No. 21-7964

IN THE

SUPREME COURT OF THE UNITED STATES

Central District

Esteban Saucedo — PETITIONER
(Your Name)

vs.

Jim Robertson — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Court of Appeal's, 2nd Dist appellate, State of California
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Esteban Saucedo C.P.C # BM 4865
(Your Name)

P.B.S.P-A-4 / P.O. Box 7500
(Address)

Crescent City, Ca 95532
(City, State, Zip Code)

N/A
(Phone Number)

--) **QUESTION(S) PRESENTED**

Was Appellant's Confession Admissible since it was based in illegal police tactics?

:.) Would a different verdict have been reached, had the illegally Solicited evidence not been considered?

) Is the time ripe for our High Court to address the constant Violation, including Petitioners, of our fundamental rights pursuant to our miranda rights and Constitution which are too often Violated under the disguised tactics of the famous "Perkin's operations" and which our Supreme Court Justices Liu and Cuellar insist that it be addressed?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Esteban Saucedo, Petitioner
Pelican Bay State Prison / A-41
P.O. Box 7500
Crescent City, CA 95532

Solicitor General of the United States, Room 5614
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

RELATED CASES

- See Table of Authorities "A" PG - A1, A2

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TABLE OF AUTHORITIES A.

CASES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix N/A to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix N/A to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix B to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Court of Appeal, 2nd App Dist, Div 2 court appears at Appendix A to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was N/A.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. N/A A N/A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts**:

The date on which the highest state court decided my case was Oct 13, 2021. A copy of that decision appears at Appendix B.

[ ] A timely petition for rehearing was thereafter denied on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

[X] An extension of time to file the petition for a writ of certiorari was granted to and including (Rule 14.5) (date) on 01/10/22 03/14/22 (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- See Table of Authorities "B" B1

TABLE OF AUTHORITIES B.

CONSTITUTION

STATUTES

RULES

OTHER

STATEMENT OF THE CASE

By an amended information, filed March 7, 2019, appellant was charged with the following offenses and special allegations; Count 1- murder of Oliver White, in violation of section 187; Count 2- attempted murder of Ronald Jackson, in violation of section 664/187. It was further alleged that the attempted murder was willful, deliberate and premeditated, within the meaning of section 664. subdivision(a)

As to both offenses, the following special allegations were alleged/

(1) criminal street gang enhancement, pursuant to section 186.22, subdivision(b)(1)(C);

(2) personal and intentional discharge of a firearm, causing great bodily injury and death, within the meaning of section 12022.53. subdivision (d);

(3) personal and intentional discharge of a firearm,within the meaning of section 12022.53. subdivision (c);

(4) personal use of a firearm, within the meaning of section 12022.53. subdivision(b);

(5) a principal personally and intentionally discharged a firearm, causing great bodily injury and death, within the meaning of sections 12022.53. subdivisions (b) and (e)(1).

Jury trial began September 9,2019. (2CT 175.) The prosecution filed 402 motions regarding admission of certain evidence. (2RT 1.) The court held a heering on these motions in chambers (2CT 175), and its rulings were announced on the record as follows; (1) the tape of the 911 call was admitted; (2) the Perkins tape f appellant and undercover informant Ortiz was admitted; (3) the defense would be permitted to examine prosecution itness Anna Ortiz regarding prior acts of moral turpitude and benefits and leniency from testifying. (2RT 2-5) fter the jury was sworn , juror number % brought up that because of his occupation he would not "go against" olice officers. (2RT22.) The court ultimately granted this motion and excuse juror No. 5 before the case was submitted o the jury for deliberation. (3RT 713-714.)

Appelant's 1118.1 motion brought at the close of the prosecution's case was denied. (3RT 678.)

Jury instructions were reviewed off the record in chambers.

There were no objections or request for modification or additions by defense counsel. (3RT 679.)

Before closing arguments the court granted the prosecution's motion to dismiss the special allegation pursuant to the section 12022.53. subdivision (e). (3RT 715: 2CT 264.) After the case has been submitted to the jury, the court granted the prosecution's motion to dismiss the 12022.53, subdivisions (d) gun allegations as to count 2. (3RT 953-954; 2CT 312.)

Jury deliberations began the morning of September 12, 2019. (2CT 312.) At noon that day, the jury asked to be given the jailhouse recordings and the transcripts to follow along with. They also asked for transcipts for witness Ammy Wu, the prosecution's gun analyst. (@CT 305) After lunch, the jurors were provided with the tape transcripts. Thereafter, they heard readback for witness Wu's tectimony. (2CT 313.) The jury reached verdicts at 3;00 p.m. later that day (September 12, 2019). Appellant was found guilty of both counts, and the remaining special allegation were found true. (2RT 306-307, 314-315.)

Sentence was pronounce February 10, 2020. For count one, appellant was sentence to 25-years-to-life with a consecutive sentence of 25-years-to-life for the section 12022.53, subdiviision (d) enhancement.

The court struck the section 186.22 gang enhancement, The court denied appellant's motion (3RT 1012) to stay the section 12022.53 enhancement. (#RT 1203.) For count two, appellant was sentence to a consecutive indeterminate life term, with a minimum term of seven years. As to count two only, the court struck the enhancements pursuant to sections 186.22 and 12022.53, subdivision(d) (3RT 1204.)

The court imposed a $300.00 restitution fund fine, pursuant to section 1202.4, subdivisions (b) and a stay $300.00 parole revocation fine pursuant t o section 12022.45 It also imposed a section 1465.8 cort security fee of $80.00, and a criminal conviction assessment (Gov. Code § 70373) of $60.00. (2CT 343.)

Because appellant is eligible for a Youth Offender Parole Hearing pursuant to section 3051, defense counsel usbmitted a "Franklin Hearing Packet" to be forwarded to the Department of Corrections. (2CR 343.)

Appellant's timely notice of appeal was filed February 10, 2020. (2CT 344.)

A. Evidence Regarding The Shooting

1. Testimony About the Offense.

On February 1, 2016 Oliver White and his friend Ronald Jackson were standing in the driveway of the White residence having a conversation when someone began shooting, Mr. White was struck and died from a gun shot wound to his head which traveled front to back. (2RT 324-325, 328, 330; 3RT 674, 676).) Although

Mr. White was not a gang member (2RT 311-312), other members of the household were East Coast 76 Crips members. (2RT 317.) The home had been shot at before, including the previous evening were there was a drive by shooting perpetrated by three Latinos. (2RT 317,)

Mr. Jackson saw Mr. White get shot, and then jump under his truck, While under the truck he saw some shoes and somebody walking, headed towards Parmelee Street. He thought the person with the shoes was about 100-200 feet away, on the Southeast corner of 78th and Parmelee. (2RT 331-332.) The shooter never came close to them, and never came onto Mr. White's property. In other words, the shooter never "ran up on them and did the shooitng." (2RT 339.) After the shooting, the person with the shoes began walking north on Parmelee.(2RT 332.) Jackson did not see anyone get on a bicycle and leave the area, in fact he did not see anyone on a bicycle during his ten minute conversation with Mr. White. (2RT 340,)

It was just getting dark when the shooting occured. (The 911 call was placed at 5;54 p.m. (2CT 178.)) (2RT 340.) Mr. Jackson believed there was a streetlight on the corner, and maybe one down the middle of the block. (2RT 340.) No gang slogans were called out. (2RT 341.) No other person died as a result of the shooting that day. (2 RT 436.) No one was crippled . (2RT 440.)

Mr. White's daughter, Deshika White, was present at the time of the shooting, and call 911 to report it. The tape of this call was played to the jury and admitted in evidence. (2RT 313; People's Exhibit 2A, transcripts of 911 call tape, at 2CT 177-182.)

Mr. Jacksoin also spoke with the 911 operator. In his discription of the incident Mr. Jackson alternately used the singular and plural to describe the assailant(s). (See e.g., 2CT 180["they walked up and shot him;" "some little young guys, Some little young guys"].) Then Jackson said there was one young guy who look like he had on a mask or something. (2CT 181.)

On the 911 call, when asked whether the shooters were Hispanics or black, Mr. Jackson responded that the shooters were black. (2CT 180.) At trial, however,he testified that he was not sure of the raec race of the shooter, that he just saw something darck.)2RT 334-335.) Explaining what he meant by seeing something dark, or possibly a mask. Mr. Jackson explained that he could not see features because it was nighttime. (2RT 336)

Dale Wagner was walking her dogs that evening, She was on the Southeast corner of 78th and Parmelee. (2RT 345-346.) She saw one or two guys go in unison from standing to kneeling and shoot. Ms. Wagner fell to the ground. She look in the direction of the shots and saw a man on the ground, (2RT 347.) As did Mr. Johnson. Ms. Wagner seemed unclear about whether there was one ot two shooters. For example, Ms. Wagner spoke with officers shortly after the shooting..At that time she said there were two shooters. (2RT 440-441.) But dudring testimony she said she had told them it also could have been one. (2RT 353-354.) Sergeant Quintero testified that Ms. Wagner was not quite sure it had been two people. (2RT 444.) At the preliminary hearing , Ms. Wagner testified there wer two people, but she was not completely sure (2RT 350.)

She thought it looked like the shooter was five feet five inches tall, she believed male,and completely covered. (2RT 348-349.) She could not see facial features because the shooter was wearing a mask or bandana, and was in all black. (2RT 349.) Ms. Wagner describe the facial coverings as either bandanas or hooded sweatshirts covering their faces. (2RT 354.)

Ms. Wagner was about 50 feet away. (2RT 355.) After the shootings the assailant(s) ran Northback down Parmelee. Ms. Wagner got up and ran to the corner, but did not see anyone. (2RT 350-351.) She never saw anyone get on a bicycle. (2RT 355.)

After the shooting Ms. Wagner saw three or four men dispersing from near where the van was.(2RT 393.)

2. The Investigation.

Sergeant Quintero was the case investigator, and testified to certain findings at the crime scene. (2RT 393.) Fifteen 9 millimeter bullet casings were found on the southeast corner of 78th and Parmelee. (2RT 397-398.) The presence of casings indicated that the weapon used was a semi-automatic pistol. (2RT 399.) The location of the casing indicated that the shooter fired from that corner.(2RT 401.)

Some bullets and fragments were also located in the area of the homicide. There were fewer bullets recovered than casings. One of the fragments was consistent with a .22 caliber bullet versus a 9 millimeter. (2RT 405.)

Criminalist Anny Wu examined the fifteen shell casings collected at the crime scene. She determined that they were all fired from the same gun, most likely a Glock 9 millimeter pistol. (3RT 613-618.) One bullet fragment located near the home was consistent with a bullet used in .22 long, short and long rifle cartridges. (3RT 619.) This would have been a separate gun from the 9 millimeter. (3RT 620.) A .22 caliber is a smaller caliber than a 9 millimeter. (3RT 620.) The murder weapon in this case was never recovered. (2RT 423.)

The distance between 75th and Parmelee and 78th and Parmelee is about a mile as the crow flies. (2RT 430-431.) This was not a quiet neighborhood. (2RT 431.)

On February 1,2016, sunset occurred at 5:24P.M..(2RT 434.)

3. Paid Informant Ana Ortiz

Ana Ortiz(The undercover jail informant who later elicited appellant's statement was also named Ortiz. Appellant refers to Ana Ortiz by her first name at times to avoid confusion.) was a paid police informant. According to Ortiz, around the time of the shooting she had a boyfriend named Estevan Parra. During the time she was hanging out with Parra she was also associating with members of the Florencia 13 gang, to which Mr.Parra belonged.(2RT 360.) Ana also claimed to know appellant, who she identified as a friend of Parra's (2RT 361-362.) Ana said that appellant's "moniker" was "ck." (2RT 366.)

Ana testified that in the late afternoon-early evening on the day of the shooting she was hanging around outside a home on 75th Street with Parra, appellant, and someone named Molly. (2RT 363-364, 367-368.) Ana claimed to see Parra give appellant a gun. Ana was not sure what kind; she just described it as a handgun. (2RT 368.) She "did not recall" (During the 31 pages of her testimony,particularly in response to questions by defense counsel,Ortiz answered that she "did not recall" at least 32 times.(2RT 360-391).) any conversation between Parra and appellant whenParra gave him the gun.

According to Ana, After Parra gave appellant the gun, she saw appellant and Parra ride their bikes towards Parmelee to West Nato. She"did not recall what happened next,"Only that Parra came back first, and a couple of minutes later she heard 3-4 shots. (2RT 365, 369-370.)

Appellant returned after the shots. He was on a bike. (2RT 371.) Ortiz "did not recall which direction he came from. She Described appellant as "sweaty" and "nervous." According to Ortiz.appellant gave Parra something, and then left. Ortiz " did not recall" if she saw what appellant gave PArra. Appellant then laft in a car with Parra's brother Moy. (2RT 370-371.)

Ana Ortiz first said she did not recall what appellant was wearing (2RT 371.) but when prosecutor asked if he was wearing a sweatshirt, she answered "yes". (2RT 371.)

Ana first gave her information to sergeant Quintero about a month or more after the shooting. She claimed to have done this because she was "scared" about "whatever was going around." (2RT 372-373.) Ana had been arrested on another new case and was in custody when she spoke with Quintero. (2RT 373.)

Ana Ortiz had a number of prior arrests and convictions for various offenses. (2RT 373.) She had given testimony under a grant of immunity in a prior murder case in exchange for lenient treatment. (2RT 373, 377-378.) Ana had received thousans of dollars in payment from the Sheriff's office several times in the past, including for her testimony in the prior homicide case. (2RT 378-379.) She had also obtained relocation assistance from the California State Victim's Compensation Board, because she had been receiving "messages" from gang members. (2RT 374.)

Ana had been working with Office Guillen since possibly 2016. (2RT 379-380.) She reached out to him while she was incarcerated on her newest case, to give him information about the shooting on February 1, 2016. (2RT 380.) During the time Ana was working with Office Guillen, she continued to commit crimes. (2RT 381-382.)

Ana had been convicted in May of 2015, for petty theft; in June of 2015, for felony receipt of stolen property; in July of 2015, for felony identity theft; in April of 2016, for receipt of stolen property. (2RT 383-384.) She also had numerous additional arrests: March 2016, for joy riding; June 2016, for felony identity theft; May 2017, for burglary, conspiracy, identity theft and receipt of stolen property. She "did not recall" an arrest in April 2016, for joyriding and receipt of stolen property. (2RT 384-385.) Some of these arrests were while she was working with Officer Guillen. (2RT 385.) Ana said she was not a member of Florencia 13, but had committed crimes to earn money for the gang. (2RT 386.) Ana stated she was not being paid for her testimony in the instant case. (2RT 389.)

Ana was currently on summary probation. (2RT 390.) She had been placed on five years probation. (2RT 390.) She had been placed on five years probation in 2015, but her probation was subsequently dismissed. (2RT 391.)

4. Appellant's Recorded Perkins Statement To Undercover Jail Informant.

The investigation went several months without a prime suspect, until Quintero was contacted by Officer Guillen, who said he might have a witness with some information. The witness was Ana Ortiz, who told him that "ck" was the shooter. (2RT 406,409.)

Based on this information, Quintero arranged for an in-custody operation to obtain incriminating information from appellant. This "operation" was conducted on November 15, 2016. (2RT 427.) Quintero arranged a

set-up where appellant was placed in the company of an undercover informant posing as an older adult gang member. This informant, Ortiz, was in his early 30s. He had a number of tattoos, including on his neck and arms. (2RT 435.)

In these operations, the undercover informant asks "prodding" questions about the crime under investigation. In the present case, this was done, The undercover agent, Ortiz, "stimulated and guided" his conversation with appellant towards the murder which was the subject of the trial. Ortiz and appellant were in the jail together for between three and four hours. (2RT 410.)

The police also did some "stimulation." (2RT 410-411.) In this case, the police went up to appellant's cell, asked for him by name, and told him they were there to speak to him about a murder that happened on 78th and Parmelee were a black man was shot in the head. This was done within earshot of the undercover informant in hopes it would stimulate conversation about the crime. (2RT 411.)

Ortiz was equipped with a recording device. (2RT 414,) An edited, translated,(The defense stipulated to the Spanish-English translation in the tape.(2RT 414; 2CT 250).)version of this tape was admitted as People's Exhibit 7. The tape was divided into three parts: Cell recordings 1,2, and 3 (2 RT 413-414.) Exhibits 7A,7B, and 7C are the written transcripts included in the record. (2CT 183-248.)

For the first half of the tape, appellant did not acknowledge any involvement in the shooting. Consequently, the police engaged in further "coercion" where they took appellant out of the cell, and then put him on a hallway bench next to Ortiz. (2RT 411.)

During his"stimulation" Sergeant Quintero told appellant that police had obtained his fingerprints from the evidence. This was a "ruse" and a tactic to tey to get appellant to talk. (2RT 420.) In fact they did not obtain any usable prints from the bullet casings. (2RT 419.) During the recording, Quintero's partner, Sergeant Ruiz, obtained a DNA swab from appellant. Again, this was a "prodding" technique to get appellant to talk about the crime. (2RT 422.) IN fact, the shell casings were sent for DNA analysis, but nothing was extracted. (2RT 422.)

Sergeant Quintero told appellant the race of the shooting victim, but denied telling him where Mr. White had been shot,(2RT 442.) He did not tell appellant that the shooter had been wearing a mask. (2RT 443.)

After appellant was moved onto the bench,his statements regarding the offense changed, and he made comments coward the case. (2CT 412-413.) IN the tape, appellant identifies himself as "ck from Florence." (2CT 194.) Later, appellant said he had been "from Florence" since he was 14. (2CT 248.)

Appellant told Ortiz that someone else got rid of the gun. (2CT 225.) He described the gun as "compact." (2CT 226.) It was a plastic gun. (Ibid.) It was not a big caliber. (2CT 227.)

Appellant said he was wearing a mask, and that he was walking. (2CT 230.) THere were alot of other black people there. (2CT 233.) Appellant said he thought the shooting took place in the afternoon. (2CT 234.) Appellant later burned his clothes and shoes and the mask. (2 CT 234.) He did not think there were any witnesses. (2CT 236.)

Appellant said there was no timer for the other people to shoot back. (2CT 238.) Appellant said that he ran up to them. He cut through cars and they did not see him coming. (2CT 239.)

Appellant told Ortiz that he was surprised the police were not trying to get him for another homicide because three of them died that day. (2CT 240.) Right there in that spot. (2CT 241.) They were from 76 East Coast. One was hefty. (2CT 241.)

A Appellant responded that this was not his first time; "I got other times." but this time was the first time he "dropped noodles" on the floor. Appellant said the shooting was face to face. (2CT 242-243.)The distance described by appellant was determined to be 12-to 15 feet. (2RT 426.) Appellant told Ortiz the victims were just having a good time. They did not see appellant because he was walking, and just jumped out. (2CT 242.) One victim was sitting on the floor, and one was supposedly crippled. (2CT 243.)

Appelant said it was him and another person who went. The other person was sixteen. (2CT 243-244.) No one else was arrested for the offense. (2RT 440.)

Appellant's birthdate is September 7, 1996, and he was nineteen years old at the time of the shooting (2RT 427.)

B. GANG EVIDENCE.

Detective Micah Lopez testified as the prosecution's gang expert. (3RT 625.) According to Lopez, the gang Florencia 13 had been around since the 1950s, and had over 2,000 members. Lopez described Florencia 13's common "signs and symbols." (3RT 626-627.) The primary activities of Florencia 13 included vandalism, robberies, weapons possession, drug sales, assaults with deadly weapons and murders. (3RT 627.)

Lopez testified about Adrian Riley, with whom he'd had prior "cases." (3RT 628.) Riley had tattoos, including one which said "Florencia 13" on his back. A person who was not a member of Florencia 13 would not be permitted to have such a tattoo. (3RT 629.) In Lopez opinion, Riley was a Florencia 13 gang member, (3RT 630.) People's Exhibit 9, a docket sheet print-out, was admitted to prove Riley's prior conviction. (3RT 630-631; 2CT 252-257.) According to this exhibit, on August 29,2014, Riley had plead no contest to a violation of Vehicle Code section 10851, subdivision (a). (2CT 255.) The docket sheet alleged that the offense occurred on or about April 10, 2014, (2CT 252.)

Lopez also testified about Gonzalo Lozano, with whom he'd had prior contacts and arrests, (3RT 631.) Among other tattoos, Lozano had one on his upper body that said "Florencia." In Lopez' opinion, Lozano was also a Florencia 13 gang member. (3RT 632.) People's Exhibit 11, another docket sheet print-out, was admitted to prove a prior conviction for Gonzalo Lozano, (3RT 632; 2CT 258-260.) On November 13, 2013, Lozano plead no contest to a violation of Penal Code section 29800, subdivision(a)(1). (2CT 259-260.) The docket sheet alleged that the offense occurred on September 14, 2013. (2CT 259.)

According to Detective Lopez, the East Coast 76 Crips were a rival gang to Florencia 13. (3RT 633,) According to Lopez, gangs commit crimes for several reasons, including to increase the gang's reputation and still fear. (3RT 633.) Crimes may be committed against rival gang's to establish dominance over a particuar area or increase the gang's reputation. (3RT 635.) There was a dispute over territory between East Coast Crips and Florencia 13. (3RT 638.)

Detective Lopez had never met appellant, and had never investigated any cases involving him. (3RT 644-645.) Based on a hypothetical given to Lopez by the prosecution. Lopez gave his opinion that appellant was a member of Florencia 13. (3RT 648.) According to Lopez, the acronym "ck" stood for "crip killer"(3RT 649.) For appellant the name "CK" stood for Calvin Klien because appellant would like to wear that clothing since young.Though without objection, Lopez testified that this suggested to him that the person with this moniker had killed a crip. (3RT 649.) There would be repercussions if a person claimed membership inAA gang if they were not a member. (3RT 650.) According to Lopez, gang members are expected to "put in work" for the gang, which included committing crimes to benefit the gang. (2RT 629-630.)

Given a hypothetical with the facts of this case, Lopez testified that in his opinion the crime would be for the benefit of and in association with the Florencia 13 gang ,and would have been done with the specificintent to further promote criminal activity and gang violence. (3RT 651-652.) According to Lopez, it was immaterial that no gang slogans were called out during the shooting. (3RT 653.) Although he agreed that generally gangs want to advertise their crimes. (3RT 664.)

REASONS FOR GRANTING THE PETITION

GROUND ONE

1

SAUCEDO'S FIFTH AMENDMENT RIGHTS WERE VIOLATED WHEN HE WAS QUESTIONED BY AN UNDERCOVER AGENT IF LAW ENFORCEMENT AFTER HE HAD INVOKED HIS MIRANDA RIGHTS IN ANOTHER CASE.

A. WHILE IN CUSTODY FOR ANOTHER CASE, APPELLANT IS MIRANDIZED AND ASSERTS HIS RIGHTS, APPELLANT IS STILL IN CUSTODY WHEN POLICE CONDUCT THE PERKINS OPERATION IN AN ATTEMPT TO ELICIT INCRIMINATING STATEMENTS CONCERNING THE MURDER. APPELLANT IS NOT RE-MIRANDIZED AND DOES NOT WAIVE HIS RIGHTS BEFORE MAKING INCRIMINATING STATEMENTS TO THE UNDERCOVER INFORMANT.

1. Appellant Is Advised Of, And Asserts, His Miranda Rights In A Different Case.

The subject of appellant's prior Miranda invocation came up in the context of a 402 hearing on the defense motion to exclude any admission of gang involvement by appellant after he was arrested for another offense. (3RT 607.) Appellant was arrested on October 8, 2016, for violation of Vehicle section 10851. At the time he was advised of his Miranda rights. (3RT 605.) Appellant asserted his rights, and refused to speak with the police. (3RT 606.) Despite his invocation, the arresting officer continued to question appelant with regard to his gang membership, ostensibly as "booking questions." (3RT 607.) Appellant answered those questions. (3RT 608-609.) The trial court concluded it was PRETTY CLEAR appellant had asserted his Miranda rights (3RT 610) and therefore granted the defense motion to exclude appellan's subsequent statement about gang membership as evidence at trial in the instant case (3RT 612.)

2. Although appellant was still in Custody When He Made The INcriminating Statements To The PERKINS Operative, He Was Not Re-Mirandized.

Appellant was still in jail on the 10851 offense when, on November 15, 2016, police decided to conduct the Perkins operation in an attempt to elicit a confession to the homicide. (2RT 427, 3RT 602, 2CT 204.) The "official isolation of a criminal suspect in a police station" is "the clearest example of custody" for Miranda purposes. (People v. Lopez (1985) 163 Cal.App.3d 602, 605, citing Miranda, supra, 384 U.S. at p. 445.) Appellant was unquestionably still in custody for Fifth Amendment Purposes when incriminating statements were elicited from him by the government.

3. Appellant's Recored Perkins Statement To Undercover Jail Informant Ortiz.

After Sergeant Quintero learned that Ana Ortiz told Officer Guillen that "ck" was the "shooter." Quintero decided to pursue an in-custody operation in an attempt to obtain incriminating statements from appellant. This " Perkins operation" was conducted on November 15th, 2016. (2RT 427.) Quintero arranged a set-up where appellant was placed in the company of an undercover informant, posing as an older adult gang member. This informant, Ortiz, was in his early 30's. He had a number of tattoos, including on his neck and arms. (2RT 435.) There was no real information in the trial record with regard to Ortiz, Such as whether he was in custody himself, or was being paid for his service's, ETC... Appellant asked for information but was not given none till after trail.

In these Perkins operations, the undercover informant asks " prodding" questions about the crime under investigation. In the present case, this was done. Ortiz and appellant were in the jail together for between three and four hours. (2RT 410.) During this time Ortiz, "stimulated and guided" his conversation with appellant towards the murder which was the subject of the trial.

Although Ortiz told appellant it was illegal for the police to record his conversations without telling him (2CT 203), in fact Ortiz was equipped with a recording device, (2RT 414.) An edited, translated(the defense stipulated to the Spanish-English translation in the tape. (2RT 414; 2CT 250.),) version of this tape was admitted as People's Exhibit 7, The tape was divided into three parts; Cell recordings 1,2 and 3, (2RT 413-414.) Exhibits 7A, 7B and 7C are the written transcripts included in the record (2CT 183-248,)

During the three to four hours of their time together, Ortiz continually questioned appellant about his involvement in the shooting. (2CT 183-248.) The recording was edited such that the only parts admitted in evidence supported the prosecution's theory of appellant's guilt. (See 2CT 410-411.) The police also did their own "stimulation" in an effort to obtain incriminating statements from appellant. (2RT 410-411.) In this case, the police first went up to appellant's cell, asked for him by name.

Police told him they were there to speak to him about a murder that happened on 78th and Parmelee. This was done within earshot of the undercover informant Ortiz in hopes it wouls stimulate conversation about the crime. (2RT 411.)

For the first half or more of the tape, while appellant and Ortiz were in a cell together, appellant did notacknowledgerany involvement in the shooting. Consequently, the police engaged in even further "stimulation" in which they took appellant out of the cell. (2RT411.) During the second "stimulation" and violation of Miranda Sergeant Quintero told appellant that police had obtained his finger prints from the evidence after appellant had just told them no more then one hour ago that he wanted to speak to his lawyer. This "tactic" as they called is was simply a "ruse" designed to get appellant to talk. (2RT 420.) In fact, police did not obtain any usable fingerprints from the bullet casing. (2RT 419.)

After the second "stimulation" appellant was moved onto a bench in a hallway outside a cell, again appellant was placed next to Ortiz. The location change was because Quintero thought appellant might have been concerned about being recorded when he was inside the cell (2RT 411-412.) Ortiz resumed prodding appellant with questions about the offense, but appellant was still not providing much in the way of incriminating responses because appellant had asked for his lawyer and was waiting for him to arrive. For example, in response to a question from Ortiz: " Have you ever done shit up in personal?" appellant responded "I Don't Wanna Say, you know?" (2CT202.) At this point Ortiz told appellant that the law prevented the police from recording him unless they told him he was being recorded.(2CT 203.)

Appellant expressed concern about the supposed fingerprint evidence the policetold him they had. Ortiz told appellant the police likely had other evidence as well. He then began asking appellant about the weapon used, and whether he had gotten rid of it. (2CT 188.) "And you touch something, you could leave DNA behind, that's how they get you now. The DNA is what's fucking everybody up, man. Nowadays, have (INAUDIBLE) DNA and shit." (2CT 189.)

Not long after this, in a third act of "stimulation," Quintero's partner. Sergeant Ruiz, obtained a DNA swab from appellant. This was done while Ortiz and appellant were sitting on the bench outside the cell. When appellant asked if he was being charged with murder, Ruiz replied: "Roght now like I said this is just a confirmaiton. We need to confirm with the results that came back. So this is gonna basically tell the DA this is the dude." (2CT 221.) Again, this was a "prodding" technique to get appelllant ot talk about the crime. (2RT 422.) In fact, the shell casings had been sent for DNA analysis, but nothing was extracted. (2RT 422.)

After the DNA collection Ortiz told appellant;

> [They] already know that you're [sic] prints are on the spot. Somebody fuckin' died... This fool just took your DNA. They're hitting you with that shit. Your, you're booked for it...He's gonna add charge you. That's what they're doing. That's why they came for the fuckin DNA. Without that they can't clo-they can't hit you with it. After that it's a wrap. You're gonna get hit with that shit.

(2CT 223.)

It was at this point that appellant began responding to Ortiz' question abou the shooting.

Oritz asked appellant how he was going to explain his fingerprints on the gun, and then led into questioning appellant about whether he was sure he got rid of the gun. (2CT 225-227.) Ortiz then asked about cameras near the site of the shooting, and whether appellant could be ID'd. he asked about how appellant got ot the scene of the shooting. (2CT 230-231.) Ortiz continued to ask appellant spefific questions about possible witnesses,what time of day the shooting occurred, whether he burned the mask, (2CT 233-234.) He asked whether the other people shot back. (2CT 238.) Ortiz asked where the victims were from. (2CT 241.)
In response to Ortiz' questioning, appellant made the incriminating statements introduced in evidence against him in trial. (2CT 225-245.)

Appelant was 20 years old at the time of the Perkin's operation. (2CT 203,321.) There was no information about whether he had graduated High School. (2CT 330.) He wass still loiving with his mother . (2CT 331.) Appellant admitted to smoking marijuana since the 6th grade. Appellant had been diagnosed with Attention Deficit Hyperactivity Disorder and Insomnia, for which he had been prescribed Methylin and Diphenhydramine. (2CT 33.)

B. LAW ENFORCEMENT VIOLATED APPELLANT' RIGHTS BY ENGAGING IN THE PERKIN'S OPERATION AND USING UNDERCOVER INFORMANT ORTIZ TO ELICIT INCRIMINATING STATEMENTS AFTER APPELLANT HAD ASSERTED HIS MIRANDA RIGHTS IN ANOTHER CASE. APPELLANT'S STATEMENTS WERE INADMISSIBLE AT TRIAL.

The Fifth Amendment to the United States Constitution guarantees a right against self-incrimination, To effectuate this right an accused must also have the right to consult with an attorney and to have an attorney present during questioning if he or she desire. (Miranda V. Arizona, Supra, 384 U.S. 436, 469.) Under Miranda, a defendant's statements obtained during custodial interrogations are made inadmissible by the Fifth Amendment unless prior to any questioning, the accused is "warned 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.)

Once advised a person may waive these rights and choose to speak with law enforcement. (ibid.) If, however the suspect "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. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned." (Id. atpp.444-445.)

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 powers of the police. Statements obtained in violation of Miranda are inadmissible to establish guilt, (People V. Sims (1993) 5 Cal. 4th 405, 440.)

Appellant was given Miranda warnings on October 8, 2016, after being arrested for violation of vehicle code section 10851. Appellant asserted his right to remain silent and refused to speak with officers. (3RT 605-606.) Law enforcement must "scrupulously honor" a person's invocation. (Michigan V. Mosley (1975) 423 U.S. 96, 106.) Here, despite appellant's invocation of his Miranda rights, the police continued to ask him questions about hid gang membership. The trial court concluded appellant had validly asserted his Miranda rights (3RT 610.) and therefore granted the defense motion to exclude those statements as evidence at trial in the instant case. (3RT 612.)

Generally, once an accused has invoked his right to counsel, he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with police."" (Edwards V. Arizona supra, 451 U.S. 477, 484-485; see Minnick V. Mississippi (1990) 498 U.S. 146, 150.) In Edwards, the defendant , after initially speaking with officers, stated that he wanted an attorney. (Edwards, supra, 451 U.S. at p. 479.) The officers ceased questioning him. (Ibid.) The following morning, two detectives again approached the defendant and inform him again of his Miranda rights. (Ibid.) The defendant subsequently agreed to speak with the detectives. (Ibid.)

The United States Supreme Court held "that it is inconsistent with Miranda and its progeny for the authorities at their instance, to reinterrogate the accused in custody if he has clearly asserted his right to counsel." (Id. at p. 485.) The Edwards court elaborated that the State had "applied an erroneous standard "by focusing on the voluntariness of the waiver as opposed to determining whether the waiver "constitute[d] a knowing and intelligent relinquishment or abandonment of a known right or privilige." (Id. at p. 482.) The Edwards court "reconfirmed" the principle that "in a case where a suspect in custody has invoked his Miranda right to counsel. [he had an] 'undisputed right' under Miranda to remain silent and to be free of interrogation until he had consulte with a lawyer." (Id. at p.485, quoting Rhode Island V. Innis (1980) 446 U.S. 291, 298.) Accordingly, the court found the defendant's statement to the detectives should have been inadmissible. (Edwards, supra, 451 U.S. at p. 487.)

Similarly, in Minnick, the defendant, after initially speaking with officers, stated that he wanted an attorney.)Minnick, supra, 498 U.S. at p.148.) The interview ebded and the defendant met with an attorney two or three times. (Id. at p. 149.) Three days after the initial interview with the detective a deputy approached the defendant and advised the defendant again of his rights. (Id. at p. 149.) The defendant then made incriminating statements. (Ibid.) The United States Supreme Court explained that " a fair reading of Edwards and subsequent cases demonstrates that we have interpreted the rule to

bar police-initiated interrogation unless the accused has counsel with him at the time of questioning. Whatever the ambiguities of our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." (Id. at p. 153.)

The Fifth Amendment right to counsel in not offense-specific. Thus, once appellant invoked his Miranda right to counsel for the 10851 offense, since he remained in custody he could not be re-approached regarding any offense unless counsel was present. (Mcneil v. Wisconsin(1991) 501 U.S. 171, 177; Arizona v. Roberson (1988) 486 U.S. 675; People v. Fayed (2020) 9 Cal,5th 147, 165.)

The police sought a way around this well-established rule of constitutional law by instead employing the services of Ortiz,,an undercover agent of the police posing as a fellow inmate. An individual acts as an agent of the police when " the police and their informant [take] some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." (Kuhlmann v. Wilson (1986) 477 U.S. 436, 437.) Thus, for example, "a doctor interviewing a defendant to secure evidence on behalf of the prosecution **is an agent of law enforcement.**" (People v. Sanchez (1983) 148 Cal.App.3d 62, 69, citing People v. Walker(1972) 29 Cal.App.3d 448, 453 [doctor was an agent of the district attorney]; Estelle v. Smith (1981) 451 U.S. 454, 467
[court-appointed doctor "became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting"].) A psychiatrist retained by law enforcement also acts as an agent of the police where the" interview' constituted a continuation of the prior interrogation." (People v. Ghent (1987) 43 Cal.3d 739, 750.)

"[T] he term interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police... that the police should know are reasonably likely to elicit an incriminating response from the suspect. (Rhode Island v. Innis, supra, 446 U.S. 291, 301.) In appellant's case.law enforcement used Ortiz, with police assistance in "stimulating" conversation, to elicit incriminating statements from appellant. Appellant's rights under Miranda and Edwards were thereby violated,

The method used here is commonly known as a "Perkins operation." after the decision in Illinois v. Perkins, supra. 496 U.S. 292 (Perkins), In Perkins, the United States Supreme Court held that "[c]onversations between suspects and undercover agents do not implicate the concerns underlying Miranda." (Id. at p. 296.) In Perkins, after the defendant was placed in a cell with an undercover government agent while in custody on charges unrelated to the tried offense, the agent proposed a sham escape plot and elicited statements from the defendant implicating himself in the crime with which he was later charged, (Perkins, at pp. 294-295.)

The Perkins majority held that " Miranda forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner. ...
¶ Miranda was not meant to protect suspects from boasting about their **REAL** criminal activities in front of people whom they believe to be their cellmate."(In this case both were never cellmates.) (Id. at pp. 297-298;see People v. Tate (2010) 49 Cal.4th 635, 685-686; People v. Fayed, supra, 9 Cal.5th 147, 165.) 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." and when a suspect is unaware that he is speaking with the police that coercive atmosphere is lacking. (Ibid.)

Although Perkins gave a green light to various undercover police operations, it did not address surreptitious questioning of a suspect after he invoked his Miranda rights. In fact, neither the United States Supreme Court nor the California Supreme Court has addressed the application of Miranda in a case where the defendant has invoked his or her Miranda rights prior to a Perkins interview. (See People v. Valencia (Dec. 11,2019, No.S258038) - Cal.5th [2019 Cal. LEXIS 9091] pp. 5-8, 14-15, 21(dis, opn. Liu, J.).) However, relying on language in Perkins and the underlying policy of Miranda and Edwards, California courts of appeal, including this court, have held that Miranda and Edwards are not implicated when defendants who have invoked their Miranda right to counsel subsequently speak to someone they do not know is an agent of the police. (People v. Orozco (2019) 32 Cal.App.5th 802, 814 [Miranda forbids coercion, not strategic deception]: see also People v. Plyler(1993) 18 Cal.App.4th 535, 544-545; People v. Guilmette (1991) 1 Cal. App.4th 1534, 1539-1543.)

Other states that have considered the issue have, with one exception, reached the same conclusion, (See People v. Hunt (Ill. 2012) 969 N.E.2d 819. 827; 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; State v. Anderson (Alaska Ct.App. 2005) 117 P.3d 762, 768; State v. Hall (2003) 65 P.3d 90, 100; but see Boehm v. State (Nev. 1997) 944 P.2d 269, 271-273[holding the perkins practice of using a jailhouse informant violated the Fifth Amendment when employed after a suspect formally invoked his Miranda right to counsel].)

It is noteworthy, however, that the policy manual for the Orange County District Attorney's Office, which is one of the largest prosecutors' offices in the California state, expressly provides that; " 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/fliebank/blobdload.aspx?BlobID=23499> [as of October 8, 2020].)

In this case Ortiz, representing himself to be a senior gangster, was not a mere informant acting on his own in hopes of trading information to the police. The operation employed by police go far more then merely listening while a suspect voluntarily bragged to a cell mate. It violated one of the main underpinnings of the miranda warning— to act as a check against coercive police activity. (Miranda, supra, 384 U.S. at p. 479["the Constitution ha prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged government trickery."].)

"Although Miranda discussed the 'inherently compelling pressures' of an official interrogation [citation], 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" [citation]. (People v. Valencia, supra,—Cal.5th—[2019 Cal. LEXIS 9091]p. 12 (dis. opn. Liu, J .).) By using stimulation and interrogation to get appellant to make incriminating statement, appellant's Fifth Amendment rights were abridged.

The remedy for eliciting statements from a suspect who has invoked his Miranda rights is exclusion of the statement at trial. (Oregon v. Elstad (1985) 470 U.S. 298, 307.) The incriminating statements appellant made to the undercover operative Ortiz should not have been admitted at trial.

C. THE ERROR IN ADMITTING THE STATEMENT WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

The harmless error test of Chapman v. California (1967) 386 U.S. 18, applies to the admission of a defendant's statement obtained in violation of the Fifth and Fourteenth Amendments. (People v. Case(2018) 5 Cal.5th 1,22;cf. Arizona v. Fulminante (1991) 499 U.S. 279, 308-312 [involuntary confession].) Accordingly, the goverment, as the beneficiary of the error, bears the burden of proving it was harmless beyond a reasonable doubt. (Chapman, supra, 386 U.S. 18, 24; Case, supra, at p.22.) Appellant's convictions should be reversed because the government cannot show beyond a reasonable doubt that the erroneous admission of his statements in violation of the Fifth Amendment was harmless and did not contribute to the jury's verdict. (Chapman, supra. at p. 24.)

People v. Cahill (1993) 5 Cal.4th 478 gave examples of situations where an improperly admitted confession might be found harmless;

> The erroneous admission of an involuntary confession properly might be found harmless, for example, (1) when the defendant was apprehended by the police in the course of committing the crime, (2) when there are numerous, disinterested reliable eyewitnesses to the crime whose testimony is confirmed by wealth of uncontroverted physical evidence, or (3) in a case in which the prosecution introduced, in addition to the confession, a videotape of the commission of the crime [citation]. As these examples suggest, although in some cases a defendant's confession will be the centerpiece of the prosecution's case in support of an appellante court to determine with confidence that there is no reasonable probability that the exclusion of the confession would have affected the result.

(Id, at p. 505.)

No similar scenarios exist in appellant's case. Appellant was not identified by anyone at the scene as the shooter, in fact, no one at the scene identified or gave a detailed description of the shooter. The gun used in the crime was never recovered. Police were not able to obtain fingerprint or DNA evidence, (2RT 419, 422-423.)

Aside from appellan's statements to the Perkins operative Ortiz, the only evidence against appellant was the extremely unreliable testimony of paid police informant, Ana Ortiz, whose testimony was so questionable that even the prosecutor expressed doubt about her veracity, conceding in his argument, "Maybe she [Ana Ortiz] was there, maybe she wasn't...." (3RT 946; see also 3RT 913-916.) In fact,in closing argument the prosecutor frankly told the jury that, "It is the recorded admission that is the damning evidence in this case." (3RT 916.)

A brief review of Ana's testimony confirms the unreliability of her evidence. Ana first reached out to officer Guillen claiming to have information about the shooting after once again being incarcerated on a new case. (2RT 373, 380.) Ana had a number of prior arrests and convictions for various offenses, and had received thousands of dollars in payment from the Sheriff's office in the past for information and testimony. (2RT 373, 378-379.) She had also obtained relocation assistance from the California State Victim's Compensation Board. (2RT 374.)

During the time Ana was working with Officer Guillen she continued to commit crimes, (2RT 381-382.) She was convicted in May of 2015, for petty theft: in June of 2015.

for felony receipt of stolen property in July of 2015, for felony identity theft; in April of 2016, for receipt of stolen property. (2RT 383-384.) She also had numerous additional arrests/ March 2016, for joy riding/ June 2016, for felony identity theft/ May 2017, for burglary,conspiracy, identity theft and receipt of stolen property. She "did not recall" an arrest in April 2016, for joyriding and receipt of stolen property, (2RT 384-385.) She was currently on summary probation. (2RT 390.) She had been placed on five years probation. in 2015, but her probation was subsequently dismissed. (2RT 391.) Defense counsel aptly described Ana as "fraud personified." (3RT 933.)

The unreliability of Ana Ortiz' testimony is further demonstrated by her evasiveness during questioning. For example, during the 31 pages of her testimony, particularly in response to questions by defense counsel. Ortiz answered that she "DID NOT RECALL" at least 32 times. (2RT 360-391.) In addition, Ana did not claim to have personally witnessed the shooting. Her testimony was, at best, circumstantial evidence of appellant's involvement.

Simply put, the testimony by Ana Ortiz was far too unreliable for this court to determine with confidence that there is no reasonable possibility that exclusion of appellant's incriminating statements would have affected the result. (See People v. Cahill, supra, 5 Cal.4th at p. 505.) Again, this was even acknowledged by the prosecutor during his closing argument to the jury, when he expressly conceded that appellant's recorded statement were " the damning evidence in this case." (3RT 916.)

In Arizona v. Fulminante, the high court pointed out. "[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. . . The admissions of the defendant comefrom the ACTOR himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so .' [Citations.]" (Arizona v. Fulminante, supra , 499 U.S. at p. 296.)

In this case the admission of appellant's confession cannot be found harmless beyond a reasonable doubt. (Chapman v. California, supra, 386 U.S. at p. 24.) His convictions must therefore be reversed.

D. IF THIS COURT FINDS THE ISSUE WAS FORFEITED BY LACK OF OBJECTION, THEN THE ISSUE SHOULD BE ADDRESSED ON THE ALTERNATIVE BASIS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Appellant recognizes that his trial counsel did not make any objection to the admission of his recorded statements to the Perkins operative Ortiz, and that this lack of objection has likely forfeited the issue for direct review of the merits of his claims of error. (Evid. Code section 353.) If this court finds the issue forfeited by lack of objection, appellant's arguments must be considered on the alternative basis that his trial counsel rendered ineffective assistance by not objecting to admission of hisstatements on the grounds raised herein

The Sixth Amendment of the United State Constitution and Article I, section 15, of the California Constitution guarantee a criminal defendant the right to effective assistance of counsel." (Powell v. Alabama (1932) 287 U.S. 45, 68; People v. Ledesma (1987) 43 Cal.3d 171, 215.) Effective assistance is that which meets an objective standard of reasonableness under prevailing professional norms, (Strickland v. Washington (1984) 466 U.s. 668, 688.)

There is a two-prong standard for reviewing claims of ineffective assistance of counsel which is well-settled. A defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that he or she suffered prejudice as a result. (People v. Johnson (2016) 62 Cal.4th 600, 653.)

1. There Could Be No Reasonable, Tactical Basis For Counsel Not To Have Objected To Admission Of Appellant's Statements To Ortiz On The Ground That They Were Obtained In Violation Of His Fifth Amendment Rights.

As to the first prong, " the defendant must show that counsel's representation fell below an objective standard of reasonableness." (Strickland v. Washington, supra, 466 U.S. 668, 688.) Where the record sheds no light on why counsel acted in manner challenged, a claim that counsel's performance was deficient should be rejected unless there could be no satisfactory explanation. (People v. Pope (1979) 23 Cal.3d 412, 426.) Accordingly, "[r]eviewing courts will reverse a conviction on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission. . . or where there simply could be no satisfactory explanation therefor," (People v. Plager (1987) 192 Cal.App.3d 1537, 1543, citing and quoting Pope, supra, 23 Cal.3d 412, 426, internal punctuation omitted; People v. Mendoza Tello (1997) 15 Cal.4th 264, 266.)

Nothing beyond the appellate record could possibly provide a satisfactory explanation for counsel's failure to seek exclusion of the single most important piece of evidence in this case. In this case trial counsel could have had no reasonable, tactical, basis for not seeking to exclude the single most important piece of evidence against appellant. As noted above, it is well-recognized that "an accused's confession is the most probative and damaging evidence that can be admitted against him....." (Arizona v. Fulminante, supra, 499 U.S. at p. 296, internal citation and quotation marks omitted.)

2. It is Reasonably Probable That, But For Trial Counsel's Error, The Result Of The Proceedings Would Have Been Different.

The second prong of *Strickland* requires that a defendant demonstrate a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. (*Strickland, supra*, 466 U.S. at pp. 693-695; *People v. Ledesma, supra*, 43 Cal.3d 171, 216-218.)

As discussed above in connection with appellant's argument as to why admission of his statements cannot be found harmless beyond a reasonable doubt, it is beyond question that, but for this evidence, the result of the proceedings would have been different. There was no identification evidence, and no forensic evidence linking appellant to the shooting. The testimony by paid informant Ana Ortiz was so lacking in indicia of reliability, that even the prosecutor chose not to rely on it when asking the jury to return a guilty verdict, instead conceding that "[m]aybe she was there, maybe she wasn't...." (3RT 946; see also 3RT 913-916.) Instead the prosecutor frankly told the jury that, "It is the recorded admission that is the damning evidence in this case." (3RT 916.)

It is reasonably probable that, but for the "damning evidence" of appellant's recorded incriminating statements, the result of these proceedings would have been different. Appellant's trial counsel was therefore ineffective for not objecting to admission of these statements, and appellant's conviction should be reversed.

3. Appellant Alternatively Asserts That Prejudice Should Be Judged under the Same Standard Used for Assessing the Error on its Merits.

The error here implicated appellant's federal constitutional rights, and reviewed on the merits is therefore reversible unless it can be found harmless beyond a reasonable doubt. (*Chapman, supra*, 368 U.S. at p. 24.) With this in mind appellant alternatively contends that, even if considered as a claim of ineffective assistance of counsel, this court should "look through" to the substance of the underlying error and judge its effect according to the same standards as if ruling on the merits.

a. *Kimmelman v. Morrison* and *Strickland v. Washington*.

Appellant acknowledges that on the face of it his argument appears foreclosed by the decision in *Kimmelman v. Morrison* (1986) 477 U.S. 365. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455.) However, as explained below, appellant believes *Kimmelman* is distinguishable and should not apply here. Even assuming this court disagrees and finds *Kimmelman* to be controlling, appellant respectfully raises this issue to preserve it for further review.

The inherent unfairness in this discrepancy between the prejudice standard employed on a direct merits review of an issue, versus the standard used to assess a claim of ineffective assistance of counsel, has previously been recognized. In *People v. Mesa* (2006) 144 Cal.App.4th 1000, addressing the defendant's

majority found that the defendant had failed to demonstrate prejudice under the *Strickland* "reasonable probability" standard, and upheld the conviction. In a concurring opinion, Justice Johnson expressed his concern about requiring a defendant to demonstrate this greater degree of prejudice where counsel's ineffectiveness deprived the defendant of a fundamental constitutional right which otherwise would have been evaluated under the "harmless beyond a reasonable doubt" standard demanded by *Chapman* (*Chapman v. California, supra,* 386 U.S. 18). (*Mesa, supra,* 144 Cal.App.4th at p. 1012, Johnson, J., concurring.)

Justice Johnson elaborated:

> The threshold issue, in my view, is what would have happened if that objection had been made instead of omitted. If the answer is that there is a *reasonable doubt* whether the outcome would have remained the same because the enforcement of the constitutional right would have made that degree of difference, then the logic behind *Chapman* suggests the conviction should be reversed. It seems contrary to the principle that federal constitutional rights warrant the higher standard of protection afforded by *Chapman* to do otherwise. It undermines enforcement of the federal constitutional right to say, no, despite the fact there is a 'reasonable doubt' the conviction would have happened if the objection had been made we refuse to reverse because the defendant has failed to establish a 'reasonable probability' a different outcome would have resulted had the objection been made.

(*Ibid.*)

Adopting this approach a court would first review the federal constitutional error to determine whether the error was harmless beyond a reasonable doubt under *Chapman*. If the error was not harmless under this standard, it would follow that the client did not receive constitutionally effective assistance of counsel. (*Ibid.*) As Justice Johnson explained: "In my view, the two are linked inextricably. If the constitutional error the defense counsel's failure to object allowed to occur led to

consequences that raised a reasonable doubt about the trial's outcome then that mistake ought to satisfy the prejudice prong, at least, of the standard for ineffective assistance of counsel." (*Id.* at p. 1014.)

Justice Johnson further recognized that simply because the defendant may have been denied the right to effective assistance of counsel, that did not somehow eliminate the underlying constitutional violation. "[T]his is not solely or even primarily a Sixth Amendment 'ineffective assistance of counsel' violation to be tested under the standard of review applicable to that constitutional error. No, in this case it is a Fifth Amendment violation combined with a Sixth Amendment violation -- and more the former than the latter. As such the error should have to pass muster under both standards, not just the easier one, before being deemed harmless." (*Id.* at p. 1014.)

Appellant recognizes that in *Kimmelman* the Supreme Court approved application of the *Strickland* "reasonable probability" prejudice inquiry even though the underlying claim of error involved the defendant's Fourth Amendment right against unreasonable search and seizure. (*Kimmelman, supra*, 477 U.S. 365, 383, fn. 7; and see *People v. Mesa, supra* 144 Cal.App.4th at pp. 1008-1009.) However, appellant believes that the procedural posture of the *Kimmelman* case played a part in the Court's decision. The primary issue in *Kimmelman* was whether a court on federal habeas review could reach a defaulted Fourth Amendment claim on the grounds of ineffective assistance of trial counsel for failing to seek suppression of evidence. Importantly, had counsel sought suppression in the trial court and lost, the issue would not have been cognizable on federal habeas review. (*Stone v. Powell* (1976) 428 U.S. 465.) The decision in *Kimmelman* was thus an expansion of a defendant's remedies, permitting a challenge to the unlawful search and

But while expanding the available remedy, the *Kimmelman* Court also held that review of the issue would be conducted under the less favorable *Strickland* standard, rather than the *Chapman* standard normally applicable to review of federal constitutional errors. (See *Kimmelman, supra*, 477 U.S. at p. 382, fn. 7.) In doing so, the Court responded to a hypothetical concern that a trial attorney might intentionally default a substantive issue in hopes of later gaining a more favorable review of the claim on Sixth Amendment grounds. Rejecting this concern, the *Kimmelman* Court expressly pointed to the more difficult burden of proving ineffective assistance of counsel claims as a reason trial counsel would not intentionally forego raising an issue in state court in hopes of receiving more favorable treatment of the issue on federal habeas review. (*Id.* at p. 382, fn. 7.) Beyond that, however, *Kimmelman* did not really provide any rationale for the discrepancy between the standards of review where the underlying error from the defendant's perspective involved the denial of a federal constitutional right.

This lack of reasons was noted by the court of appeal in *People v. Howard*, which was tasked with applying the then-recent *Kimmelman* decision. (*Howard, supra*, 190 Cal.App.3d 41.) The *Howard* court declared itself constrained by *Kimmelman* to assess the error from trial counsel's failure to bring a meritorious suppression motion under the less rigorous *Strickland* standard. The court nevertheless complained that "[w]e might have preferred that ... the [*Kimmelman*] Court discuss the factors which make it willing to tolerate a greater likelihood of error in the outcome where the mistake is defense counsel's rather than that of the trial judge." (*Howard, supra*, 190 Cal.App. 3d 41, 46-47.)

In articulating its prejudice standard for ineffective assistance claims, *Strickland* referenced the lack of government

the defendant to prove a claim of ineffective assistance. "Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." (*Strickland, supra*, 466 U.S. at p. 693.)

The *Strickland* Court also noted that many claims of ineffective assistance relate to the art of representation, and thus may be difficult to assess in a given situation. "Attorney errors come in an infinite variety and are as likely to be as utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to the likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense." (*Ibid.*)

Appellant respectfully suggests that the "artistic" aspect of representation is more appropriately considered in connection with *Strickland's* first prong - whether reasonably competent counsel would have done (or omitted doing) the same thing. If so, then the outcome - good or bad - is irrelevant. If not, then the defendant should not have to meet a higher threshold of demonstrating prejudice from transgression of a federal constitutional right, or where, as here, the error takes place at the penalty phase of a capital case.

Moreover, the *Strickland* decision did not specifically consider the discrepancy in requiring different standards of prejudice depending on the manner in which an error reaches

addressed the situation where an appellate court declines to address the merits of an error on the grounds that trial counsel's failure to object or request necessary instructions has "forfeited" the issue for the direct appeal, and the defendant is thus forced to seek review on the alternative ground of IAC.

In these situations, by successfully asserting "forfeiture" of issues in the direct appeal, and instead requiring defendants to pursue potentially meritorious claims otherwise reviewable under *Chapman* (*Chapman, supra*, 386 U.S. 18) via alternative allegations of ineffective assistance of counsel, the government succeeds in re-allocating the burden of demonstrating prejudice to the defense. Although from the defendant's standpoint the error and the harm are the same, the chances of prevailing on appeal are diminished. (See, e.g., *Mesa, supra*, 144 Cal.App.4th 1000 (maj. opn.).)

Appellant asserts that in such cases it makes no sense to doubly penalize the defendant for the errors of his trial counsel by also requiring a greater showing of prejudice. The harm to appellant is no less significant because this court may find it attributable to his trial counsel rather than the trial judge.

Appellant's case does not present a situation, such as in *Kimmelman*, where the defense is actually being given the opportunity to collaterally pursue an issue which would otherwise have been procedurally barred. It also does not involve the sort of strategic decision-making involving the presentation of the defendant's case at issue in *Strickland*. Finally, there would be no reason for trial counsel to intentionally inflict error into the trial proceeding by failing to request that the jurors be instructed not to double-count the sixteen prior robbery offenses when making a decision between life and death.

b. ***Weaver v. Massachusetts.***

More recently, in *Weaver v. Massachusetts* (2017)__, 137 S.Ct. 1899, the Supreme Court considered which standard of

prejudice should be used where trial counsel failed to object to an unlawful courtroom closure during *voir dire*. Had the improper closure taken place over counsel's objection, the error would have been reversible *per se*. However, within the narrow confines of the issue as presented (a public-trial violation raised via an ineffective assistance of counsel claim) a majority of the Court concluded that the *Strickland* standard should apply. (137 S.Ct. at p. 1907, 1911, 1913.)

The Court's decision to place the burden on the defendant to demonstrate error was based in part on the nature of the error (a public trial violation), which does not in every case lead to a fundamentally unfair trial. (*Weaver, supra*, 137 S.Ct. at p. 1910.) It was also based on the difference between this error being preserved at trial and raised on direct appeal, versus being raised in a collateral proceeding via an ineffective assistance claim. (*Weaver, supra*, 137 S.Ct. at p. 1912.) In the latter situation, a timely objection would have permitted at least an opportunity for contemporaneous correction, or articulation of reasons for the court's ruling. (*Ibid.*)

But the *Weaver* opinion also expressed concern with the "systemic costs" of remedying the error. In this regard, the Court pointed out that where an error is raised on direct appeal there is a better chance that less time will have elapsed between trial and a remand. As a result witness memories more likely remain accurate, and physical evidence is still available. In addition, a reviewing court could provide direction to the trial courts "in a familiar context that allows for elaboration of the relevant principles based on review of an adequate record." In other words, the issue is better considered in a regular appellate process, not in a subsequent collateral proceeding with additional time delays. (*Id.* at p. 1912.)

By contrast, the greater time delay common to collateral

There has also usually been an opportunity for review of the trial court proceedings in a direct appeal. "These differences justify a different standard for evaluating a structural error depending on whether it is raised on direct review or raised instead in a claim alleging ineffective assistance of counsel." (*Id.* at p. 1912.)

Here, although trial counsel did not object to admission of appellant's incriminating statements at trial with the possibility of a contemporaneous ruling[7], it is nevertheless being raised in the direct appeal as opposed to a subsequent collateral proceeding. For these reasons, appellant believes it is proper to apply the *Chapman* standard, which would otherwise have been the standard for assessing prejudice in this context.

Applying that standard, for the reasons set forth in section C. *supra*. (addressing why the error cannot be found harmless beyond a reasonable doubt) the government cannot show beyond a reasonable doubt that the erroneous admission of appellant's statements obtained in violation of the Fifth Amendment was harmless and did not contribute to the jury's verdict. (*Chapman*, *supra*. at p. 24.) Appellant's conviction must therefore be reversed.

II.

APPELLANT'S STATEMENT SHOULD HAVE BEEN EXCLUDED BECAUSE THE POLICE TACTICS USED TO INDUCE HIS INCRIMINATING STATEMENTS VIOLATED HIS RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT.

A. THE *PERKINS* OPERATION VIOLATED APPELLANT'S DUE PROCESS RIGHTS.

In addition to transgressing appellant's Fifth Amendment rights, the police in this case also violated appellant's right to due process of law. (U.S. Const. 14th Amend.; See *Miller v. Fenton* (1985) 474 U.S. 104, 110 [notwithstanding Miranda's prophylactic

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[7]. Although different counsel *did* object to admission of the statements at the preliminary hearing. (2CT 99.)

protections, "the Court has continued to measure confessions against the requirements of due process"]; *Perkins, supra*, 496 U.S. at pp. 301-303 (conc. opn. of Brennan, J.) citing *Miller v. Fenton, supra*, 474 U.S. 104, 109-110, 116; *People v. Benson* (1990) 52 Cal.3d 754, 778; see also Justice Liu's dissent from denial of review in *People v. Valencia, supra*, __Cal.5th__ [2019 Cal. LEXIS 9091] [expressing a willingness to consider whether the use of deceptive techniques to deliberately circumvent a suspect's invocation of *Miranda* rights violates due process].)

The United States Supreme Court has long held that "certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment. ... [T]he Court's analysis has consistently been animated by the view that 'ours is an accusatorial and not an inquisitorial system,' [citation], and that, accordingly, tactics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness." (*Miller v. Fenton, supra*, 474 U.S. 104, 109-110.)

An involuntary statement obtained through coercive police activity is inadmissible under the due process clauses of the federal and state Constitutions. (*People v. Benson, supra*, 52 Cal.3d 754, 778; *People v. Linton* (2013) 56 Cal.4th 1146, 1176; *Lego v. Twomey* (1972) 404 U.S. 477, 483 "Coercion" in this sense means "overcom[ing] a person's free will" because "[t]he question is whether the statement is the product of an essentially free and unconstrained choice or whether the defendant's will has been overborne and his capacity for self-determination critically impaired by coercion." (*People v. Williams* (2010) 49 Cal.4th 405, 436, internal quotations omitted; *accord, People v. Case, supra*, 5 Cal.5th at p. 25; *Rogers v. Richmond* (1961) 365 U.S. 534, 544.)

In determining whether or not an accused's will was overborne, an examination must be made of "all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation." (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226; *Arizona v. Fulminante*, *supra*, 499 U.S. 279, 285.) Under both state and federal law, courts apply a totality of circumstances test to determine the voluntariness of a confession. (*People v. Massie* (1998) 19 Cal.4th 550, 576; *People v. Orozco*, *supra*, 32 Cal.App.5th at p. 819.)

"Prior to *Miranda*, the admissibility of an accused's in custody statements was judged solely by whether they were 'voluntary' within the meaning of the Due Process Clause. [Citations.] If a suspect's statements had been obtained by 'techniques and methods offensive to due process,' [citation], or under circumstances in which the suspect clearly had no opportunity to exercise 'a free and unconstrained will,' [citation], the statements would not be admitted." (*Oregon v. Elstad*, *supra*, 470 U.S. 298, 304.) Justice Brennan's concurrence in *Perkins* supported application of due process principles to ensure that "'the admissibility of a confessions turns as much on whether the techniques for extracting the statements ... are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne.'" (*Perkins*, *supra*, 496 U.S. at pp. 301-302 (conc. opn. of Brennan, J.), quoting *Miller v. Fenton*, *supra*, 474 U.S. 104, 116.)

Justice Brennan joined with the majority in *Perkins*, but wrote separately to warn that *Perkins* could be limited on its facts and that a different result might obtain where, as here, the police use more coercive or otherwise improper tactics to facilitate a confession, noting that "the deception and manipulation practiced on respondent raise a substantial claim that the confession was obtained in violation of the Due Process Clause...." (*Perkins*, *supra*, 496 U.S. at p. 301, conc. opn. of Brennan, J.)

Though often couched in the "convenient shorthand" of whether a statement was "involuntary," due process protections preclude law enforcement not only from using threats, violence, or even promises, but also deception and manipulation such as what occurred here. The focus is not only on whether the suspect's will was actually overborne, but depends just as much on whether inquisitorial means of "deception and manipulation" were employed to obtain the statement. (*Perkins, supra*, 496 U.S. at pp. 301-302, conc. opn. of Brennan, J.) "The deliberate use of deception and manipulation by the police appears to be incompatible 'with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means.' *Miller, supra*, at 116, and raises serious concerns that respondent's will was overborne." (*Perkins, supra*, 496 U.S. at p. 303, conc. opn. of Brennan, J.)

Our own Supreme Court at one time recognized that an incriminating statement made to an undercover inmate might yet be involuntary where, as here, the government causes the defendant to speak when he otherwise would not have done so:

> This court does not foreclose the possibility that when an accused is in custody and confides in a government agent who is "ostensibly no more than a fellow inmate" [citation], his statements may be deemed involuntary even though there is no coercion. The accused may well make "voluntary" statements when he believes he is conversing with an ally. Yet by purposefully creating a false sense of security, the state is in a sense causing or compelling the accused to speak when he would not otherwise do so.

(*People v. Whitt* (1984) 36 Cal.3d 724, 745-746.)

As Justice Brennan cautioned in *Perkins*, "The method used to elicit the confession in this case deserves close scrutiny. The police devised a ruse to lure respondent into incriminating himself when he was in jail on an unrelated charge. A police agent, posing as a fellow inmate ... tricked respondent into

confessing that he had once committed a murder. (*Perkins, supra*. 496 U.S. at p. 302. conc. opn. of Brennan. J.)

> We have recognized that "the mere fact of custody imposes pressures on the accused: confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents." [Citation.] As Justice Marshall points out. the pressures of custody make a suspect more likely to confide in others and to engage in "jailhouse bravado." [Citation.] The State is in a unique position to exploit this vulnerability because it has virtually complete control over the suspect's environment. Thus. the State can ensure that a suspect is barraged with questions from an undercover agent until the suspect confesses. [Citations.] The testimony in this case suggests the State did just that.

(*Perkins, supra*. 496 U.S. at pp. 302-303. conc. opn. of Brennan. J.)

Prior to its 1966 decision in *Miranda v. Arizona*. the United States Supreme Court. applying a due process voluntariness test. recognized in several cases that the police use of deceptive interrogation tactics played a significant role in producing involuntary confessions. In *Leyra v. Denno* (1954) 347 U.S. 556. Leyra asked the police to allow him to see a physician because he was suffering from sinus problems. The police brought in a psychiatrist who posed as a general physician. (*Id*. at p. 559.) The Court held that the "subtle and suggestive" questioning by the psychiatrist amounted to a continued interrogation of the suspect without his knowledge. This deception and other circumstances of the interrogation rendered Leyra's confession involuntary. (*Id*. at pp. 561.)

Similarly. in *Spano v. New York* (1959) 360 U.S. 315. the police used a new officer Spano considered to be a close friend to play on Spano's sympathies and deceive him by telling Spano the friend/officer's job was in jeopardy because of Spano. Spano relied on counsel's advice to not answer questions, but after relentless entreaties by his "friend." he eventually confessed. (*Spano v. New*

York, *supra*, 360 U.S. at pp. 318-319.) The Court held that the officer's deception was a key factor in rendering Spano's confession involuntary. (*Id.* at pp. 323-324.)

Appellant's case is distinguishable from *People v. Orozco*, where this Court found the defendant was tricked, not coerced, found the confession was not involuntary, and that there was no violation of due process. (*Orozco*, *supra*, 32 Cal.App.5th at p. 819.) That case involved the death of Orozco's six-month old daughter from blunt trauma inflicted in the hours prior to her death when Orozco was alone with her. (*Id.* at pp. 806-807.) Orozco voluntarily spoke to the police and denied that he hurt her. (*Id.* at p. 807.) When he was asked if he would take a polygraph test, he requested an attorney and was placed under arrest. (*Id.* at pp. 807-808.)

After several hours, the police told Orozco's girlfriend, the child's mother, that she had a right to know what happened to her daughter and had her talk with Orozco in a monitored interview room. (*Orozco*, *supra*, 32 Cal.App.5th at pp. 807-808.) To stimulate conversation, an officer entered the interview room and informed the couple the autopsy report showed the child had been beaten and indicated that both of them were looking at going to jail for child neglect. (*Id.* at p. 809.) Orozco then told his girlfriend he did not want the police to "take" her. (*Ibid.*) The officer reentered the room and asked her to step outside. He asked if she would take a polygraph test and told her that Orozco had refused to take one. This was to stimulate conversation. (*Ibid.*) Returning to the interview room, Orozco's girlfriend asked Orozco why he refused to take a polygraph test and implored him to tell her the truth. After initial denials, he broke down sobbing and told her that he killed their baby. (*Ibid.*)

Although this court called the police conduct in Orozco "deplorable," and a "deliberate circumvention of *Miranda's* protections" (*Orozco*, *supra*, at pp. 816, 819) it nevertheless ruled

the conduct was not coercive because the *Miranda* rule is designed to combat coercion. "'not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be' someone he can trust." (*Orozco, supra*. 32 Cal.App.5th at p. 817. quoting *Perkins, supra*. 496 U.S. at p. 297.) This Court found that the "proximate cause" of Orozco's confession was Orozco's conversation with his girlfriend and not the deceptive act of orchestrating its occurrence. thus. the requisite proximate causal link between the police stratagem and defendant's confession was missing. (*Id*. at p. 820.)

But here, the proximate cause of appellant's confession *was* the strategic tactics of the police. Appellant confessed only after multiple applications of "stimulation" combined with ongoing questioning by the undercover operative led him to make incriminating statements. "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." (*People v. Valencia* (Dec. 11. 2019. No. S258038) ___Cal.5th___ [2019 Cal. LEXIS 9091] p. 7 (dis. opn. Liu. J.).) Essentially the same tactic is involved where police enlist the use of inmate informants. (*Id*. at p. 8.)

In *People v. Rodriguez* (2020) 40 Cal.App.5th 194, using a stratagem similar to this case. a police agent posed as an older. well-connected gang member to get the defendant to confess. (*Id*. at p. 198.) Division Eight of this court pointed out that the defendant was 26 years old while the police agent claimed to be 35 years old. not a huge age difference. (*Id*. at p. 199.) It stated. "Deference to seniority could be a factor in some factual settings. but we will not embrace this theory as a universal principle based on anecdotal speculation." and in light of the trial court's finding they talked to each other like "new best friends." it held the

At the time of the *Perkins* operation in this case, appellant had recently turned 20 years old. (2CT 203, 321.) There was no information about whether he had graduated from High School. (2CT 330.) He was still living with his mother. (2CT 331.) Appellant had been diagnosed with Attention Deficit Hyperactivity Disorder and Insomnia. (2CT 33.) Ortiz was in his early 30s, and had numerous tattoos. (2RT 435.) Appellant's age and apparent lack of maturity, coupled with the ADD, likely made him more susceptible to the police "stimulation" and ongoing prodding by the undercover operative Ortiz to elicit incriminating statements.

In *Spano v. New York, supra*, the Court cautioned: "as law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated, our duty to enforce federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgments to be made." (*Spano, supra*, 360 U.S. at p. 321; *accord, Illinois v. Perkins, supra*, 496 U.S. at p. 303, conc. opn. Brennan, J.)

In this regard, Justice Marshall's dissenting opinion in Perkins was prophetic: "The exception carved out of the Miranda doctrine today may well result in a proliferation of departmental policies to encourage police officers to conduct interrogations of confined suspects through undercover agents, thereby circumventing the need to administer Miranda warnings." (*Perkins, supra*, 496 U.S. at p. 309 (dis. opn. Marshall, J.).) That, indeed, is what has occurred in the intervening years.

Justice Liu's dissent to the California Supreme Court's denial of the petition for review in *People v. Valencia, supra*, ___Cal.5th___ [2019 Cal. LEXIS 9091], referenced five unpublished California cases decided in 2019 and seven earlier cases from 1991 to 2015 where the police used deceptive schemes to elicit confessions from suspects who had invoked their Miranda

pp. 5-6.) Questioning the legality of the procedure, Justice Liu commented, "[I]t 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.' [Citation.]" (*Id.* at p. 17.)

A police tactic recognized by jurists as a deceptive and manipulative practice (*Perkins, supra*, 496 U.S. at pp. 300-301, conc. opn. of Brennan, J.), a "deplorable," and "deliberate circumvention of *Miranda's* protections" (*Orozco, supra*, at pp. 816, 819), which "trivializes" the right to cut off questioning and seek the assistance of counsel (*People v. Valencia* (Dec. 11, 2019, No. S258038) ___Cal.5th___ [2019 Cal. LEXIS 9091] p. 24 (dis. opn. Liu, J.) should not be countenanced and enabled by courts' refusal to acknowledge the practice for what it is - a clear violation of a citizen's right to due process of law.

This court should so hold, and find that the *Perkins* operation in this case transgressed appellant's right to due process of law. Because appellant's statements were obtained by "techniques and methods offensive to due process" they should not have been admitted as evidence against him at trial. (*Oregon v. Elstad, supra*, 470 U.S. 298, 304.)

B. THE ERROR IN ADMITTING THE STATEMENT WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

The error in admitting a statement obtained in violation of an accused's Fourteenth Amendment right to due process of law is subject to review under *Chapman's* harmless error standard. (*Arizona v. Fulminante, supra*, 499 U.S. 279, 308-312.) The government, as the beneficiary of the error, thus bears the burden of proving it was harmless. (*Chapman, supra*, 386 U.S. 18, 24; *Case, supra*, 5 Cal.5th at p. 22.) For the reasons set forth in Argument I, section C, Appellant's convictions should be reversed

that the erroneous admission of his statements was harmless and did not contribute to the jury's verdict. (*Chapman, supra*, at p. 24.)

In appellant's related argument that his statements were admitted in violation of his Fifth Amendment rights (Argument I. section C. *supra*). appellant discussed factors which might lead a court to conclude admission of incriminating statements was harmless error. These included: (1) whether the defendant was arrested at the scene: (2) whether there were numerous. disinterested and reliable witnesses whose testimony was confirmed by significant amounts of uncontroverted physical evidence: (3) introduction of a videotape of the crime. (*Cahill, supra*, 5 Cal.4th at p. 505.)

Clearly none of these examples apply to appellant's case. There was no eyewitness identification and no physical evidence was recovered which tied appellant to the crime. The only evidence besides appellant's statements was the extremely unreliable testimony by paid police informant. Ana Ortiz, whose testimony was so questionable that even the prosecutor expressed doubt about her veracity (3RT 946: see also 3RT 913-916) and expressly conceded in closing argument that "It is the recorded admission that is the damning evidence in this case." (3RT 916.)

The admission of appellant's confession – the most probative and damaging evidence that could be admitted against him (*Arizona v. Fulminante, supra*, 499 U.S. at p. 296) -- cannot be found harmless beyond a reasonable doubt. (*Chapman supra*, 386 U.S. at p. 24.) His convictions must therefore be reversed.

C. IF THIS COURT FINDS THE ISSUE WAS FORFEITED, THEN THE ISSUE SHOULD BE ADDRESSED ON THE ALTERNATIVE BASIS THAT APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

As he did in connection with this Fifth Amendment argument, appellant recognizes that because his trial counsel did

issue is likely forfeited for direct review. (Evid. Code section 353.) Appellant's arguments must therefore be considered on the alternative basis that his trial counsel rendered ineffective assistance by not objecting to admission of his statements on the grounds raised herein.

Under both the Sixth Amendment of the United States Constitution and article I, section 15, of the California Constitution, appellant is guaranteed the right to effective assistance of counsel. (*Powell v. Alabama, supra*, 287 U.S. 45, 68; *Ledesma, supra*, 43 Cal.3d 171, 215.) In Argument I. Section D, supra, appellant fully set forth the requirements for raising an ineffective assistance of counsel argument, and incorporates the discussion of the legal and constitutional standards as more fully set out therein.

1. There Could Be No Reasonable, Tactical Basis For Counsel Not To Have Sought Exclusion Of Appellant's Inculpatory Statements On The Ground That They Were Obtained In Violation Of His Due Process Rights.

Appellant's argument here is essentially the same as with regard to his claim that the statements were obtained in violation of his Fifth Amendment rights. Simply put, trial counsel could have had no reasonable, tactical, basis for not seeking to exclude the single most important piece of evidence against appellant. (See *Arizona v. Fulminante, supra*, 499 U.S. at p. 296.) There is nothing in or beyond the appellate record that could possibly provide a satisfactory explanation for counsel's failure to object to admission of this highly inculpatory evidence. Counsel's failure to seek exclusion of appellant's statements therefore fell below the objective standards of reasonableness. (*Strickland v. Washington, supra*, 466 U.S. 668, 688.)

2. It is Reasonably Probable That, But For Trial Counsel's Error, The Result Of The Proceedings Would Have Been Different.

The second prong of *Strickland* requires that a defendant demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. (*Strickland, supra*, 466 U.S. at pp. 693-695; *People v. Ledesma, supra*, 43 Cal.3d 171, 216-218.)

As discussed above in connection with appellant's argument as to why admission of his statements cannot be found harmless beyond a reasonable doubt, it is beyond question that but for this evidence, the result of the proceedings would have been different. There was no identification evidence, and no forensic evidence linking appellant to the shooting. The testimony by paid informant Ana Ortiz was so lacking in indicia of reliability, that even the prosecutor chose not to rely on it when asking the jury to return a guilty verdict, instead conceding that "[m]aybe she was there, maybe she wasn't...." (3RT 946; see also 3RT 913-916.) Instead the prosecutor frankly told the jury that, "It is the recorded admission that is the damning evidence in this case." (3RT 916.)

It is reasonably probable that, but for the "damning evidence" of appellant's recorded incriminating statements, the result of these proceedings would have been different. Appellant's trial counsel was therefore ineffective for not objecting to admission of these statements, and appellant's conviction should be reversed.

3. Appellant Alternatively Asserts That Prejudice Should Be Judged under the Same Standard Used for Assessing the Error on its Merits.

The error here implicated appellant's federal constitutional right to due process of law. Reviewed on the merits it is therefore

doubt. (*Chapman, supra*. 368 U.S. at p. 24.) As he did in Argument I. section D.3, *supra*. appellant alternatively contends that. even if considered as a claim of ineffective assistance of counsel. this Court should "look through" to the substance of the underlying error and judge its effect according to the same standards as if ruling on the merits.

Appellant previously set forth this legal argument in detail and will not reiterate it here. but instead incorporates it as if fully set forth herein. For the same reasons previously given. this court should evaluate the effect of the error from admission of appellant's statements under the same standard (*Chapman*) as if the issue was addressed on the merits. instead of through the lense of an ineffective assistance of counsel claim applying the "but for" prejudice standard of *Strickland*.

III.

APPELLANT'S CONFESSION WAS INADMISSIBLE BECAUSE POLICE TACTICS WERE "DELIBERATELY DESIGNED TO ELICIT INCRIMINATING REMARKS" IN VIOLATION OF SECTION 4001.1(B)

A. THE POLICE TACTICS VIOLATED SECTION 4001.1.

Appellant's incriminating statements were also inadmissible because they were obtained in violation of Penal Code section 4001.1(b). which states: "No law enforcement agency and no in–custody informant acting as an agent for the agency. may take some action. beyond merely listening to statements of a defendant. that is deliberately designed to elicit incriminating remarks." Here. law enforcement actions went "beyond mere listening" and were "deliberately designed to elicit incriminating remarks" from appellant.

An "in custody informant" for purposes of section 4001.1. subdivision (c) is defined by reference to section 1127a. subdivision (a). which provides that an "in custody informant" is "a person. other than a codefendant, percipient witness.

statements made by the defendant while both the defendant and the informant are held within a correctional institution." The record in the present case is undeveloped with regard to the status of the undercover operative Ortiz - - whether he was an actual in-custody informant, or a police operative posing as an inmate. Regardless, for purposes of section 4001.1 he was clearly acting as an agent of the state and appeared to be held in custody. Ortiz also did more than merely listening to appellant's statements. He purposefully "stimulated" and "guided" appellant, during the three to four hours they were together, into making incriminating statements regarding the homicide under investigation. (2RT 410.)

In addition, the investigating officers involved in this *Perkins* operation themselves took actions designed to "stimulate" appellant into making incriminating statements. During his "stimulation" Sergeant Quintero lied and told appellant that police had obtained his fingerprints from the evidence. (2RT 419-420.) In a "prodding" effort to get appellant to talk to Ortiz about the case, police also obtained a DNA swab from appellant, even though they knew no DNA evidence had been obtained from evidence at the scene. (2RT 422.)

These police actions went far beyond "merely listening," and included giving appellant false information about evidence in the case, which was done for the express purpose of prodding appellant into making statements in response to Ortiz' questions. Clearly, the actions of both Ortiz and the detectives violated section 4001.1.

People v. Gallardo (2017) 18 Cal.App.5th 51, the only published state court decision thus far to consider a challenge to a *Perkins* operation raised under section 4001.1, found the statute inapplicable in the circumstances of its case. *Gallardo* relied on the following language in the statute enacting section 4001.1: "It is the intent of the Legislature that subdivision (b) of Section

4001.1 of the Penal Code is a restatement of existing case law and where the language in that subdivision conflicts with the language of that case law, the decisions of *Kuhlmann v. Wilson* [(1986) 477 U.S. 436], and *United States v. Henry* [(1980) 447 U.S. 264], and other United States Supreme Court decisions which have been decided at the time this act is enacted shall be controlling." (Stats. 1989, ch. 901, section 4, page 3095.)

Applying the holdings in *Kuhlmann* and *Henry*, *Gallardo* pointed out that both decisions were concerned with application of a defendant's Sixth Amendment rights as set forth in *Massiah v. United States* (1964) 377 U.S. 201. *Massiah* held that incriminating statements deliberately elicited by law enforcement agents once a defendant's Sixth Amendment rights have attached are inadmissible. This rule is "offense specific." (*Gallardo, supra*, 18 Cal.App.5th at p. 78.) *Gallardo* therefore concluded that section 4001.1 does not apply to statements obtained by undercover informants or law enforcement personnel regarding *uncharged* offenses to which a defendant's Sixth Amendment rights have not yet attached. (*Gallardo, supra*, 18 Cal.App.5th at pp. 78-79.)

Importantly, *Gallardo*, and the U.S. Supreme Court cases of *Kuhlmann* and *Henry* on which *Gallardo* relied, were all premised on a claimed *Sixth Amendment* violation. None of those cases involved a situation where the defendant had invoked his *Miranda* rights prior to the undercover operation. Appellant's argument, which relies on the *Fifth Amendment* right to counsel which appellant asserted when he earlier invoked his *Miranda* rights, is therefore distinguishable and the holdings of *Kuhlmann*, *Henry* and *Gallardo* do not preclude extending section 4001.1 to appellant's case.

Thus, in *United States v. Henry*, *supra*, 447 U.S. 264, the United States Supreme Court held that a defendant's Sixth Amendment right to counsel is violated when a government

about a charged offense. (*Id.* at pp. 269–270.) And in *Kuhlmann*, *supra*, 477 U.S. 436, the court concluded no Sixth Amendment violation had occurred where the police had instructed an informant to merely listen to the defendant, and report any incriminating information he might disclose regarding a charged offense. (*Id.* at pp. 459–460.) Neither *Kuhlmann* nor *Henry* addressed or even mentioned the decisions in *Miranda* or *Edwards*.

In fact, the decision in *Gallardo* does not actually pertain to appellant's case, which involves a Fifth vs. a Sixth Amendment claim. Moreover, the language of the statute enacting section 4001.1 is very broad and makes clear that section 4001.1 was not limited to the scenario addressed in *Kuhlmann* and *Henry*, but was expressly intended to also apply the then-existing law of "other United States Supreme Court decisions which have been decided at the time this act is enacted shall be controlling."

Miranda (384 U.S. 436) and *Edwards* (451 U.S. 477) were both existing decisions at the time section 4001.1 was enacted in 1989,[8] and are thus "other United States Supreme Court decisions [] decided at the time" section 4001.1 was enacted. (Stats. 1989, ch. 901, section 4, page 3095.) As such, they are "controlling." (*Ibid.*) In addition, *Perkins* had *not* yet been decided, and therefore has no bearing on how section 4001.1 should be interpreted or applied.

As discussed in Argument I, *supra*, the *Perkins* operation here transgressed appellant's Fifth Amendment rights, as set forth in *Edwards* and *Miranda*. Section 4001.1 must be interpreted in light of these controlling United States Supreme Court decisions, which prohibit law enforcement from questioning an in-custody suspect about *any* case, once that person has invoked their Fifth Amendment rights. (*McNeil v. Wisconsin*, *supra*, 501 U.S. 171, 177; *Arizona v. Roberson*, *supra*, 486 U.S.

675; *People v. Fayed, supra*, 9 Cal.5th 147, 165.) Thus properly interpreted, the government agents here violated section 4001.1 when they conducted the *Perkins* operation after appellant had invoked his *Miranda* rights on his other case.

B. THE REMEDY SHOULD BE EXCLUSION OF THE STATEMENTS.

Section 4001.1(b) does not specify a penalty, but since the Legislature stated that this provision was a codification of cases which required exclusion of confessions where police went beyond mere listening, and because exclusion is the normal remedy for improperly obtained confessions, the only consequence here that makes sense is exclusion of any evidence obtained in violation of the statute. (*Cf. Case, supra*, 5 Cal.5th 1.22

Accordingly, the confession elicited in violation of this statute should not have been admitted.

C. THE ERROR IN ADMITTING THE STATEMENT WAS NOT HARMLESS.

Viewed as an error of state law, the effect of the erroneous admission of appellant's statements must be evaluated under California's "reasonable probability" standard. Reversal is thus required if there is a "reasonable probability" the result could have been different without the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) In this context, the Supreme Court has made it clear that "'probability' does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*. [Citations.]" (*People v. Wilkins* (2013) 56 Cal.4th 333, 351, internal quotation marks omitted, italics in text.) Therefore, if there is a "reasonable chance" even one juror would have had a reasonable doubt whether appellant committed the offense, the error requires reversal. (*People v. Soojian* (2010) 190 Cal.App.4th 491, 520.) Here, it is reasonably probable that admission of appellant's incriminating statements affected the outcome of the trial.

might lead a court to conclude admission of incriminating statements was harmless error, none of which is present in appellant's case. There was no eyewitness identification and no physical evidence was recovered which tied appellant to the crime. The only evidence besides appellant's statements was the extremely unreliable testimony by paid police informant, Ana Ortiz, whose testimony was so questionable that even the prosecutor expressed doubt about her veracity (3RT 946; see also 3RT 913-916) and expressly conceded in closing argument that "It is the recorded admission that is the damning evidence in this case." (3RT 916.)

The admission of appellant's confession -- the most probative and damaging evidence that could be admitted against him -- (*Arizona v. Fulminate, supra*, 499 U.S. at p. 296) was not harmless error. (*People v. Watson, supra*, 46 Cal.2d 818, 836.) His convictions must therefore be reversed.

D. IF THIS COURT FINDS THE ISSUE WAS FORFEITED, THEN THE ISSUE SHOULD BE ADDRESSED ON THE ALTERNATIVE BASIS THAT APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

As he did in connection with his earlier arguments, appellant recognizes that because his trial counsel did not make any objection to the admission of his statements the issue is likely forfeited for direct review (Evid. Code section 353) and must therefore be considered on the alternative basis that his trial counsel rendered ineffective assistance by not objecting to admission of his statements on the grounds raised herein.

Under both the Sixth Amendment of the United States Constitution and article I, section 15, of the California Constitution, appellant is guaranteed the right to effective assistance of counsel. (*Powell v. Alabama, supra*, 287 U.S. 45, 68; *Ledesma, supra*, 43 Cal.3d 171, 215.) In Argument I, Section D,

ineffective assistance of counsel argument, and incorporates the discussion of the legal and constitutional standards as more fully set out therein.

1. There Could Be No Reasonable, Tactical Basis For Counsel Not To Have Sought Exclusion Of Appellant's Inculpatory Statements On The Ground That They Were Obtained In Violation Of Section 4001.1.

Appellant's argument here is essentially the same as raised in connect with his earlier claims. Simply put, trial counsel could have had no reasonable, tactical, basis for not seeking to exclude the single most important piece of evidence against appellant. (See *Arizona v. Fulminate, supra*, 499 U.S. at p. 296.) There is nothing in or beyond the appellate record that could possibly provide a satisfactory explanation for counsel's failure to object to admission of this highly inculpatory evidence. Counsel's failure to seek exclusion of appellant's statements therefore fell below the objective standards of reasonableness. (*Strickland v. Washington, supra*, 466 U.S. 668, 688.)

2. It is Reasonably Probable That, But For Trial Counsel's Error, The Result Of The Proceedings Would Have Been Different.

The second prong of *Strickland* requires that a defendant demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. (*Strickland, supra*, 466 U.S. at pp. 693-695; *People v. Ledesma, supra*, 43 Cal.3d 171, 216-218.)

Appellant has already discussed why admission of his statements cannot be found harmless under either *Watson* or *Chapman*. There was no identification evidence, and no forensic evidence linking appellant to the shooting. The testimony by paid informant Ana Ortiz was so lacking in indicia of reliability that

return a guilty verdict, conceding that "It is the recorded admission that is the damning evidence in this case." (3RT 946; see also 3RT 913-916.)

It is thus reasonably probable that, but for the "damning evidence" of appellant's recorded incriminating statements, the result of these proceedings would have been different. Appellant's trial counsel was therefore ineffective for not objecting to admission of these statements, and appellant's

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court grant review and reverse the court of appeal's decision finding no error in the admission of petitioner's statements obtained during the *Perkins* operation.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ESTEBAN SAVLEDO

Date: MAY 10th 2022