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# ONE MINUTE BRIEF

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**NUMBER:** 2019-20    **DATE:** 09-06-19    **BY:** Devallis Rutledge    **TOPIC:** *Perkins* after *Miranda* Invocation

**ISSUE:** Once a Mirandized suspect has invoked *Miranda*, is it too late to conduct covert questioning by an undercover police officer or agent?

As a general rule, once a Mirandized suspect has requested counsel, no admissible statement can be taken from that suspect by police-initiated custodial interrogation, *Edwards v. Arizona* (1981) 451 US 477; see 1MB 2017-16, unless the suspect has been released from custody for at least 14 days. *Maryland v. Shatzer* (2010) 559 US 96; see 1MBs 2010-05, 2016-01.

In *Illinois v. Perkins* (1990) 496 US 292, the Supreme Court ruled that undercover custodial questioning is not subject to *Miranda*, as long as the suspect is **unaware** that he is talking to a government agent. See 1MBs 2005-14, 2012-01, 2015-17. *Perkins* involved questioning by an **undercover officer** posing as an inmate, but its rationale has also been applied to covert questioning by **informants** and **visitors**. *People v. Tate* (2010) 49 Cal.4<sup>th</sup> 635, 685-87; see 1MB 2015-17.

- When the undercover officer questioned Lloyd Perkins, however, **Perkins had not invoked *Miranda***. This fact was considered significant by Justice Brennan in his solo concurring opinion, and it is sometimes argued by defendants as a reason to exclude their statements made during covert questioning **after invocation**.

- By contrast, when police arranged for a surreptitiously-recorded meeting between custodial suspect Eduardo Orozco and his girlfriend, **Orozco had been Mirandized and had repeatedly asked for counsel**. Would his statements be *admissible* under *Perkins*, **even though** he had invoked counsel, or would they be *inadmissible* under *Edwards*, **because** he had invoked counsel? Short answer: **admissible**.

*“[T]his case squarely presents the question: When a suspect invokes his Miranda right to counsel and law enforcement **subsequently** orchestrates a conversation between the suspect and **someone the suspect does not know is an agent of law enforcement**, which decision controls—Edwards or Perkins? We conclude that **Perkins controls**....*

*“Perkins had a seven-justice majority, so Brennan’s concurrence was not the critical fifth vote; as a consequence, **the concurrence is dicta**. ...*

*“The officers’ deliberate circumvention of Miranda’s protections by disregarding defendant’s requests for counsel and orchestrating the monitored conversation between defendant and [his girlfriend] did not violate due process.”*

*People v. Orozco* (2019) 32 Cal.App.5<sup>th</sup> 802, 812-13, 815, 819 (Emphases added; review denied, June 12, 2019; petition for cert filed, August 19, 2019.)

(While Eduardo Orozco was “caring for” his six-month-old daughter, he beat her to death. She had 29 bruises, seven rib fractures, a punctured right lung and a lacerated liver. This was the kind of case in which a confession could be crucial, and for which “Perkins operations” can be extremely useful, if handled properly.

(To avoid Sixth Amendment/*Massiah* problems, **timing matters**. See 1MB 2015-17. Also, certain information may have to be **disclosed** under *Brady v. Maryland* and PC § 1054.1. For consultation and oversight on cases in the jurisdictions within Los Angeles County, the District Attorney’s Office has a *Perkins* committee and coordinator [perkinscoordinator@da.lacounty.gov], as well as specific protocols for handling cases involving “Perkins operations.” See SD 17-04 and LPM Ch. 27. In other jurisdictions, investigators may consult with local prosecutors as to local policies and practices.)

**BOTTOM LINE: Although litigation of *Miranda* issues can be reduced by the precaution of conducting *Perkins* operations without first having given a warning or seeking a waiver for overt interrogation, *Orozco* supports the admissibility of voluntary statements covertly obtained after an invocation, and before attachment of the Sixth Amendment right to counsel on the target offense.**

This information was current as of publication date. It is not intended as legal advice. It is recommended that readers check for subsequent developments, and consult legal advisors to ensure currency after publication. Local policies and procedures regarding application should be observed.