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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>DEMECIO C. PEREZ,<br><br>Defendant and Appellant. | B280410<br><br>Los Angeles County<br>Super. Ct. No. TA136425 |

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura R. Walton, Judge. Reversed.

Matthew D. Alger, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., Shawn McGahey Webb, and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

This appeal presents the issue of whether defendant Demecio Perez's Sixth Amendment right to counsel was violated when, after he was formally charged with two murders and an attempted murder, extradited from Mexico, taken into custody, and advised of his *Miranda* rights, and after he expressly requested counsel, police placed him into a jail cell with a paid police informant in the hopes of eliciting incriminating statements. During a two-hour conversation with this informant, Perez made incriminating statements about the charged crimes. Over Perez's Sixth Amendment objection, the trial judge allowed a recording and transcript of this conversation to be presented at trial.

*Massiah v. United States* (1964) 377 U.S. 201 (*Massiah*) holds that the government violates a defendant's Sixth Amendment right to counsel when it introduces into evidence incriminating statements deliberately elicited from the defendant by agents of the state, outside the presence of counsel, after the commencement of criminal proceedings. The protections afforded under the Sixth Amendment attach when the "government has committed itself to prosecute[.]" (*Kirby v. Illinois* (1972) 406 U.S. 682, 689–690 (*Kirby*).) At that point, the defendant "finds himself faced with the prosecutorial forces of organized society and immersed in the intricacies of substantive and procedural criminal law." (*Ibid.*)

We conclude Perez's right to counsel attached before he made incriminating statements to the informant on May 17, 2015, because the government had committed itself to prosecute Perez before that date. Specifically, on May 12, 1995, the prosecutor obtained an arrest warrant and filed a juvenile

petition charging Perez with the two murders and the attempted murder for which he was ultimately convicted in this case more than 20 years later; on May 4, 2015, the prosecutor filed a felony complaint in this case charging Perez with the two murders and the attempted murder; and, on May 5, 2015, the prosecutor amended the 1995 juvenile petition to secure Perez's extradition from Mexico for those crimes. Further, after obtaining the warrant for Perez's arrest and filing the juvenile petition against Perez in May 1995, the prosecutor did not pursue any other suspects for those crimes in the intervening 20 years. In reaching our conclusion that the right to counsel had attached, we adopt the reasoning and rationale of the Sixth District's opinion in *People v. Viray* (2005) 134 Cal.App.4th 1186 (*Viray*) and the United States Supreme Court decisions upon which it rests.

We further hold that the conduct engaged in here—essentially, a continuation of police interrogation by a paid informant who had been placed in Perez's jail cell in the hopes of eliciting incriminating statements—was a critical stage of the prosecution for which counsel was required to be present. Critical stages in the criminal process are those " 'where the results might well settle the accused's fate and reduce the trial itself to a mere formality.' " (*Maine v. Moulton* (1985) 474 U.S. 159, 170.) The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a " 'medium' " between him and the State. (*Id.* at p. 176.)

Finally, the other evidence of Perez's guilt did not render the erroneous admission of his statements harmless. To the contrary, all three eyewitnesses who testified at the trial either recanted, could not recall but doubted their earlier statements, or changed their testimony and then recanted their 20-year-old

identifications of Perez as the shooter. To be sure, these eyewitnesses were impeached by their prior statements, Perez owned the car believed to have been used in the crime, and Perez fled to Mexico for 20 years. Nevertheless, without his own words implicating him in the shooting, this evidence could not have secured a conviction beyond a reasonable doubt.

Because the erroneous admission of statements obtained in violation of the Sixth Amendment was not harmless beyond a reasonable doubt, the judgment must be reversed.[1]

## BACKGROUND

### 1. The 1995 Drive-by Shooting and Investigation

On February 14, 1995, Adan Castaneda's car wouldn't start. Wanting to take his family out for dinner that evening, Castaneda took his car to a 16-year-old neighbor and mechanic, Johnny G., to see if he could fix it.[2] Johnny's house was on South Hickory Street in Los Angeles, between 96th and 97th Streets. Joining Castenada that morning in front of Johnny's house were Jose Juarez—Castaneda's housemate and a fellow member of the Krazy Mexican Town criminal street gang (KMT)—and Miguel S., another KMT member, who was having Johnny change the oil in his car.

According to statements made shortly after the events, Miguel saw a black Buick Regal pull up about two feet from where he was standing with Juarez. Miguel turned and saw that

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[1] Because we reverse on this basis, we do not address Perez's remaining claims of error.

[2] We identify witnesses who were juveniles in 1995 by their first names and last initials. (Cal. Rules of Court, rule 8.90(b)(10).)

the front passenger had his right arm on the window frame. In his right hand, the passenger was holding a black semiautomatic handgun. The front passenger asked, "Hey, where you vatos from?" Miguel believed Juarez had replied "KMT." Miguel said, "Oh shit, he has a strap" (meaning a gun) and took off running. As he fled, Miguel heard three or four gunshots. Miguel ran behind his car and up the driveway into Johnny's garage. He later described the shooter as an 18- to 19-year-old male with a bald head and said that the car was a black Riviera with tinted back windows.

Johnny also spoke to the police shortly after the shooting. According to him, he turned around and saw a two-door black Riviera. The passenger had asked, "Hey, what's up? What set are you from?" Because Johnny thought the guy was joking, he just stood there. The passenger then put his arm out the window, pulled back the slide on a semiautomatic handgun, and chambered a round. Johnny started to run away but was unable to avoid getting shot.

In a second statement to police, Johnny described the passenger as a 20- to 25-year-old Mexican male with a chubby face. And, while he initially described the passenger as bald, in his second statement to investigators, Johnny said the shooter had his hair combed back. Johnny also reported that both of the car's occupants were from a tagging crew. The Riviera had chrome wheels, a hood that was out of alignment, and a damaged radiator or grille. As Johnny heard gunshots, he ran behind Castaneda's car, tripped and fell, then got up and ran into his garage. When he got inside, he fell to the floor. He had gunshot wounds to his stomach, right side, and buttock.

When the shooting stopped, Castaneda was lying on the sidewalk. He died from a gunshot wound to the chest. Juarez collapsed and later died from a bullet that had gone through his chest and lodged in his left arm.

Los Angeles Police Department officers in the area heard six or seven gunshots. When they approached, they found seven spent bullet casings at the scene. All seven casings were .45 caliber automatic. All had been fired from the same gun, which was never found. Five fired bullets and a bullet fragment were also found at the scene. Four of the five fired bullets were .45 caliber and had been fired from the same firearm. The bullet removed from Juarez's arm during the autopsy was fired from the same firearm as the .45 caliber bullets found at the scene of the shooting.

About 10 days after the shooting, Juarez's brother Eduardo reported to investigators that he'd seen a black Buick Riviera parked in the driveway of a home on 90th Street, east of Compton. Eduardo also reported seeing young Latino males near the car. The next day, he reported seeing the car again.

On April 12, 1995, about two months after the shooting, Johnny told the police that he had seen the person who shot him. The shooter wasn't wearing a shirt, and Johnny could see that he had a large tattoo around his neck consisting of letters. Johnny had seen the shooter three times after the shooting.

The next day, April 13, 1995, detectives went to 90th Street and saw Perez in an alley directly behind a residence at 1537 E. 90th Street. Because he was wearing a tank top, the detective could see that he had a tattoo below his neck that read "Baby, I'm for real." The detective did a Department of Motor Vehicles

search and found that Perez was the registered owner of a 1979 Buick.

With this information, the police prepared a photo lineup and showed it to the witnesses. Initially, Johnny did not make an identification. A week later, on May 2, 1995, the detective showed Johnny another photo lineup—this time using a photograph of Perez from 1993. Johnny pointed at Perez's photo and said he looked the most like the guy who shot him. Johnny also reported that he had seen the shooter driving and that the Buick's hood was still out of alignment, but the car now had stock wheels.

On May 5, 1995, police executed a search warrant at Perez's residence. Inside the home, they found a notebook with EZ Boys graffiti on it. In an alley behind the house, they saw EZ Boys graffiti along with Perez's moniker, "Travesio." When the car was impounded, the hood was out of alignment and the grille was damaged. While the Buick did not have chrome wheels or rims, police recovered chrome rims from Perez's garage. It was not determined, however, whether those rims would fit a Buick Riviera. EZ Boys was etched into the Buick's upholstery and EZB was scratched into the door panel. Johnny later identified Perez's car as the vehicle from which gunshots were fired.

On May 15, 1995, Miguel identified Perez from a six-pack photographic lineup as a person who "looks like the suspect I saw with a gun." He said that if the person in the photo had "a little mustache," he would be "the guy that did the shooting." Miguel also positively identified the Buick Riviera as the vehicle used in the shooting, noting, however, that the car now had different rims.

Another eyewitness, 13-year-old Carlos G., had also seen the shooting. Carlos described a black Riviera with scratches and

body damage that had driven down the street. Carlos told detectives that the shooter was wearing a jersey that had the number 14 on it and had his hair pulled straight back. In late May 1995, Carlos identified Perez from a photographic six-pack as the shooter. Carlos also identified Perez's car as the one that was used in the shooting, but noted that the car no longer had chrome wheels.

The prosecution also presented evidence about the area's gang milieu. Florencia 13 and Grape Street are large gangs with longstanding feuds. It was stipulated that on February 14, 1995, the EZ Boys met the definition of a criminal street gang. EZ Boys was a clique within Florencia 13 and has been associated with Florencia. The shooting occurred in an area claimed by the South Side Watts Varrio Grape gang. KMT got along with Grape Street and considered the 9600 block of Hickory Street to be South Side Watts Varrio Grape territory. If KMT were an ally of the Grape gang, then it would have been a rival of EZ Boys.

**2. Perez is charged with two murders and attempted murder but fails to appear.**

On May 5, 1995—the day police executed a search warrant at his home—Perez failed to appear in his open juvenile probation case. An arrest warrant was issued and held.[3]

On May 12, 1995, the prosecution filed a juvenile petition and request for fitness hearing alleging Perez had committed two counts of murder and one count of attempted murder. An arrest warrant was issued. When interviewed by the police, no one in Perez's family knew his whereabouts.

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[3] We take judicial notice of the superior court files in case Nos. TA136425 and TJ021954. (Evid. Code, § 452, subd. (d)(1).)

On June 7, 1995, after Perez failed to appear for two more court appearances in his probation case, an arrest warrant was issued. Ten days later, police asked the court to keep the warrant in full force and effect until 1998. They then "shelved" the investigation.

### 3. After 20 years, Perez is extradited from Mexico, then interrogated by the police and an informant.

Apparently, Perez had fled to Mexico, where he remained for the next two decades.

Once the District Attorney's Office learned of his whereabouts, they filed new or amended charging documents in two courts. On February 4, 2015, they filed a complaint in case No. TA136425 alleging two counts of murder and one count of attempted murder. An arrest warrant was issued based on the complaint. The following day, February 5, 2015, the prosecution amended the 1995 juvenile petition to allow them to extradite Perez from Mexico.

On February 16, 2015, Perez was taken into custody in Tijuana, Mexico and transported to San Ysidro, California, where he was turned over to the FBI's fugitive task force. He was booked into the 77th Street Station jail in Los Angeles the next day. At the jail, Perez initially agreed to talk to LAPD investigators, but invoked his right to counsel after about 30 minutes. The detectives ended the interview—but they did not stop the questioning.

About an hour after Perez invoked his right to counsel, officers placed him into a cell with an undercover LAPD informant posing as a gang member. Police had used this technique at least eight or 10 times before—indeed, they had used this informant before—and they were "hopeful" that Perez

would provide "statements that would help in this investigation." They paid the informant $1,000 for his efforts.

For the next two hours, police monitored the encounter between Perez and the informant in real time using audio visual equipment and a microphone hidden in the cell. The informant also wore a recording device. Authorities did not tell Perez that his new cellmate was working for the police or that a camera was hidden on the informant's person.

During this conversation, and in response to a number of the informant's questions, Perez said he was from the EZ Boys, and he'd been on the run for 20 years. After the informant asked him, "What are they trying to say you guys used, a knife too, or …," Perez said, "no, a strap." When the informant speculated that the police could find the gun, Perez admitted that the evidence was "gone." In response to the informant's statement, "Man, you were just a kid when you left here, man, too," Perez admitted that he was a "damned stupid little kid … putting in work." Perez explained that he'd been arrested because the car used in the shooting was registered to him. He claimed that he was innocent—but then said he didn't pull the trigger.

At two points in the conversation, Perez described his brief interview with the police. Perez reported to the informant that he'd rejected the officer's invitation to confess "to something I don't know about," and then explained that he'd "said just—just let's take it to court and talk to my lawyer." Later, Perez returned to this subject and said, "the only thing I could tell you, I'm—I am innocent. Then they were like, Oh, so you don't want to talk. I go, no, no. I just wait for my lawyer to get here."

As the conversation continued, the informant speculated that a "crimey" could have implicated Perez, but Perez remarked

that no, two of them were dead and the other one was in Mexico. Perez said the shooting happened "a couple of blocks" from where he lived. He then explained that he had a school attendance alibi because he had signed in to his continuation program that morning and then "went back" right after the shooting and signed out at the end of the day.

Later, when the informant suggested that "those three fools" (the shooting victims) in Perez's case "probably didn't even know what the fuck was going on," Perez remarked, "they didn't see me coming. [¶] … [¶] No, when they turned around, we were already on them [¶] … [¶] Jumped out of the car and shh, shh, shh." The informant asked if Perez was still driving, and Perez replied, "No, I was with my brother."

In response to the informant asking if the police told him what kind of gun was used, Perez admitted that they "used two," but noted that "[the police] don't know. I don't know. I just—I just told them, you know what, I just want to talk to my lawyer." Then, Perez admitted that he really didn't know who hit whom, but acknowledged that he "went after" the third victim who stood there.

**4. Adult Court Proceedings**

On February 18, 2015, the day after his booking and interrogation, Perez appeared for a bench warrant hearing in case No. TA136425, the adult case. On February 23, 2015, the prosecution filed an amended petition under Welfare and Institutions Code section 602 in case No. TJ021954. Perez was arraigned on that petition the following day and arraigned on the adult complaint a week later, on March 4, 2015.

The juvenile matter was transferred to adult court on August 5, 2015, after Perez was found unfit for juvenile

proceedings, and on August 31, 2015, an amended felony complaint was filed in case No. TA136425.

After a preliminary hearing at which he was held to answer, Perez was charged by information dated December 21, 2015, with two counts of special-circumstance first degree murder (Pen. Code,[4] §§ 187, subd. (a), 190.2, subd. (a)(3); counts 1–2) and one count of attempted first degree murder (§ 664/187, subd. (a); count 3). As to each count, the information alleged that Perez personally used a handgun (§ 12022.5, subd. (a)) and committed the crimes for the benefit of a criminal street gang (§ 186.22, subd. (b)(5)). Perez pled not guilty and denied the allegations.

Before trial, defense counsel moved to exclude Perez's statements to the paid informant, contending they were obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) and the Sixth Amendment. The court denied the motion.

### 4.1. Trial Proceedings

At trial, all the people who had previously identified Perez either recanted or provided conflicting testimony about the shooter's identity.

#### 4.1.1. Miguel's Testimony

Miguel testified that he witnessed a shooting on February 14, 1995, and spoke to police that day. He recalled a dark car pulling up next to where he and the others were standing on Hickory Street, but he claimed to have run when he saw the passenger pointing a black semiautomatic out the car window. Although he testified that he heard gunshots, Miguel testified that he had not seen the front passenger's face and therefore,

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[4] All undesignated statutory references are to the Penal Code.

could not identify the shooter. He also testified that he didn't recognize the defendant sitting at counsel table. Nor could Miguel identify the car used in the crime, whether it had rims, or the condition of its paint. Miguel also could not recall whether anyone in the dark car said anything to him before the shooting started.

Miguel claimed that he could not recall what he had reported to the police—but he did remember trying to avoid a female detective who was investigating the case. He couldn't remember whether he was given any admonitions before viewing the photographic lineup, couldn't identify any of the people in the array at the time of trial, and couldn't recall ever having spoken to the police about his earlier identification of the shooter or his description of the car used in the shooting.

#### 4.1.2. Johnny's Testimony

Johnny testified that he was 16 years old on the day of the shooting in 1995. He was a mechanic who helped people in the neighborhood with their cars and, on February 14, 1995, he was trying to get Adan Castaneda's blue Buick Regal to start. Shortly after Johnny started working on the car, "all the shooting started." He could remember little else from that day, however.

Johnny could not recall who else was standing near him when the shooting started, the name of the owner of the car he was working on, how many shots he heard, or whether there was a car going by when the shots rang out—nor could he see the person who shot him. He did remember seeing a black Riviera drive down Hickory Street "a little bit before" he was shot, but he couldn't remember if the car had rims. Nor could Johnny recall the condition of the car or how many people were inside.

This testimony directly contradicted statements Johnny had made both at the time of the shooting and in a subsequent interview with police conducted shortly before trial. Nevertheless, at trial, Johnny claimed that he could not identify the shooter because it was "just too fast." All Johnny could remember was "just getting shot."

Johnny further testified that did not remember having made the statements attributed to him in the police reports. Then, Johnny asked the court for permission to speak. He observed that he was a victim 21 years ago and was being victimized again by having to testify. Johnny testified, out of the presence of the jury, that he still lived in the neighborhood and had family in that area. "All of [the prosecutor's] questions, people are hearing them, you know." Although upon further questioning, Johnny testified that he had never been threatened, he "didn't want that to happen." After that interlude, Johnny answered "don't remember" or "don't recall" to many of the prosecutor's remaining questions.

On cross-examination, Johnny muddied the waters further by recalling that the car involved in the shooting had a "clean paint job," contradicting his prior description of the car as "raggedy." Johnny also testified that his earlier identifications had been directed by police, who told him when they showed him the six-pack that "he's right in front of you." Johnny denied ever having identified the shooter and admitted on cross-examination that he lied to the detective in a recent interview about seeing the driver and a passenger. In fact, Johnny testified, he'd told police that he didn't "recognize any of them" in the photo array.

Finally, Johnny, like Miguel, testified that he'd never seen the defendant sitting at counsel table.

#### 4.1.3. Carlos's Testimony

Carlos also testified at trial about the shooter's identity. He testified to being at his mother's house in the 9600 block of South Hickory on the day of the 1995 shooting. He had been hanging out with Castaneda, Miguel, and the others shortly before the shooting. He left to go to his mother's house to get some food for everyone. As he was returning to Johnny's driveway, he saw a black car pass in front of him, and saw Juarez walk towards him, then drop to the ground. Carlos ran to Juarez and tried to render aid. He later saw Castaneda on the ground.

On the first day of his trial testimony, Carlos testified that he didn't recognize the defendant sitting at counsel table and had never seen him before. The next day, Carlos complained that he hadn't been able to see the defendant at counsel table the day before because his glasses were not his normal prescription. The court allowed Carlos to walk closer to Perez—and then, upon closer scrutiny, Carlos testified that he recognized Perez. And, he noted that he "recognized him from the black car"—in other words, as the passenger. Carlos had an opportunity to see Perez when the passenger briefly turned his face toward Carlos as the black car drove away after the shooting. He saw the passenger stretch his forearm out the car window and start firing a gun. He saw sparks and heard gunshots. Carlos also testified that he had recognized Perez in the photo array that he was shown by police in 1995. He testified that he truthfully recounted the events to detectives in 1995 and further confirmed the accuracy of those statements.

But later in his direct examination, Carlos changed his testimony again. He admitted that in 2002, he had been convicted of first degree murder in Mexico and was serving his sentence

when he was transported to the United States in 2014. While incarcerated, Carlos met with an LAPD detective and, during that interview, he lied to the detective about being able to see the shooter. Carlos also testified that he invented the 1995 identification to get the detective to stop yelling at him. He picked someone at random out of the six-pack "just to get it over with." According to Carlos, "from the start, I told her I didn't really see nothing. I wasn't there."

From that point on, Carlos recanted his prior identification testimony in its entirety. "Now, as a grown man, I realize I can't walk out—I can't walk out of this courtroom knowing I'm wrong for pointing somebody out," he explained.

On cross-examination, Carlos was unable to identify Perez in court. In response to defense counsel asking whether the defendant in court was the person in the passenger seat of the black car, Carlos testified, "No sir. To me, he's an innocent man."

### 4.2. Verdicts and Posttrial Proceedings

The jury convicted Perez of both counts of special-circumstance first degree murder and the sole count of attempted murder and found the firearm and gang allegations to be true.

The defense moved for a new trial—asserting again that Perez's statements to the paid police informant were constitutionally defective under either *Miranda*, *supra*, 384 U.S. 436 or *Massiah*, *supra*, 377 U.S. 201. The motion was denied.

The court sentenced Perez to concurrent terms of life without the possibility of parole for counts 1 and 2 (§§ 187, subd. (a), 190.2, subd. (a)(3)) and a consecutive term of life with

the possibility of parole for count 3 (§ 664/187, subd. (a)).[5] The court imposed a consecutive determinate term of 20 years—10 years each for the personal use enhancements to counts 1 and 3—and a concurrent 10-year term for the personal use enhancement to count 2. (§ 12022.5, subd. (a).) The court struck the gang enhancement for all counts. (§ 186.22, subd. (b)(5).) Finally, the court awarded Perez 706 days of pre-sentence custody credit.

Perez filed a timely notice of appeal.

## DISCUSSION

We are asked to decide whether the LAPD's use of a paid confidential informant to elicit incriminating statements from Perez violated his right to counsel under *Massiah*, *supra*, 377 U.S. 201—and if so, whether the admission of his statements at trial was prejudicial under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). We conclude that the court erred by admitting the statements and that the error was prejudicial. Accordingly, we reverse and remand for a new trial.

### 1. The Right to Counsel

The Sixth Amendment provides in pertinent part: " '[I]n all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence.' " This text defines the scope of the right to counsel in three ways: It provides *who* may assert the right (the accused), *when* the right may be asserted (in " 'all criminal prosecutions' "), and *what* the right guarantees (" 'the Assistance of Counsel for his defence' "). (*Rothgery v.*

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[5] The parties agree that the abstract of judgment and the court's sentencing minute order should be corrected to show a sentence of life *with* the possibility of parole on count 3.

*Gillespie County* (2008) 554 U.S. 191, 214 (conc. opn. of Alito, J.) (*Rothgery*).)

In addressing *when* the right applies, the United Supreme Court has held that the initiation of adversary criminal proceedings " 'marks the commencement of the "criminal proceedings" to which' " the Sixth Amendment applies. (*Moore v. Illinois* (1977) 434 U.S. 220, 226–227.) Put another way, a defendant's Sixth Amendment rights "attach" at the beginning of his or her prosecution.

In addressing *what* the right protects, the Court has held that "defence" means defense at trial—but certain pretrial events may so prejudice the outcome of the defendant's prosecution that, as a practical matter, the defendant must be represented at those events to enjoy genuinely effective assistance at trial. (*United States v. Wade* (1967) 388 U.S. 218, 226–227.) Such " 'critical stage[s]' " of the prosecution include preliminary hearings (*Coleman v. Alabama* (1970) 399 U.S. 1, 9), pretrial lineups (*Wade*, at p. 228), and psychiatric exams (*Estelle v. Smith* (1981) 451 U.S. 454, 469–470). Applying these principles in *Massiah*, the Court held that "the government violates a defendant's Sixth Amendment right to counsel when it introduces into evidence incriminating statements deliberately elicited from the defendant by agents of the state, outside the presence of counsel, after the commencement of criminal proceedings." (*Viray*, *supra*, 134 Cal.App.4th at p. 1194, citing *Massiah*, *supra*, 377 U.S. at p. 206.)

Here, Perez contends that because the prosecutor had initiated criminal proceedings against him in 1995, *Massiah* prohibited the paid informant—an agent of the state—from interrogating him in 2015, and the fruits of that interrogation in

violation of the prohibition should have been excluded from evidence.

Our " 'review of a trial court's ruling on a motion to suppress is governed by well-settled principles. [Citations.] [¶] In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. [Citations.] "The [trial] court's resolution of each of these inquiries is, of course, subject to appellate review." [Citations.] [¶] The court's resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law, … is also subject to independent review.' " (*People v. Alvarez* (1996) 14 Cal. 4th 155, 182; see *People v. Waidla* (2000) 22 Cal.4th 690, 741 [in reviewing Sixth Amendment claims, an "appellate court applies the independent or de novo standard of review …, either in whole or in part, insofar as the trial court's decision entails a measurement of the facts against the law"].)

**2. The admission of Perez's custodial statements violated his Sixth Amendment right to counsel.**

To determine whether LAPD's use of a paid informant to elicit incriminating statements from Perez violated Perez's Sixth Amendment rights, we must answer two questions: (1) had Perez's Sixth Amendment right to counsel attached at the time that he was interrogated, and, if so, (2) was that questioning a critical stage in the prosecution so as to require the presence of

counsel? If both elements are met, Perez's statements to the informant violated his Sixth Amendment rights and ought to have been excluded from his trial.

**2.1. The right to counsel had attached.**

Before trial, the court held that Perez's Sixth Amendment rights had not attached at the time of the custodial interview. Rather, the trial judge read the Supreme Court decision in *Rothgery* to hold that the Sixth Amendment right to counsel does not attach until a defendant's initial appearance before a judicial officer. Because Perez had not yet been arraigned on the charges at the time of his interrogation, the court concluded that his Sixth Amendment right to counsel had not yet attached. The trial court further found that to the extent *Viray* held to the contrary, it had been implicitly overruled by the Supreme Court's later decision in *Rothgery*. Accordingly, she found no constitutional violation and allowed the interview and a transcript to be introduced at trial.[6] We disagree.

In *Viray*, the Court of Appeal considered and discussed at some length the exact issue presented in this appeal: Does the Sixth Amendment right to counsel attach upon the filing of an accusatory charging document—either a complaint (or juvenile

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[6] Perez's claimed violation of the Sixth Amendment was renewed in his motion for a new trial. The judge again held that the Sixth Amendment right to counsel had not attached because adversary judicial proceedings had not yet commenced. The court further distinguished *Viray* because in that case, the defendant was interviewed at the courthouse just prior to her arraignment; in this case, Perez was not in a courthouse and could not be located for 20 years.

petition) or an indictment?[7] The appellant in that case was accused of felony financial abuse of an elder (her aunt). (*Viray*, *supra*, 134 Cal.App.4th at pp. 1191–1192.) In 2002, police began investigating the appellant's acquisition of her aunt's properties. (*Id*. at p. 1191.) In November of that year, appellant was questioned by a police officer but refused to re-convey any of the properties. Rather, she expressed surprise that her aunt had not intended to convey the properties to her. (*Ibid*.) The District Attorney signed a felony complaint on December 6, 2002, and filed that complaint on December 10, 2002. (*Id.* at pp. 1191–1192.)[8] Arraignment was set for January 3, 2003. (*Id*. at p. 1192.) The morning of appellant's arraignment, before her case was called, the prosecutor arranged a meeting with her. Appellant was then interrogated at length by the prosecutor and an investigator at the Salinas District Attorney's Office. (*Ibid*.)

Unlike in this case, the appellant in *Viray* was not given any warnings or admonitions about her right to counsel. (*Viray*, *supra*, 134 Cal.App.4th at p. 1192.) At the beginning of the interrogation, the appellant confirmed that she had no attorney, but said that she would retain one if authorities pursued the matter. (*Ibid*.) The interrogation was recorded. At 1:30 p.m. the same day, appellant was arraigned on the complaint and the public defender was appointed to represent her. (*Ibid*.)

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[7] While *Viray*'s analysis of that issue was arguably unnecessary to the ultimate judgment in that case, its conclusion accurately and fairly evaluated the question using United States Supreme Court authority as its guide.

[8] While *Viray* says the prosecutor signed the complaint in 2004 before filing it in 2002, that appears to be a scrivener's error. (*Viray*, *supra*, 134 Cal.App.4th at p. 1191.)

At the appellant's court trial in June 2003, the prosecution introduced both the recording and the transcript of the pre-arraignment, post-filed-complaint interview. (*Viray*, *supra*, 134 Cal.App.4th at pp. 1192–1193.) Counsel did not object. (*Id*. at pp. 1190, 1192, 1208–1210.) Appellant was convicted of financial abuse of an elder because she attempted to steal a house from her aunt by duping her into signing a deed that the aunt believed would transfer a different property. (*Id*. at p. 1193.)

On appeal, appellant argued that the prosecutor violated her Sixth Amendment right to counsel and engaged in extreme misconduct by interrogating her at length on the morning of her arraignment. (*Viray*, *supra*, 134 Cal.App.4th at p. 1194.) Although the court eventually found that the appellant had forfeited this claim of constitutional error (*id*. at pp. 1208–1210), it explained that had such an objection been timely made, the court would have had to exclude the evidence (*id*. at pp. 1207–1208). Reviewing relevant United States Supreme Court authority, the court found that the Sixth Amendment right to counsel attaches—and *Massiah's* prohibition against interrogation without the presence of a lawyer exists—at the time that a criminal complaint is filed. (*Viray*, at pp. 1205–1206.)

In reaching this conclusion, the Court of Appeal addressed several federal decisions that determined the point at which the Sixth Amendment precludes the government from interrogating the appellant. (*Viray*, *supra*, 134 Cal.App.4th at p. 1195.) The court also noted that once an accusatory pleading[9] is filed, a criminal prosecution can be dismissed only by a magistrate or

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[9] "The words 'accusatory pleading' include an indictment, an information, an accusation, and a complaint." (§ 691, subd. (c).)

judge on a finding that dismissal is " 'in furtherance of justice.' " (*Id.* at pp. 1196–1197.) And, under section 1192.6, subdivision (b), if dismissal of a count in a felony case is sought by the prosecutor, he or she must "state specific reasons for the dismissal in open court, on the record." (*Ibid.*)

The *Viray* court then evaluated whether the "prosecutorial forces of organized society" had been brought to bear against the appellant when she was questioned by the prosecutor. In concluding that they had, the court noted that the filing of a felony complaint constituted a " 'formal charge' " that must be seen to be the initiation of " 'formal prosecutorial proceedings.' " (*Viray*, *supra*, 134 Cal.App.4th at p. 1196.) Under California law, such a complaint "triggers a duty on the part of authorities to bring the accused 'without unnecessary delay, … before a magistrate,' who must provide the defendant with a copy of the complaint and advise her of the right to counsel." (*Ibid.*; §§ 858, 859.)

We adopt the analysis regarding attachment of the Sixth Amendment right to counsel set forth in *Viray*. The essential question, as correctly posed in that decision, is whether, upon the filing of a formal accusatory pleading, the "investigation had ceased to be a general investigation of an 'unsolved crime,' " and, instead, the defendant "had become the accused, and the purpose of the interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so." (See *Escobedo v. Illinois* (1964) 378 U.S. 478, 484–485.)

We hold that the 1995 filing of a juvenile petition charging Perez with felony offenses—the exact same offenses for which he was ultimately tried and convicted in 2016—followed by the 2015 filing of a felony complaint and Perez's extradition from Mexico

for those offenses, combined with the prosecution's failure to pursue any other suspect, amply demonstrate that the investigation was no longer a general inquiry into an unsolved crime, but instead, was focused on a particular suspect who had been formally charged with the relevant offenses.

The use of a dividing line based on when the general investigation of a crime ends and the prosecution of a defendant begins was discussed in *Kirby*. In that case, the United States Supreme Court declared that the right to counsel is "historically and rationally applicable only after the onset of formal prosecutorial proceedings." (*Kirby*, *supra*, 406 U.S. at p. 690.) The Court explained: "The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute and only then that the adverse positions of the government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable." (*Id*. at pp. 689–690.)

Here, the government had "committed itself to prosecute" Perez, and Perez found "himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." The "adverse positions" of the government and Perez had solidified. Indeed, the prosecution team was so committed to these charges that a month after they filed the petition and Perez went missing, they put the case "on a shelf" for 20 years until he could be located.

They did not pursue any additional suspects. And other than filing a felony complaint and amending the original petition so they could extradite him from Mexico, the charges asserted against Perez in 1995 were the charges upon which he was convicted in 2016.

In short, by the time of his removal to the United States and his brief questioning by the LAPD—at which point he requested the appointment of an attorney—Perez was "immersed in the intricacies of substantive and procedural criminal law." (*Viray, supra*, 134 Cal.App.4th at p. 1195.) And, while the filing of a complaint would ordinarily require no response from the accused until arraignment (§§ 858, 859), as in *Viray*, "this generalization flies out the window" where the police secretly question a defendant before he has been arraigned. (*Viray*, at p. 1198; see *Brewer v. Williams* (1977) 430 U.S. 387 [a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment"].)

Although the trial judge here found that a Supreme Court decision issued after *Viray* somehow vitiated the decision, *Rothgery* does nothing to affect the vitality and applicability of *Viray*. (*Rothgery*, *supra*, 554 U.S. 191; *Viray, supra*, 134 Cal.App.4th 1186.) In *Rothgery*, the petitioner sued Gillespie County, Texas under 42 U.S.C. § 1983, alleging that his Sixth Amendment right to counsel had been violated by the county's unwritten policy of denying appointed counsel to indigent defendants out on bond until, at least, the entry of an information or indictment. (*Rothgery*, at p. 197.)

In that case, the Texas police had relied on erroneous information that Rothgery had a previous felony conviction to arrest him as a felon in possession of a firearm. (*Rothgery*, *supra*, 554 U.S. at p. 195.) In Texas, there is an initial hearing before a magistrate in which the probable cause determination is made, bail is set, and the defendant is "formally apprised of the accusation against him." (*Ibid*.) There was no formal complaint filed against Rothgery at the time of this proceeding. Instead, Rothgery was committed to jail and later released after posting bond. Rothgery had no money for an attorney and made several requests for appointed counsel to represent him, all of which went unheeded. Six months later, Rothgery was formally charged by indictment and re-arrested. At that point, his bail was increased, and he was jailed when he could not post bond. Rothgery was *then* assigned a lawyer, who assembled the paperwork that prompted the indictment's ultimate dismissal. (*Id*. at pp. 196–197.)

Rothgery sued civilly under 42 U.S.C. § 1983, claiming that the deprivation of his Sixth Amendment right to counsel by the state was a violation of constitutional law. (*Rothgery*, *supra*, 554 U.S. at p. 197.) Rothgery argued that had he been provided with counsel within a reasonable time after the initial magistrate hearing, he would not have been formally charged, re-arrested, or jailed for three weeks. In response to Rothgery's assertion that the county's unwritten policy of denying appointed counsel to indigent appellants out on bond until an indictment is entered violated his Sixth Amendment rights, the county moved for summary judgment. (*Ibid*.) The district court granted summary judgment and the Fifth Circuit affirmed because the relevant prosecutors were not involved in or aware of Rothgery's arrest or

court appearance, and there was " 'no indication that the officer … at Rothgery's appearance had any power to commit the state to prosecute without the knowledge or involvement of a prosecutor,' [citation]." (*Id.* at pp. 197–198.)

Thus, the issue in *Rothgery* was whether attachment of the right to counsel required that a public prosecutor—as distinct from a police officer—be aware of a first appearance or involved in its conduct. (*Rothgery*, *supra*, 554 U.S. at pp. 194–195.) The attachment standard used by the Fifth Circuit, i.e., that the right to counsel depended on whether the prosecutor had a hand in starting the adversarial judicial proceedings, was wrong. (*Id.* at pp. 197–199, 205.) As the Court held, "an accusation filed with a judicial officer was sufficiently formal, and the government's commitment to prosecute it sufficiently concrete, when the accusation prompted arraignment and restrictions on the accused's liberty to facilitate the prosecution [citations]." (*Id.* at p. 207.)

In adopting this view, the Supreme Court did *not* hold that the Sixth Amendment right to counsel did not attach *until* a defendant's first appearance before a judicial officer. Rather, it simply concluded that an adversarial judicial proceeding could commence even *before* the prosecutor filed a formal complaint or indictment. (*Rothgery*, *supra*, 554 U.S. at p. 210.) The Court noted that "by the time a defendant is brought before a judicial officer, is informed of a formally lodged accusation, and has restrictions imposed on his liberty in aid of the prosecution, the State's relationship with the defendant has become solidly adversarial." (*Id.* at p. 202.) And, that is just as true when the proceeding comes before the indictment as when it comes after it. (*Ibid.*) Thus, the facts in *Rothgery* are distinguishable from those

presented here and the opinion cannot be fairly read to overrule or otherwise limit *Viray*'s conclusion that the filing of a formal accusatory pleading *also* commences adversarial judicial proceedings to which the right to counsel attaches.

The other cases relied upon by the People on appeal do not compel a different result. In those cases, a formal pleading relating to the charges about which questioning was directed had not been filed by the prosecutor. (See *United States v. Pace* (9th Cir. 1987) 833 F.2d 1307 [no Sixth Amendment right to counsel upon the filing of a complaint by the FBI and the arrest of the defendant]; *People v. Wader* (1993) 5 Cal.4th 610, 635 [no Sixth Amendment right where the questioning by police was about a crime unrelated to the case with pending charges in a different county]; *People v. Woods* (2004) 120 Cal.App.4th 929, 941 [no Sixth Amendment right before the " 'formal instigation of charges' "]; *Anderson v. Alameida* (9th Cir. 2005) 397 F.3d 1175 [no Sixth Amendment right based only on a probable cause complaint issued by the San Francisco police].)

Nor does *People v. Chutan* answer the question presented here. (*People v. Chutan* (1999) 72 Cal.App.4th 1276, 1283.) In *Chutan*, the court held that because the right to counsel applies only when a person stands accused in a *criminal* prosecution, and because a juvenile *dependency* proceeding is not a criminal prosecution, the defendant's interrogation did not violate the Sixth Amendment notwithstanding his representation by counsel in a related dependency proceeding concerned with placement of his children.[10] (*Ibid.*) Moreover, the court noted that "the right to

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[10] To be sure, juvenile *delinquency* proceedings are different than adult criminal proceedings. However, changes in the law during the last decades have made the consequences of a delinquency adjudication

counsel is 'offense specific'—i.e., it is limited in its application to a single criminal case in which adversary proceedings have commenced by way of indictment or arraignment on a criminal complaint [citations]—and at the time of the interrogation here, Chutan had not yet been charged with *any* criminal offense in *any* case." (*Ibid*.) In short, *Chutan* did not hold that absent an indictment or arraignment, the Sixth Amendment does not attach.

The People's reliance on *Frye* is also misplaced. (*People v. Frye* (1998) 18 Cal.4th 894, overruled in part on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) In that case, the Court simply noted that the "right to counsel attaches at the time adversary judicial proceedings are initiated against the accused, *such as* when the defendant is indicted or arraigned." (*Id*. at p. 987, italics added.) The Court did not consider whether other events—such as the filing of a formal complaint—could also constitute "adversary criminal judicial proceedings" for Sixth Amendment purposes. (See *People v. Wader*, *supra*, 5 Cal.4th at p. 654 [Sixth Amendment right to counsel attached before arraignment when complaint charging capital murder was filed].)

In sum, we hold that an "adversarial judicial proceeding" had begun, and its attendant Sixth Amendment right to counsel had attached, before the accused, Perez, was arraigned on the

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more like those of a conviction for a crime. (See *In re Jensen* (2001) 92 Cal.App.4th 262, 266.) In any event, as we have discussed, the prosecutor also filed a felony criminal complaint against Perez before he made incriminating statements to the informant. Accordingly, we need not decide whether the filing of a juvenile delinquency petition by itself constitutes the commencement of criminal proceedings under *Massiah*.

charges. And as discussed below, Perez's surreptitious interview by a paid police informant violated those constitutional protections.[11]

### 2.2. The questioning was a critical stage of the proceedings.

Before concluding that a Sixth Amendment violation has occurred in this case, however, we must also consider the separate question of whether Perez's surreptitious interview by a paid police informant constituted a critical phase of the proceedings for which the Sixth Amendment's now-attached right to counsel applied.

"In *Massiah*, *supra*, 377 U.S. 201, the United States Supreme Court held that once an adversarial criminal proceeding has been initiated against the accused, and the constitutional right to the assistance of counsel has attached, any incriminating statement the government deliberately elicits from the accused in the absence of counsel is inadmissible at trial against that defendant. [Citations.] In order to prevail on a *Massiah* claim involving use of a government informant, the defendant must demonstrate that both the government and the informant took

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[11] In so holding, we reject the trial judge's reliance on Perez's absence from California as relevant to whether, at the time a formal complaint had been filed, the State had committed to prosecuting him for these offenses. To be sure, Perez may have been unaware that a juvenile petition and felony complaint charging him with two murders and attempted murder had been filed—but Perez's knowledge of his jeopardy is not the relevant inquiry. Rather, the question of whether an "adversarial judicial proceeding" has commenced focuses on the intention of the State to prosecute. Upon his eventual extradition from Mexico, the State evinced exactly the intention reflected in the exact charges set forth in the 1995 juvenile petition and 2015 complaint.

some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks. [Citation.] Specifically, the evidence must establish that the informant (1) was acting as a government agent, i.e., under the direction of the government pursuant to a preexisting arrangement, with the expectation of some resulting benefit or advantage, and (2) deliberately elicited incriminating statements. [Citations.]

"Where the informant is a jailhouse inmate, the first prong of the foregoing test is not met where law enforcement officials merely accept information elicited by the informant-inmate on his or her own initiative, with no official promises, encouragement, or guidance. [Citation.] In order for there to be a preexisting arrangement, however, it need not be explicit or formal, but may be 'inferred from evidence that the parties behaved as though there were an agreement between them, following a particular course of conduct' over a period of time. [Citation.] Circumstances probative of an agency relationship include the government's having directed the informant to focus upon a specific person, such as a cellmate, or having instructed the informant as to the specific type of information sought by the government. [Citation.]

"As to the second prong, that of deliberate elicitation, actual interrogation by an informant is not required in order to satisfy this element. [Citation.] Thus, where a fellow inmate, acting pursuant to a prearrangement with the government, 'stimulate[s]' conversation with a defendant relating to the charged offense [citation], or actively engages the defendant in such conversation [citation], the defendant's right to the assistance of counsel, as defined by *Massiah*, is violated." (*In re Neely* (1993) 6 Cal.4th 901, 915–916.)

In *United States v. Henry* (1980) 447 U.S. 264, the Supreme Court considered whether the admission of incriminating statements made by the defendant to his cellmate, an undisclosed government informant, after he had been indicted and was in custody, violated the Sixth Amendment. (*Id*. at p. 265.) The Court was asked to decide whether a confrontation between government agents and an accused is a critical stage of the prosecution to which the assistance of counsel attaches. (*Id*. at p. 269.) In making that determination, the Court looked at whether a government agent " 'deliberately elicited' " incriminating statements. (*Id*. at p. 270.) If so, the interrogation was a critical stage for which counsel's presence was required under the constitution. (*Ibid*.)

To determine whether the cellmate's questions were the equivalent of an interrogation, the Court considered three factors: (1) the informant was acting under instructions as a paid informant for the government; (2) the informant was ostensibly nothing more than a fellow inmate; and (3) the defendant was in custody and under indictment at the time of the conversation. (*United States v. Henry*, *supra*, 447 U.S. at pp. 270–274.) The Court held that by "intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." (*Id.* at pp. 274–275.)

Later that term, the Supreme Court decided *Maine v. Moulton*, *supra*, 474 U.S. 159. There, the Sixth Amendment right to counsel had attached upon the defendant's indictment. The issue presented was whether a monitored conversation between the defendant and his codefendant after the defendant was charged was a critical stage in the prosecution for which counsel's

presence was required. (*Id.* at pp. 163–166.) Unbeknownst to the defendant, his codefendant had agreed to cooperate with the prosecution. (*Ibid*.)

The Court held that the conversation violated the defendant's right to have counsel present at questioning. Citing *Powell v. Alabama* (1932) 287 U.S. 45, the Court noted that the "assistance of counsel cannot be limited to participation at trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself." (*Maine v. Moulton*, *supra*, 474 U.S. at p. 170.) Critical stages in the criminal process were those " 'where the results might well settle the accused's fate and reduce the trial itself to a mere formality.' " (*Ibid*.)

The state argued that because Moulton, and not the prosecution, had set up the confrontation between the accused and the police agent, the Sixth Amendment was not violated. (*Maine v. Moulton*, *supra*, 474 U.S. at p. 174.) But the Supreme Court flatly rejected any attempt to so limit the right to counsel: "[T]he State's attempt to limit our holdings in *Massiah* and *Henry* fundamentally misunderstands the nature of the right we recognized in those cases. The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State. … [T]his guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right." (*Id.* at p. 176.) "[K]nowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity.

Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." (*Ibid.*)

As discussed, in "determining the merits of a *Massiah* claim, the essential inquiry is whether the government intentionally created a situation likely to induce the accused to make incriminating statements without the assistance of counsel." (*People v. Frye*, *supra*, 18 Cal.4th at p. 993.) Here, as in *Massiah*, the police arranged a surreptitious interrogation during which Perez made several incriminating statements. As in *Massiah*, the paid police informant here created an environment—by claiming to also be in custody for a gang-related murder and directly asking about particular facts of Perez's crimes—in which "it was highly likely [Perez] would reveal information to his confederate that he would not have wanted to reveal to police. [Citations.]" (*Frye*, at pp. 992–993.) Unlike in *Frye*, however, the recording equipment on the informant and in the cell were not disclosed to Perez, and even in his informal discussions with the informant, Perez reported that he'd requested a lawyer. (*Id.* at p. 993.) Thus, it must be concluded that this conversation elicited statements that Perez would not have wanted to reveal to the police directly.

In the present case, the practices employed by the LAPD created a situation likely to induce the accused to make incriminating statements without the assistance of counsel—and indeed, the prosecution did not seriously controvert that Perez's conversations were a critical stage in the criminal proceeding. Throughout the two-hour taped interview, the informant deliberately elicited incriminating statements from Perez. The

informant inquired about the facts and circumstances surrounding Perez's present predicament and his actions in 1995. These questions and observations were intended to, and did, elicit incriminating statements. The interrogation here was a critical stage of the proceeding for which counsel was required to be present. As that did not occur in this case, Perez's Sixth Amendment rights were violated, and the fruits of that violation should have been excluded.

**3. The error was not harmless beyond a reasonable doubt.**

"We assess federal constitutional errors under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). Under *Chapman*, we must reverse unless the People 'prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' (*Ibid.*)" (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1165–1166.)[12] A review of the trial transcript in this case supports the conclusion that the People have not met that burden here.

While there were three contemporaneous identifications of Perez as the shooter, those identifications were not confirmed 20 years later. The eyewitnesses testified either that they could not recall their 1995 identifications or that they had been coerced to

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[12] While the complete denial of the right to counsel is structural error (see *Chapman*, *supra*, 386 U.S. at p. 23, fn. 8, citing *Gideon v. Wainwright* (1963) 372 U.S. 335), the Supreme Court has held that the absence of counsel at a critical stage of trial can be subject to harmless error review. (See *Coleman v. Alabama*, *supra*, 399 U.S. at pp. 10–11 [counsel's absence at preliminary hearing subject to harmless error review, in a case where state law prohibited prosecution from using anything from preliminary hearing at trial].)

make those identifications by overzealous police investigators. The eyewitnesses claimed not to recognize Perez in court as the passenger in the black car—and one witness even recanted his identification of the car itself. Carlos, who had confirmed Perez's identity a year before trial, not only recanted that identification on the stand but also recanted his courtroom identification of Perez from the day before. Johnny had an almost complete failure of recall regarding any of the events and, during a brief colloquy with the judge out of the jury's presence, said that he was being re-victimized by having to testify as a witness in the case. Although Perez was the registered owner of the car used in the shooting and had shown a consciousness of guilt by fleeing to Mexico for 20 years, his statements to the confidential informant contributed significantly to the convictions in this case.

As the admission of the jail interview and transcript at Perez's trial was prejudicial, the convictions must be reversed.

## DISPOSITION

The judgment is reversed and the matter is remanded for proceedings consistent with the views expressed in this opinion.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

JONES, J.*

WE CONCUR:

LAVIN, Acting P. J.

EGERTON, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.