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Criminal Procedure: Another Loophole in *Miranda*: The "Undercover Agent" Exception in *Illinois v. Perkins*

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I. Introduction

In *Illinois v. Perkins*,[1] an undercover law enforcement officer posing as an inmate employed a "jailbreak" ruse to elicit incriminating statements from the incarcerated Perkins. During the ruse, Perkins implicated himself in a murder. The United States Supreme Court held that an undercover law enforcement officer is not required to give *Miranda*[2] warnings to an incarcerated suspect before asking questions that may elicit incriminating statements.[3] According to the Court, interests protected by *Miranda* are not implicated by the use of undercover agents employed in the prison context.[4] Therefore, *Miranda* warnings are not required to safeguard the constitutional rights of inmates who make voluntary statements to undercover agents.[5]

This note begins by summarizing the background and facts of *Perkins*. Next, the majority opinion, Justice Brennan's concurrence and Justice Marshall's dissent are summarized. This note demonstrates that *Perkins* is not consistent with previous decisions involving jailhouse informants. In fact, this note concludes that *Perkins* creates an exception to *Miranda* that places little restriction on conduct which is designed to deliberately elicit statements from incarcerated suspects.

II. Law Prior to Illinois v. Perkins

The fifth amendment guarantees citizens the privilege against self-incrimination.[6] The Supreme Court secured this privilege in a landmark decision in *Miranda v. Arizona*.[7] *Miranda* established strict guidelines requiring that all subjects of custodial questioning[8] must be advised of their rights prior

1. 110 S. Ct. 2394 (1990).

2. Miranda v. Arizona, 384 U.S. 436 (1966); *see infra* notes 6-9 and accompanying text (discussion of *Miranda* and the Court's holding in that case).

3. *Perkins*, 110 S. Ct. at 2396.

4. *Id.* at 2399.

5. *Id.*

6. U.S. CONST. amend. V. The relevant part of the fifth amendment reads that no person "shall be compelled in any criminal case to be a witness against himself." *Id.*

7. 384 U.S. 436 (1966). In *Miranda*, police officers, detectives, and the prosecuting attorney questioned the defendant in a room cut off from the outside world. "[I]t is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity." *Miranda*, 384 U.S. at 457.

8. Custodial interrogation means, according to *Miranda*, "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444.

to any interrogation by police.[9] These guidelines are commonly referred to as *Miranda* rights.

In a subsequent decision, *Rhode Island v. Innis*,[10] the Court widened the scope of interrogation subject to *Miranda* requirements. In *Innis*, interrogation included not only express questioning by police but also any words or actions (other than those normally attendant to arrest and custody) that police should know are reasonably likely to elicit an incriminating response from the suspect.[11] Further, in *Moran v. Burbine*,[12] the Supreme Court identified the objective of *Miranda* as not to "mold police conduct for its own sake" but to dissipate the compulsion inherent in custodial interrogation to prevent abridgment of fifth amendment rights.[13]

Prior to *Perkins*, the Supreme Court had not resolved the question of whether *Miranda* requirements would apply when undercover agents question incarcerated suspects.[14] Lower courts were split over the issue.[15]

The Court previously had addressed the use of undercover agents or informants eliciting statements from incarcerated suspects in violation of

9. *Id.* at 467. *Miranda* requires that all subjects of custodial interrogation must be advised prior to questioning that: (1) they have the right to remain silent; (2) anything they say can be used against them in a court of law; (3) they have the right to have an attorney present; and (4) if they cannot afford an attorney one will be appointed for them prior to questioning if they so desire. *Miranda*, 384 U.S. at 479.

10. 446 U.S. 291 (1980).

11. *Innis*, 446 U.S. at 301. In *Innis*, a man arrested for murder asserted his right to counsel but then revealed the location of the weapon in response to conversation between two officers transporting him to the police station who speculated on the consequences should children find the hidden murder weapon before police. *Id.* at 294-95. The Court held that the conversation between the two officers did not constitute "interrogation" of the suspect. *Id.* at 300-02.

12. 475 U.S. 412 (1986). In *Moran*, the Court held that police failure to inform defendant of his attorney's phone call did not deprive defendant of information essential to knowingly waive his fifth amendment right to remain silent. *Id.* at 421-22.

13. *Id.* at 425.

14. The Court in *United States v. Henry* left open its position in *Hoffa v. United States* that the fifth amendment is not "implicated by the use of undercover Government agents before charges are filed because of the absence of the potential for compulsion." United States v. Henry, 447 U.S. 264, 272 (1980) (citing Hoffa v. United States, 385 U.S. 293 (1966)).

15. Cases that prohibit all undercover activities which authorities should know are reasonably likely to elicit incriminating responses from an inmate: People v. Perkins, 176 Ill. App. 3d 443, 531 N.E.2d 141 (App. Ct. 1988); Holyfield v. State, 101 Nev. 793, 711 P.2d 834 (1985); State v. Fuller, 204 Neb. 196, 281 N.W.2d 749 (1979); State v. Travis, 116 R.I. 678, 360 A.2d 548 (1976); State v. Calhoun, 479 So. 2d 241 (Fla. Dist. Ct. App. 1985); State v. Perkins, 753 S.W.2d 567 (Mo. Ct. App. 1988); United States v. Brown, 466 F.2d 493 (10th Cir. 1972). *Contra* People v. Williams, 44 Cal. 3d 1127, 751 P.2d 901, *cert. denied*, 109 S. Ct. 514 (1988) (*Miranda* inapplicable to conversations between inmates and undercover agents); State v. McDonald, 387 So. 2d 1116 (La.), *cert. denied*, 449 U.S. 957 (1980) (same where encounter not "intimidating"); People v. Aalbu, 696 P.2d 796 (Colo. 1985) (en banc) (same); United States v. Willoughby, 860 F.2d 15 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 846 (1989) (same).

See also Note, *Confusing the Fifth Amendment with the Sixth: Lower Court Misapplication of the* Innis *Definition of Interrogation*, 87 MICH. L. REV. 1073 (1989) (questioning of inmate by undisclosed government agent outside scope of *Miranda*).

the sixth amendment right to counsel.[16] In 1980, the Court in *United States v. Henry*,[17] held that the defendant's sixth amendment right to counsel is violated when a fellow inmate (a government informant) intentionally creates a situation likely to induce the indicted defendant to make incriminating statements without assistance of counsel.[18]

Six years later, in *Kuhlmann v. Wilson*,[19] the Court reiterated its concern with interrogation and/or investigative techniques equivalent to interrogation.[20] *Kuhlmann* held that the sixth amendment right to counsel is not violated by a defendant's incriminating statements to a jailhouse informant placed in close proximity when the informant makes no effort to stimulate conversations about the crime charged.[21] Thus, *Perkins* presented the Court with the opportunity to apply the *Miranda* doctrine in the prison context when the sixth amendment right to counsel protections are inapplicable.

III. Facts of Illinois v. Perkins

In 1984, Richard Stephenson was shot and killed in a suburb of East St. Louis, Illinois. In 1986, police learned that Donald Charlton, an inmate serving a prison sentence for burglary at the Graham Correctional Facility in Illinois, had information concerning the homicide.[22] Charlton told police that while at Graham he met Perkins, a fellow inmate. According to Charlton, Perkins confessed to him in detail about a homicide he had committed two years earlier in an East St. Louis suburb. Because Charlton reported details of the murder not released to the public, police found Charlton's story credible.

By the time police heard Charlton's account, Perkins had been released from Graham. Later that month, police learned that Perkins was incarcerated in a jail in Montgomery County, Illinois, facing aggravated battery charges unrelated to the Stephenson murder. Police decided to elicit information about the Stephenson murder from Perkins through an undercover police agent placed in the cellblock with Perkins.[23] As part of the ruse,

16. The sixth amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence [sic]." U.S. CONST. amend. VI. After formal charges are filed against the subject of interrogation, the sixth amendment prohibits government interference with right to counsel of accused. Maine v. Moulton, 474 U.S. 159, 176 (1985); *see also* Massiah v. United States 377 U.S. 201 (1964); United States v. Henry, 447 U.S. 264 (1980).

17. 447 U.S. 264 (1980).

18. *Id.* at 274.

19. 477 U.S. 436 (1986).

20. *Id.* at 457.

21. *Id.* at 456.

22. Charlton agreed to cooperate with police without a "deal" in exchange for his information. Petitioner's Brief on the Merits at 3, Illinois v. Perkins, 110 S. Ct. 2394 (1990) (No. 88-1972). Charlton said he relayed the information to police because he believed that "[p]eople should not kill people." People v. Perkins, 176 Ill. App. 3d 443, 531 N.E.2d 141, 142 (App. Ct. 1988).

23. Police feared that the use of an eavesdropping device in the jail would be unsafe and impracticable. Petitioner's Brief on the Merits at 3-4, *Perkins* (No. 88-1972).

Charlton and police officer John Parisi posed as escapees from Graham's work release program.[24] Police instructed Parisi and Charlton not to question Perkins about the murder, but merely to engage him in conversation and relay any information obtained.[25]

Police placed Parisi and Charlton, wearing jail garb, in the cellblock with Perkins at the Montgomery County jail. Charlton introduced Parisi to Perkins as "Vito." Parisi told Perkins about his and Charlton's escape from Graham. Parisi also said that he wasn't going to do any more time and he "needed to get out of there."[26] Perkins replied that he could have a gun smuggled in to take the elderly jailor hostage and showed Parisi a crowbar hidden for use in the jail break.

Later that evening, while other inmates slept, the trio met again to refine their plan. Perkins began by saying that his girlfriend could smuggle in a pistol. Parisi asked Perkins if he had ever "done" anybody. Perkins then recounted details of his involvement in the Stephenson murder in response to questions from Parisi and Charlton.[27] Parisi and Perkins then engaged in casual conversation before Perkins fell asleep.

24. Police developed the story that Charlton and Parisi had escaped from Graham, traveled to the area to meet Perkins, run out of money, committed burglaries, been arrested, and thrown in jail. *Id.*

25. Parisi had skimmed Charlton's interview with police, but was unfamiliar with the details of the Stephenson murder. *Id.*

26. *Id.* at 5.

27. Parisi summarized the rest of the conversation with Perkins:

> [Parisi:] You ever do anyone?
> [Perkins:] Yeah, once in East St. Louis, in a rich white neighborhood . . . by a race track in Fairview Heights
>
> * * *
>
> Me and two guys cased the house for about a week . . . the second house on the left from the corner.
> [Parisi:] How long ago did this happen?
> Perkins: Approximately about two years ago. I got paid $5,000 for that job.
> [Parisi:] How did it go down?
> Perkins: I walked up to this guy['s] house with a sawed-off under my trench coat.
> [Parisi:] What type gun[?]
> Perkins: A .12 gauge Remington Automatic Model 1100 sawed-off . . . . I rang the bell and . . . he motioned for me to go to the garage . . . .
> [Parisi:] How old was the dude?
> Perkins: About 40. So the garage door starts to open and I ask the dude [his name] . . . .
> Charlton: What kind of door was it?
> Perkins: An automatic garage door. I know because I heard the motor . . . .
> Charlton: Where did you shoot him?
> Perkins: In the right leg . . . . [He bled to death]
> [Parisi:] What size shells did you use?
> Perkins: I don't know what size . . . . So I ejected the shell and was going to shoot him again, but [the] dogs were barking in the garage and the shot made a lot of noise, so I just started running.
>
> * * *
>
> An old lady from across the street came out but I don't think she could recognize

The next morning, police removed Parisi and Charlton from the cellblock. Later, police brought Perkins to the courthouse and arrested him for Stephenson's murder. At that time, Perkins received *Miranda* warnings and requested counsel. Before trial, the court granted Perkins' motion to suppress his statements on the ground that government agents questioned Perkins while in custody and without *Miranda* warnings.[28] The state appealed to the Appellate Court of Illinois on the sole issue of whether Perkins' fifth amendment rights were violated.[29] The Appellate Court of Illinois held that the failure to warn Perkins pursuant to *Miranda* rendered his statements to undercover agent Parisi and informant Charlton inadmissible.[30]

IV. Summary of the Opinions in Illinois v. Perkins

A. The Majority Opinion

In *Perkins*, the United States Supreme Court reversed and remanded, holding that an undercover law enforcement officer posing as a fellow inmate need not give *Miranda* warnings to an incarcerated suspect before asking questions that may elicit incriminating responses.[31] Justice Kennedy, writing for the majority,[32] explained that warnings are not required to safeguard constitutional rights of inmates who make statements to undercover agents. Interests protected by *Miranda* are not implicated in these cases.[33]

Initially, the majority noted that procedural safeguards of *Miranda* warnings serve to preserve the fifth amendment privilege during incommunicado interrogation of suspects in a police-dominated atmosphere. This atmosphere produces inherently compelling pressures on suspects to confess involuntar-

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me because it was 8:30 at night and it was getting dark.
* * *
[Parisi:] Who had the guy done?
Perkins: One of the guys in the car. He worked with him somehow.
* * *
He owed him money for drugs . . . .
Charlton: What did you do with the gun?
Perkins: I threw it over a four or five hundred foot cliff as you are going into Litchfield.

Id. at 5-8.

28. *Id.* at 10.

29. *Id.*

30. People v. Perkins, 176 Ill. App. 3d 443, 531 N.E.2d 141, 146 (App. Ct. 1988).

31. *Perkins*, 110 S. Ct. at 2399.

32. Chief Justice Rehnquist and Justices White, Blackmun, Stevens, O'Connor, and Scalia joined Justice Kennedy.

33. *Perkins*, 110 S. Ct. at 2399. The Court noted that the use of undercover agents is a recognized law enforcement technique, often employed in the prison context to detect violence against correctional officers or inmates. *See also* Dix, *Undercover Investigations and Police Rulemaking*, 53 TEX. L. REV. 203 (1975) (discussing problems in developing workable guidelines for use by undercover agents in investigations).

ily.[34] The requirements of *Miranda*, however, would be enforced only in those situations that implicate the concerns underlying *Miranda*.[35]

According to the majority, questioning by captors who appear to control the suspect's fate may create pressures that will "weaken the suspect's will."[36] The conversation between Perkins and the two police agents, however, lacked the essential factors important in *Miranda*: a police-dominated atmosphere and compulsion.[37] Because Perkins spoke freely to those whom he considered fellow inmates, the coercive atmosphere was lacking.[38]

Miranda's premise is that the danger of coercion results from interaction between custody and official interrogation. When the police agent wears the same prison gray uniform as the suspect, however, there is no "interplay" between police interrogation and police custody.[39] Hence, *Miranda* warnings are not required when a suspect is in custody in a technical sense and converses unknowingly with a government agent.[40]

The majority asserted that detention does not warrant a presumption that undercover questioning would render resulting statements involuntary and, thus, inadmissible.[41] Statements given freely and voluntarily without any compelling influences are still admissible in evidence.[42] Although coercion is forbidden, strategic deceptions[43] that mislead a suspect or lull him into a false sense of security are not the compulsion or coercion concerns underlying *Miranda*.[44] Thus, *Miranda* does not protect suspects who boast about their criminal activities in front of persons whom they believe to be their cellmates.[45] Next, the majority addressed *Hoffa v. United States*[46] and *Mathis v. United States*.[47] In *Hoffa*, the Court held permissible under the fifth amendment the placement of an undercover agent near a suspect in order to gather incriminating information.[48] The fact that the undercover agent

34. *Perkins*, 110 S. Ct. at 2397 (quoting Miranda v. Arizona, 384 U.S. 436, 437 (1966)).

35. *Id.* (citing Berkemer v. McCarty, 468 U.S. 420, 437 (1984)).

36. *Perkins*, 110 S. Ct. at 2397.

37. *Id.*

38. Trickery of the "jail plant" ploy affords the suspect no opportunity to apply his powers of resistance because the peril of speaking is hidden from him. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 606 (1979).

39. *Perkins*, 110 S. Ct. at 2397 (quoting Kamisar, *Brewer v. Williams, Massiah and Miranda: What is "Interrogation"? When Does it Matter?*, 67 GEO. L.J. 1, 67, 63 (1978)). "[T]here is no '*interplay* between police interrogation and police custody,'" at least where it counts — in the suspect's mind. As far as the suspect is aware, the suspect is not "surrounded by antagonistic forces." *Id.* at 64 (emphasis in original).

40. *Perkins*, 110 S. Ct. at 2397.

41. *Id.* at 2398.

42. *Id.* at 2397 (quoting Miranda v. Arizona, 384 U.S. 436, 478 (1966).

43. Use of trickery or deceit in the questioning of criminal suspects is a staple of current police interrogation practices. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979).

44. *Perkins*, 110 S. Ct. at 2397.

45. *Id.* at 2398. Coercion is determined from the perspective of the suspect. Rhode Island v. Innis, 446 U.S. 291, 301 (1980); Berkemer v. McCarty, 468 U.S. 420, 442 (1984).

46. 385 U.S. 293 (1966).

47. 391 U.S. 1 (1968).

48. *Hoffa*, 385 U.S. at 304.

fooled the suspect into thinking he was a sympathetic colleague did not affect the voluntariness of the statements.[49] The only difference between *Perkins* and *Hoffa*, noted the majority, was the incarceration of Perkins.[50]

In *Mathis*, the Court held inadmissible under the fifth amendment an inmate's incriminating statements disclosed during questioning by an Internal Revenue Service agent about possible tax fraud charges.[51] The majority held *Mathis* inapposite because there is no presumption of coercion when the inmate is unaware that he is speaking to a government agent.[52]

The majority in *Perkins* also noted that the sixth amendment precedents were inapplicable because charges had not been filed on the murder which was the subject of the interrogation.[53] Finally, the majority observed that police will have little difficulty applying the *Perkins* holding that undercover agents need not give *Miranda* warnings to incarcerated suspects.[54] Finding no federal obstacle to the admissibility of Perkins' statements at trial, the Court reversed and remanded.[55]

B. The Concurring Opinion

Justice Brennan[56] concurred with the majority that *Miranda* is inapplicable when a suspect is unaware that his questioner is a police agent.[57] Brennan emphasized, however, that the issue on appeal focused on the applicability of *Miranda* to questioning of incarcerated suspects by undercover agents.[58] Therefore, if Perkins had invoked his fifth amendment right to silence and/or his sixth amendment right to counsel, the proper inquiry would focus on whether he subsequently waived his asserted rights.[59]

49. *Perkins*, 110 S. Ct. at 2398 (referring to *Hoffa*, 385 U.S. at 304) (during Hoffa's trial, an undercover agent reported Hoffa had divulged his attempts to bribe jury members).

50. *Id.*

51. *Mathis*, 391 U.S. at 4-5.

52. *Perkins*, 110 S. Ct. at 2398.

53. *Id.* at 2399; *see supra* notes 16-21 for discussion of the sixth amendment cases.

54. *Id.*

55. *Id.*

56. At the time this note was written, Judge David Souter had replaced Justice Brennan on the Court.

57. *Perkins*, 110 S. Ct. at 2399 (Brennan, J., concurring).

58. *Id.* The record does not indicate whether Perkins previously invoked either his sixth amendment right to counsel or fifth amendment right to silence on the aggravated battery charge. Also, the record does not indicate whether police had formally or informally charged Perkins with either aggravated battery or Stephenson's murder. The sixth amendment prohibits police interference with right to counsel after charges are filed on the subject of the interrogation. Kuhlmann v. Wilson, 477 U.S. 436, 458 n.21 (1986) (same); Moran v. Burbine, 475 U.S. 412, 431 (1986) (same); Maine v. Moulton, 474 U.S. 159, 180 n.16 (1985) (statements obtained in violation of the sixth amendment right to counsel must be excluded only from trial of offense as to which right has attached). However, if police had formally charged Perkins with aggravated battery and he had invoked his right to counsel or *Miranda* rights, he might challenge admissibility of his incriminating statements. *See* Arizona v. Roberson, 486 U.S. 675 (1988) (invocation of fifth amendment right to counsel by one in custody prohibits police from initiating "custodial interrogation" concerning even separate crimes).

59. *Perkins*, 110 S. Ct. at 2399 (Brennan, J., concurring). Waiver of *Miranda* rights "must

Justice Brennan stated that the Constitution does not condone the method used to elicit the confession in *Perkins*.[60] Brennan emphasized that certain interrogation techniques, such as the deception and manipulation practiced on Perkins, are "offensive to a civilized system of justice" and thus condemned under the due process clause of the fourteenth amendment.[61] Nevertheless, Brennan concurred, but only on the sole issue of the applicability of *Miranda*.

While custody itself imposes pressures on the accused, Justice Brennan noted, confinement may produce subtle influences, making the accused particularly susceptible to the "ploys of undercover government agents."[62] Further, Brennan suggested that the state is in a unique position to exploit a suspect's vulnerability because it has complete control over the suspect's environment.[63] Therefore, the state can ensure that the suspect is barraged with questions from an undercover agent until the suspect confesses.[64]

Finally, Justice Brennan concluded that the lower court on remand should determine whether, under the totality of the circumstances, police elicited Perkins' confession in a manner that violated the due process clause of the fourteenth amendment.[65] Brennan added that although the confession was not elicited by means of physical torture[66] or overt psychological pressure,[67] a court's duty to enforce federal constitutional protections does not cease, but only becomes more difficult, because of the more delicate judgments to be made.[68]

C. *The Dissenting Opinion*

In dissent, Justice Marshall argued that Perkins was in custody as that term is defined in *Miranda* because police questioned Perkins in jail.[69] Marshall rejected the argument that Perkins was not in custody for purposes of *Miranda* because of his familiarity with the custodial environment as a result of spending two days in jail.[70]

[be] voluntary in the sense that it [must be] the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Burbine*, 475 U.S. at 421.

60. *Perkins*, 110 S. Ct. at 2399 (Brennan, J., concurring).

61. *Id.* at 2399-400 (Brennan, J., concurring) (quoting Miller v. Fenton, 474 U.S. 104, 109-10 (1985), *cert. denied*, Miller v. Neubert, 479 U.S. 989 (1986)).

62. *Id.* at 2400 (quoting United States v. Henry, 447 U.S. 264, 274 (1980)).

63. *Id.* (Brennan, J., concurring).

64. *Id.*

65. *Id.* at 2400-01 (Brennan, J., concurring).

66. *See* Brown v. Mississippi, 297 U.S. 278 (1936).

67. *See* Payne v. Arkansas, 356 U.S. 560 (1958).

68. *Perkins*, 110 S. Ct. at 2401 (Brennan, J., concurring) (quoting Spano v. New York, 360 U.S. 315, 321 (1959), *overruled*, Miranda v. Arizona, 384 U.S. 436 (1966)).

69. *Id.* at 2401 (Marshall, J., dissenting).

70. *Id. Cf.* Orozco v. Texas, 394 U.S. 324 (1969) (suspect who had been arrested in his home and questioned in his bedroom was in custody, notwithstanding his familiarity with the surroundings).

Although the majority downplayed the nature of the interrogation by "disingenuously" referring to the questioning as conversation,[71] Marshall insisted that the conversation became an interrogation because police subjected Perkins to express questioning intended to evoke an incriminating response.[72] Therefore, in Marshall's view, police should have informed Perkins of his *Miranda* rights.[73]

According to Marshall, the concerns underlying *Miranda* include not only police coercion.[74] Such concerns also include any police tactics that might compel a suspect in custody to make incriminating statements without full awareness of his constitutional rights.[75] Therefore, the compulsion proscribed by *Miranda* includes deception by the police.[76] Marshall distinguished the deceptive interrogation tactics in *Hoffa v. United States*[77] by noting that Hoffa was not in custody, as was Perkins.[78]

Next, Marshall emphasized the state's advantage in obtaining incriminating statements from incarcerated suspects because psychological pressures inherent in confinement increase a suspect's anxiety and make him likely to seek relief by confiding in others.[79] Police control over the people with whom the suspect may confide presents unique opportunities to exploit the suspect's vulnerability. Thus, if pressures of confinement make the suspect confide in anyone, police can make sure it will be their agent.[80]

Moreover, Marshall stated that an incarcerated suspect is under the constant threat of physical danger peculiar to the prison environment.[81] An inmate may have to demonstrate his toughness to other inmates by recounting or inventing past violent acts.[82] Marshall charged that police deceptively

71. *Id.*

72. *Id.* at 2402; *see* Rhode Island v. Innis, 446 U.S. 291 (1980).

73. *Id.*

74. *Id.*

75. *Id.*; *see Miranda*, 384 U.S. at 468 (referring to "inherent pressures of the interrogation atmosphere"); Estelle v. Smith, 451 U.S. 454, 467 (1981) ("The purpose of [*Miranda*] admonitions is to combat what the Court saw as 'inherently compelling pressures' at work on the person and to provide him with an awareness of the Fifth Amendment privilege and the consequences of forgoing it") (quoting *Miranda*, 384 U.S. at 467).

76. *Id.* Justice Marshall referred to the following: *Miranda*, 384 U.S. at 453 (indicting police tactics "to induce a confession out of trickery," such as using fictitious witnesses or false accusations); Berkemer v. McCarty, 468 U.S. 420, 433 (1984) ("The purposes of the safeguards prescribed by *Miranda* are to ensure that the police do not coerce *or* trick captive suspects into confessing") (emphasis deleted, emphasis added); *cf.* Moran v. Burbine, 475 U.S. 412, 421 (1986) ("[T]he relinquishment of the right [protected by the *Miranda* warnings] must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, *or* deception.") (emphasis added).

77. 385 U.S. 293 (1966), *reh'g denied*, 386 U.S. 940, 951 (1967).

78. *Perkins*, 110 S. Ct. at 2402.

79. *Id.* at 2403. Justice Marshall referenced his statements to Dix, *Undercover Investigations and Police Rulemaking*, 53 TEX. L. REV. 203, 230 (1975).

80. *Id.* (quoting White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 605 (1979)).

81. *Id.*

82. *Perkins*, 110 S. Ct. at 2403.

took advantage of Perkins' psychological vulnerability by suggesting a sham jailbreak.[83] In such a situation, Perkins could have felt compelled to demonstrate his willingness to shoot a guard by recounting his past involvement in a murder.[84]

According to Marshall, *Miranda* warnings are required because these custodial pressures allow deceptive interrogation tactics that compel suspects to make incriminating statements.[85] This compulsion is not eliminated simply because the suspect is unaware that his interrogator is a police agent.[86]

Justice Marshall reminded the majority that their opinion was incompatible with the Court's consistently held principle that *Miranda* should remain "clear and simple."[87] Such a bright line rule,[88] that *Miranda* warnings precede any custodial interrogation, serves to inform with specificity what law enforcement officers may do in conducting interrogations.[89] Finally, Marshall warned of the disturbing ramifications of *Perkins* and its undercover agent exception to *Miranda*.[90]

V. Analysis

Rights declared in words might be lost in reality.

— Justice McKenna[91]

Perkins[92] establishes that an undercover officer posing as a fellow inmate need not give *Miranda* warnings to an incarcerated suspect before asking questions that may elicit an incriminating response.[93] By determining that conversations between an incarcerated suspect and an undercover police agent do not implicate the concerns underlying *Miranda*,[94] the Court has created another exception to custodial interrogation.[95]

83. *Id.*

84. *Id.* Agent Parisi stressed that a killing may be necessary in the escape and then asked Perkins if he had ever murdered someone.

85. *Id.*

86. *Id.* (Marshall, J., dissenting).

87. *Id.* Justice Marshall referred to the following: *Miranda*, 384 U.S. at 441-42 (noting that one reason certiorari was granted was "to give concrete guidelines for law enforcement agencies and courts to follow"); *McCarty*, 468 U.S. at 430 (noting that one of "the principal advantages of the [*Miranda*] doctrine . . . is the clarity of that rule"); *Roberson*, 486 U.S. at 680 (same); *see also* New York v. Quarles, 467 U.S. 649, 657-58 (1984) (recognizing need for clarity in *Miranda* doctrine but finding narrow "public safety" exception does not significantly lessen clarity and is easy for police to apply).

88. Justice Marshall is referring to Fare v. Michael C., 442 U.S. 707, *reh'g denied*, 444 U.S. 887 (1979).

89. *Perkins*, 110 S. Ct. at 2403-04. Justice Marshall is quoting from *Fare*, 442 U.S. at 718.

90. *Id.*

91. Weems v. United States, 217 U.S. 349, 373 (1910).

92. 110 S. Ct. 2394 (1990).

93. *Perkins*, 110 S. Ct. at 2399.

94. *Id.* at 2397.

95. The Court has construed "custody" to exclude situations involving detainment of a

This exception seems clear: undercover agents need not give *Miranda* warnings to incarcerated suspects. As Marshall noted in *Perkins*, however, the outer boundaries of this exception are by no means clear.[96] *Perkins* would not permit such obvious compulsion as an undercover agent threatening an inmate into confessing.[97] Nevertheless, left unresolved in *Perkins* is how far police undercover agents or jailhouse informants may go in their attempts to deliberately elicit incriminating statements from incarcerated suspects.[98]

The Court, in *Moran v. Burbine*,[99] noted that custodial interrogations are composed of two competing concerns: (1) the need for police questioning as a tool for effective law enforcement; and (2) the risk that police will inadvertently cross the line between legitimate efforts to elicit admissions and impermissible compulsion.[100] *Miranda* tried to reconcile these opposing concerns, according to *Moran*, by giving the suspect some control over the interrogation.[101]

Perkins, however, could not exert control over the interrogation. Perkins remained unaware of any interrogation because he viewed agent Parisi as a fellow cellmate. The fact that police exerted control over the course of the interrogation, nevertheless, is apparent by the specific questions asked by Parisi and Charlton in an attempt to manipulatively invoke incriminating responses from Perkins.[102]

Moreover, the Court in *Perkins* concluded that *Miranda* offered no protection for suspects boasting about their criminal activities to cellmates.[103]

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suspect which are not "police-dominated" in Berkemer v. McCarty, 468 U.S. 420, 439 (1984). The Court held that roadside questioning of a motorist detained pursuant to routine traffic stop did not constitute "custodial interrogation." *Id.* at 441. The Court noted that a routine traffic stop exposed to public view "both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist's fear that, if he does not cooperate, he will be subjected to abuse." *Id.* at 438.

96. *Id.* at 2404.

97. The Supreme Court has prohibited invidious police conduct in obtaining involuntary confessions. *See* Payne v. Arkansas, 356 U.S. 560 (1958) (defendant confessed after police implied that a mob was after him and that he would be protected if he told the truth); Chambers v. Florida, 309 U.S. 227 (1940) (defendant subjected to repeated questioning over seven days while being held incommunicado); Brown v. Mississippi, 297 U.S. 278 (1936) (defendant twice hung to a tree and then whipped).

98. Both Justice Brennan's concurrence and Justice Marshall's dissent took issue with the majority's approval of the deception and manipulation used to elicit the confession from Perkins. Police agencies also recognize that deception as a tool in law enforcement is often viewed with distaste by community members. Dix, *supra*, note 33, at 208.

99. 475 U.S. 412 (1986). For a discussion of *Moran*, see *supra* note 11 and accompanying text.

100. *Id.* at 426.

101. *Id.*

102. For the text of the conversation between Perkins and Parisi and Charlton, see *supra* note 27.

103. *Perkins*, 110 S. Ct. at 2398.

However, Perkins made statements about his prior criminal activities only after police devised a ruse — the jailbreak — to lure him into incriminating himself. Such action by Parisi and Charlton beyond merely listening should have traversed that fine line between legitimate and impermissible compulsion.

The Court's previous decisions involving jailhouse informants violating the sixth amendment right to counsel suggest that Parisi and Charlton's action became impermissible compulsion.[104] The Court in *United States v. Henry*[105] held that although the jailhouse informant did not directly question defendant, the informant "stimulated" conversation with defendant in order to elicit incriminating information in violation of the right to counsel.[106]

In *Kuhlmann*,[107] the Court found no violation of the sixth amendment right to counsel where a jailhouse informant acted as a "listening post" without "participating in active conversation and prompting particular replies."[108] Clearly, in *Perkins*, Parisi did not act as a mere listening post but subjected Perkins to deliberate questioning in order to "stimulate" an incriminating conversation.[109]

This "listening post" rationale is also inferred beyond the sixth amendment cases. In *Hoffa*, police requested the government informant to only report information of illegal activity of which he became aware.[110] There are no indications in *Hoffa* that the informant made any attempt to deliberately elicit incriminating information from the suspect.[111] In fact, Chief Justice Warren noted that the informant became the equivalent of a "bugging device" that reported everything seen or heard.[112]

The better reasoned rule from *Perkins* would remain consistent with the sixth amendment cases by allowing admission of incriminating statements if the undercover agent served only as a listening post and made no deliberate attempt to elicit statements.[113] Such a rule would offer some measure of

104. This note is aware that "the policies underlying the two constitutional protections [fifth and sixth amendments] are quite distinct." Rhode Island v. Innis, 446 U.S. 291, 300. n.4. However, the rationale of prohibiting the use of undercover agents in deliberately eliciting incriminating statements from incarcerated suspects in violation of the sixth amendment right to counsel should be incorporated into *Perkins*. The overriding policy would be that coercive police tactics against an incarcerated suspect create an unacceptable risk of infringement of the suspect's constitutional rights. *See also* Dix, *supra* note 33; Arizona v. Fulminante, 111 S. Ct. 1246, 1266 (1991) (impossible to create a meaningful distinction between confessions elicited in violation of the sixth amendment and those in violation of the fourteenth amendment).

105. 447 U.S. 264 (1980); *see supra* notes 17-18 and accompanying text.

106. *Henry*, 447 U.S. at 273.

107. 477 U.S. 436 (1986) ; *see supra* notes 19-20 and accompanying text.

108. *Id.* at 456 n.19.

109. For the text of the conversation between Perkins and Parisi and Charlton, see *supra* note 26.

110. Hoffa v. United States, 385 U.S. 293, 299 n.4 (1966).

111. In *Moran*, the suspect, not police, initiated the conversation that led to the damaging confession. Moran v. Burbine, 475 U.S. 412, 421-22 (1986).

112. *Hoffa*, 385 U.S. at 319 (Warren, C.J., dissenting).

113. Per se rules, prohibiting certain police tactics, would provide better guidance for the

protection against possible future abuse resulting from an informant's zeal in obtaining incriminating, but involuntary, statements from incarcerated suspects. Unfortunately, the actual rule enunciated in *Perkins* leaves little constitutional protection between incarcerated suspects and their captors.

Finally, *Perkins* may only serve to increase tension in our overcrowded and volatile prison systems.[114] Thus, an inmate turned informant could threaten or bully a fellow inmate into making a confession free of *Miranda* constraints in order to gain favor from law enforcement officers.[115] *Perkins* is too broad in the unique context of the prison environment where the constant threat of physical danger increases the potential for abuse of constitutional rights.[116]

Effective law enforcement should not sacrifice constitutional guarantees. The rule in *Perkins* jeopardizes constitutional protections for incarcerated suspects because of the state's unique position to exploit an inmate's vulnerability. In resolving this issue in future cases, the Court should heed the warning from Justice McKenna that our rights declared in words may become lost in reality.[117]

VI. Conclusion

Perkins establishes an exception to *Miranda* whenever an undercover agent converses with an incarcerated suspect. *Perkins* should have allowed admission of incriminating statements only when the undercover agent listened and made no deliberate attempt to question the suspect about the crime. Unfortunately, *Perkins* offers little constitutional protection for incarcerated

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police and increased protection for suspects. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 599 (1979).

114. "[I]t is traditional that informants, called 'rats' or 'snitches,' are to be punished [by other inmates] with severe beatings or death." L. BOWKER, PRISON VICTIMIZATION 27 (1980). Justice Marshall also noted the "constant threat of physical danger peculiar to the prison environment . . . ." *Perkins*, 110 S. Ct. at 2403.

115. Alas, the possibility for abuse may have become a reality. On March 26, 1990, the Supreme Court granted certiorari in *Arizona v. Fulminante*. The case involved an inmate acting as a government informer who offered to protect defendant from other inmates, who had been giving defendant "rough treatment," if defendant confessed to killing a child. In exchange for informant's protection, defendant confessed and was convicted based upon the strength of the confessions. In *State v. Fulminante*, the Arizona Supreme Court held that the informer exerted improper coercion, but error was harmless in admitting confession in view of second voluntary confession to another person. On reconsideration, the court held that error in admitting coerced confession is never harmless and reverses conviction. State v. Fulminante, 778 P.2d 602, 627 (Ariz. 1988).

116. "Prison is a barely controlled jungle where the aggressive and the strong will exploit the weak and the weak are dreadfully aware of it." L. BOWKER, *supra* note 110, at 19.

117. In a 5-4 decision, the Supreme Court in *Arizona v. Fulminante* broke with precedent and held that the harmless error rule of *Chapman v. California* is applicable to the admission of involuntary/coerced confessions. Arizona v. Fulminante, 111 S. Ct. 1246, 1254 (1991) (citing Chapman v. California, 386 U.S. 18 (1967)).

suspects against possible abuse from conduct directed toward eliciting incriminating statements.

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