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.4th 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.5th 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.