone on suicide watch.
- To save his own life, Flores confesses.
- Once Flores is charged with murder, he formally has the privilege against self-incrimination and the right to counsel.
- Flores' constitutional rights and privileges are useless given the prosecution has coerced the murder confession.

A. *Massiah* and Its Progeny Support That an Informants' "Active Elicitation" of Incriminating Statements Constitutes a Sixth Amendment Violation.

Respondent falsely asserts that Flores is requesting this Court to create a new standard for coerced confessions. Opp.15. To the contrary, *Massiah*, *Henry*, *Moulton*, and *Kuhlmann* are consistent with Flores' arguments. Prosecutors have learned to circumvent the

standards set in *Massiah*. *United States v. Massiah*, 377 U.S. 201 (1964).

The defendant's in *Massiah*, *Henry*, and *Kuhlmann* were interrogated by an informant after the right to counsel had attached. The primary focus of these cases was the manner whereby the confessions were extracted. This Court held that a Sixth Amendment violation occurs when the government *actively* elicits incriminating statements. *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986).

This Court noted that the government is responsible for acts it "*must have known*" will lead to constitutional violations. *United States v. Henry*, 447 U.S. 264, 274 (1980). Specifically, "confinement may bring into play subtle influences that will make [an individual] particularly susceptible to the ploys of undercover Government agents..." *Id.* at 271.

The abuse of undisclosed interrogation by a police surrogate who uses techniques that are equivalent of direct police interrogation are constitutional violations since they don't occur "*by luck or happenstance*." *Kuhlmann Id.* at 459. *Moulton* held that the "government has an affirmative obligation not to circumvent the protection afforded by counsel." *Maine v. Moulton*, 474 U.S. 159, 171 (1985).

While Flores was ostensibly in custody for a minor drug charge, he was held solely to extract his confession to murder, a crime for which the government clearly intended to charge him.

In *Moulton*, the defendant confessed to his codefendant who acted as a government agent and Moulton made

incriminating statements about charged and “pending” crimes. This Court affirmed the Maine Supreme Court’s finding that the statements were inadmissible. This court held because the “express purpose” of the meeting was to discuss the “*pending charges*,” and that the government concealed the fact that the informant was a state agent, the police denied Moulton the opportunity to avail himself of the right to counsel. *Ibid.*

Here, murder charges were a formality. The police had fully investigated the case and sought a confession to make conviction virtually certain. Allowing police and prosecutors to postpone the filing of charges until a confession is extracted eviscerates the right to counsel.

B. Cobbs’ “Offense Specific” Rule Is Inapplicable Here.

The circumstance in this case are vastly different than in *Cobb*. In *Cobb*, the defendant was indicted for burglary and granted counsel. A woman and her infant were missing from the burgled house. Cobb denied involvement with their disappearance. Upon release on bond, he confessed to his father that he murdered the woman and child. Cobb’s father provided a statement to the police, an arrest warrant was issued, and police took Cobb into custody. Cobb then waived *Miranda* rights and voluntarily confessed to the murders. *Texas v. Cobb*, *supra*, 532 U.S. 162, 164-168.

Unlike Flores, Cobb was not coerced in any way and the decision cannot be applied here. Although Cobb moved to suppress the confession, this Court held that the Sixth Amendment is offense specific and Cobb’s voluntary confession was admissible.

In stark contrast, Flores, reasonably believed the Mexican Mafia “*were waiting for him*” for a suspected drive-by shooting, and he would be assassinated for such a violation. App.53a.

Unlike Cobb, Flores had no desire to confess or make incriminating statements to the police. Flores was concerned that the officers might hear their conversation but was assured by the informant that it would be considered “entrapment.” App.62a.

Flores is not asking this Court to create a new rule or expand precedent. He is asking this court to rein in police and prosecutors who violate the constitutional protections which prohibit active elicitation of incriminating statements. *Massiah*, 377 U.S. at 204.

Respondent ignores these decisions and instead claims that the petition is procedurally barred, distracting from serious constitutional violations. Opp.14.

In sum, the balancing factors that Flores proposed will limit future injustices such as those that occurred in this case. (*see* cert p. 34). If this Court upholds the government’s tactics, a defendant’s Sixth Amendment rights can be asserted only where they have no value.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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