No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LARRY HAYES

Petitioner

v.

MARVIN PLUMLEY, WARDEN

HUTTONSVILLE CORRECTIONAL CENTER

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

Larry Hayes gave detectives a false confession, which the state later used to help convict him at trial. His case presents two unresolved questions regarding the parameters of permissible police conduct during a custodial interrogation: First, what constitutes a promise of leniency that destroys the voluntariness of a subsequent confession? Second, given what we now know about the pressure of custodial interrogations and the rate at which false confessions occur during them, should a *Miranda* waiver be a "strong indicator" of a subsequent confession's voluntariness?

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Petition for Writ of Certiorari

Larry Hayes respectfully asks that a writ of certiorari issue to review the judgment below.

Opinions Below

The opinion of the Fourth Circuit Court of Appeals appears at pages 1-18 of the Appendix to the Petition. The opinion of the District Court for the Southern District of West Virginia is available at pages 107-43 of the Appendix to the Petition.

Statement of Jurisdiction

The judgment of the Fourth Circuit Court of Appeals was entered on July 3, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Introduction and Statement of the Case

On September 30, 2010, Larry Hayes was 21 years old and he had never been a suspect in any crime—he had never even had a speeding ticket. But on that day Mr. Hayes was watching his fiancée's daughter, Rebecca, while his fiancée was at work. When work was over, he drove to pick his fiancée up, noticing on the way that Rebecca was slumped over in her car seat, unconscious. App. A at 3. Emergency medical technicians met him at the fiancée's workplace and took Rebecca to the hospital. *Id.* Three days later, Rebecca died, and Mr. Hayes was charged with "death of a child by a parent, guardian, or custodian by child abuse." *Id.* at 4. A jury subsequently found him guilty after a four-day trial. *Id.* at 6.

Before trial, Mr. Hayes was questioned three times regarding the events leading to Rebecca's death: once by police detectives the day after Rebecca lost consciousness; once by Child Protective Services and a detective two days after Rebecca lost consciousness; and once by detectives the day after Rebecca died. App. F at 53. Although the record is not clear on the length of the first two interviews, the final interview lasted for approximately two-and-a-half hours. App. A at 9.

That final interview was conducted after two detectives showed up at Mr. Hayes' home. App. F at 53. Mr. Hayes asked if the detectives could question him there, but they declined and instead asked him to come with them to the police station. *Id.* at 52. The questioning took place in the station house kitchen, with the door closed. *Id.* Four detectives were present and participated in the questioning. *Id.* at 53. The detectives advised him of his *Miranda* rights, and Mr. Hayes signed a waiver. *Id.*

Shortly after the questioning began, the detectives started asking Mr. Hayes whether Rebecca had been injured in an accident. *See, e.g.,* App. M at 287, 302. Mr. Hayes denied hurting Rebecca forty-six times. *Id.* at 276-311. He also said multiple times that he feared being put in jail "for something I didn't do." *See, e.g., id.* at 276. The detectives repeatedly told Mr. Hayes that they did not think he hurt Rebecca on purpose, that good people make mistakes, that accidents happen "all the time," and that people who commit accidents are not "put in jail." *Id.* at 276-311. They also suggested how the accident might have occurred. *Id.* at 299 ("You could have held . . . held her in your arms with your body . . . her body could have hit an object or you

could had [sic] an object that could have hit her. It's physically possible."). Mr. Hayes subsequently confessed to falling down the stairs while holding Rebecca, presumably causing the injuries that led to her death. *Id.* at 311. All parties now agree that the confession was false. App. I at 223-24.

Before trial, Mr. Hayes moved to suppress this confession, but the trial judge denied the motion, finding the statement voluntary. App. H at 171-80. After his state appeals were unsuccessful, Mr. Hayes filed a federal habeas petition, alleging that the failure to suppress his confession violated the Due Process Clause of the Fourteenth Amendment. App. G at 121. The District Court denied his claim on the merits, finding that the detectives did not give Mr. Hayes any promises of leniency and that the trial court was reasonable in finding Mr. Hayes' confession voluntary. *Id.* The District Court found its ruling "debatable," though, and issued Mr. Hayes a certificate of appealability. *Id.* at 142. The Fourth Circuit nevertheless affirmed on July 3, 2018, finding that the trial court's determination of voluntariness was not "unreasonable." App. A at 15. Mr. Hayes respectfully asks this Court to reconsider that decision for the following reasons.

Reasons for Granting the Petition

Everyone agrees that Larry Hayes gave a false confession. But everyone disagrees on why he gave it. What we do know is that detectives repeatedly told Mr. Hayes that they did not think he hurt Rebecca on purpose, and that if he did not hurt her on purpose, then he would serve no jail time. This interrogation tactic is so common that it has a name—"minimization"—and it has long been recognized as an

"outstanding example" of one of the "tactics that have been shown to be coercive and to produce false confessions."[1] Mr. Hayes says that the detectives' use of that tactic here convinced him to confess because it implied that he would be treated more leniently. But the Fourth Circuit disagreed, affirming the decision to allow the state to introduce Mr. Hayes' confession at trial. In doing so, it committed two errors that warrant this Court's review.

First, the Fourth Circuit found that what the detectives told Mr. Hayes was true and therefore could not be coercive. App. A at 10. But Mr. Hayes denied hurting Rebecca forty-six times before he falsely confessed, and there is a good chance the detectives' minimizing statements led him to do so. In disregarding that possibility, the Fourth Circuit added to the growing disagreement between lower courts over whether minimizing statements can be treated as a coercive promise of leniency, and it added to the growing disagreement among lower courts over whether a false confession's lack of reliability is a relevant factor in the coercion analysis.

Second, the Fourth Circuit found that Mr. Hayes' *Miranda* waiver was a "strong indication" that his confession was voluntary. App. A at 14. But that ignores what we now know about the rate of false confessions during custodial interrogations. Multiple studies over the last two decades have shown that the rate of false confessions during those interrogations is alarmingly high. Yet lower courts

[1] Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 492 & n.536 (1998).

continue to rely on *Miranda* waivers as a "virtual ticket of admissibility" for confessions, often citing decisions from this Court—that predate those studies—on the importance of *Miranda* waivers.[2] Because those studies show that reliance on *Miranda* waivers is misplaced and "that reform of our understanding of coercion is long overdue," Mr. Hayes respectfully asks this Court to grant his petition to address this important question. *Dassey v. Dittmann*, 877 F.3d 297, 331 (7th Cir. 2017) (en banc) (Rovner, J., Wood, C.J., Williams, J., dissenting) (recognizing that there is a "chasm between how courts have historically understood the nature of coercion and confessions and what we now know about coercion with the advent of DNA profiling and current social science research").

I. No consistent standard for evaluating alleged promises of leniency exists.

The detectives repeatedly encouraged Mr. Hayes to admit an accidental role in Rebecca's death by stating that people who hurt someone else by accident receive lenient treatment. *See, e.g.,* App. M at 303 (telling Mr. Hayes that he could either "go to court [as] a cold-blooded killer who has no remorse or [he could] go to court [as] a dad who loved his daughter and made a mistake"); *id.* at 297 ("I feel confident that you didn't do this on purpose which to me makes a big difference."). Mr. Hayes said that the detectives were "gonna' put me away," even if it was an accident. *Id.* at 301-02. But the detectives still insisted that people who hurt others accidentally do not "do time." *Id.* Even so, the Fourth Circuit found that, because it is true that

[2] The "virtual ticket to admissibility" language comes from *Missouri v. Seibert*, 542 U.S. 600, 608-09 (2004), a case that predates much of what we now know about the rate of false confessions.

people who are involved in accidents receive more lenient treatment than those who commit intentional harm, the detectives' statements were not coercive promises of leniency. App. A at 10 (stating that the "detectives never promised or impliedly offered exoneration in exchange for a confession"). That finding reflects two growing disagreements in the lower courts that merit this Court's review.

A. Lower courts disagree over whether minimizing statements can be treated as a promise of leniency.

The most influential police training manuals teach minimization, which is an "outstanding example" of a "poor police practice" that, studies show, frequently "produce[s] false confessions." Leo & Ofshe, *supra*, at 492 & n.536. While this practice does not require detectives to use materially false statements when trying to obtain a confession, it does require them to downplay a suspect's culpability, telling the suspect to make a concession (like confessing to a mistake) and implying that the suspect will be treated more leniently if he does so. *Id.* For our purposes here, the question this practice raises is whether that implication can be a promise of leniency that coerces a suspect into giving an involuntary confession. This Court and lower courts have answered that question in different ways.

In *Bram v. United States*, this Court stated that "direct or implied promises, however slight, can make a confession involuntary." 160 U.S. 532, 542–43 (1897). There, the interrogating officer had informed the defendant that a witness had seen him commit murder. *Id.* at 562. The detective then told the defendant: "If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders." *Id*. The defendant denied any involvement in the murder but

did so in a way that implicated himself. *Id.* at 539. In deciding that his statement was involuntary, this Court relied on the fact that the officer "imported a suggestion of some benefit as to the crime and its punishment" by imploring the defendant to name an accomplice. *Id.* at 565. Put differently, this Court's focus was not whether the interrogating detectives' statements were true or false. Rather, the Court's analysis centered on whether the statements misleadingly suggested a "hope of benefit" and elicited a confession that would not have been given otherwise. *Id.* at 564. The implication was that the detective's statement (name an accomplice to share the blame) was an implied promise of leniency that coerced the suspect into confessing. *Id.*

Since *Bram*, though, this Court has modified its coercion analysis, narrowing it to focus particularly on whether a suspect's will has been overborne. *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973). As a result, lower courts have diverged on whether true statements that misleadingly imply the prospect of lenient treatment (like the statement in *Bram*) are coercive. Some say no, requiring materially false statements by detectives before finding that a subsequent confession was coerced. *See, e.g.,* App. A at 10; *United States v. Umaña*, 750 F.3d 320, 345 (4th Cir. 2014) (finding that while the detectives' statements "may have been misleading, they never amounted to an outright promise that nothing [the suspect] said would ever be used against him"); *United States v. Villalpando*, 588 F.3d 1124, 1128 (7th Cir. 2009) ("[F]or Villalpando to succeed here, he has to establish that his interrogator made him a promise that was materially false and

thus sufficient to overbear his free will."). On the other hand, other courts have recognized that true-but-misleading statements that imply leniency can coerce a confession. *See, e.g., United States v. Lopez*, 437 F.3d 1059, 1064-65 (10th Cir. 2006) (affirming the finding of a promise of leniency where the agent asked the suspect to admit to "killing by mistake," then showed the suspect pieces of paper marked "murder," "mistake," "60," and "6").

This matters because detectives—like the ones in Mr. Hayes' case—frequently use true-but-misleading minimizing statements to imply leniency when trying to elicit a suspect's confession.[3] In using these statements to minimize the apparent severity of the alleged crime (and thereby obtain a confession), detectives can avoid coercion findings in circuits that require materially false statements—even though the true-but-misleading minimizing statements are equally coercive.[4] To eliminate that inconsistency, this Court should grant Mr. Hayes' petition and

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[3] *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 89, 916-17 (2004) ("For example, in homicide cases, interrogators often suggest that if the suspect admits to the crime it will be framed as an unintentional accident or as an act of justifiable self-defense, but that if he continues to deny guilt, his actions will be portrayed in their worst possible light . . . . This [minimization] technique is intended to communicate through 'pragmatic implication' that the suspect will receive more lenient treatment if he confesses but harsher punishment if he does not.").

[4] *See Dassey v. Dittmann*, 877 F.3d 297, 334-35 (7th Cir. 2017) (en banc) (Rovner, J., Wood, C.J., Williams, J., dissenting) ("[T]he research demonstrates that minimization techniques are the functional equivalent in their impact on suspects.") (citing Saul M. Kassin, et al., *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication,* 15 LAW & HUM. BEHAV. 233, 234-35 (1991)).

determine if a detective's minimizing statements can result in an involuntary confession.

B. A false confession can evidence a promise of leniency, but lower courts disagree over whether to consider a confession's reliability as part of the coercion analysis.

Promises of lenient treatment can, and often do, result in false confessions.[5] So when everyone agrees that a confession is false, there is at least a decent chance that detectives obtained the confession by promising lenient treatment. Yet the Fourth Circuit here, when examining whether the detectives promised Mr. Hayes lenient treatment, did not account for the fact that his confession was false. This reflects the growing disagreement among lower courts over whether a confession's reliability matters in the coercion analysis.

That disagreement stems from this Court's equivocal treatment of reliability when addressing coercion. Originally, the Court emphasized that the coercion doctrine was designed to keep out unreliable statements, an emphasis that continued for the next seventy-five years. *See, e.g., Hopt v. Utah*, 110 U.S. 574, 585 (1884); *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960). But then the Court seemed to indicate that "the reliability of a confession has nothing to do with its

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[5] *See* Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1, 28 (2015) (noting that "a defendant facing the possibility of a heavy sentence if convicted has a powerful incentive to take such a deal and confess, whether he is actually guilty or not"); Fadia M. Narchet et al., *Modeling the Influence of Investigator Bias on the Elicitation of True and False Confessions*, 35 LAW & HUM. BEHAV. 452, 454 (2010) (recognizing that psychologically-based interrogation techniques have been shown to encourage false confessions because they implicate powerful human psychological tendencies toward conformity, obedience to authority, and compliance with requests).

voluntariness" because evidence that a confession is true can muddy the inquiry into whether a suspect's "will has been overborne." *Jackson v. Denno*, 378 U.S. 368, 384-85 (1964) (citing *Rogers v. Richmond*, 365 U.S. 534 (1961)). Still, the Court "seemed to signal [yet] another direction" twenty years later in *Colorado v. Connelly*, indicating that analyzing "a confession's reliability as part of the totality of the circumstances may survive." *Dassey v. Dittmann*, 877 F.3d 297, 317 (7th Cir. 2017) (en banc) (describing *Colorado v. Connelly*, 479 U.S. 157 (1986)). The point is that, after these cases, "it is not clear" if courts should consider a confession's reliability when determining if that confession was coerced. *Id.*

Because of that lack of clarity, some lower courts refuse to consider the reliability of a confession. *See, e.g., United States v. Preston*, 751 F.3d 1008, 1018 (9th Cir. 2014) (stating that "the voluntariness inquiry focuses not on the truth or falsity of the confession, but on the coercive nature of the interrogation"). But others regularly do. *See Conner v. McBride*, 375 F.3d 643, 652-53 (7th Cir. 2004) ("[W]e consider the reliability of Conner's confession as a factor in the totality test."); *United States v. Rutledge*, 900 F.2d 1127, 1129 (7th Cir. 1990) ("Of course if the confession is *unreliable*, it should go out . . . .") (emphasis in original); *Ross v. State*, 45 So.3d 403, 433 (Fla. 2010) ("[T]he danger of police engaging in the type of tactics exhibited in this case is . . . that the confession itself is unreliable."); *State v. Lynch*, 686 S.E.2d 244, 248-49 (2009) (Nahmias, J., concurring) (describing the "reliability of a confession to murder" as one of the "important questions presented" in the case).

This disagreement matters because we now have "overwhelming evidence" that interrogation tactics like the ones used in this case can lead to false confessions. *See, e.g., Dassey*, 877 F.3d at 334-35 (en banc) (Rovner, J., Wood, C.J., Williams, J., dissenting); Leo & Ofshe, *supra*, at 492 & n.536. We also have overwhelming evidence that false confessions happen with regularity. *Id.* Because of that, Mr. Hayes respectfully asks this Court to grant his petition to address whether courts can consider a confession's reliability when examining whether detectives promised a suspect lenient treatment.

II. Relying on a *Miranda* waiver as a "strong indicator" of a confession's voluntariness is inconsistent with modern evidence on the frequency of false confessions and the original meaning of the Fifth Amendment.

The Fourth Circuit found that Mr. Hayes' *Miranda* waiver was a "strong indication" that his confession was voluntary. App. A at 14. It did so by relying on *Missouri v. Seibert*, 542 U.S. 600, 608-09 (2004), where this Court stated that "litigation over voluntariness tends to end with the finding of a valid waiver" and that "giving the warnings and getting a waiver has generally produced a virtual ticket of admissibility." App. A at 14-15. This deferential standard is problematic for two reasons.

First, the *Seibert* comments were based on a footnote from *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984) (stating that "cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare"). Those cases are 14 years old and 34 years old, respectively, and

their dicta on how *Miranda* waivers impact the voluntariness analysis is completely out of step with modern research showing the tendency of suspects to provide false confessions even after *Miranda* waivers have been given.[6] We now know, for example, that over 13% of exonerations since 1989 have involved a false confession post-*Miranda* warning—at an average wrongful time served of 12.5 years.[7] We also know that this figure probably grossly underestimates the actual number of false confessions obtained by interrogators after *Miranda* waivers; in many cases, for instance, charges are dropped due to irrefutable evidence of the suspect's innocence.[8] Given the gravity of this evidence, a valid *Miranda* waiver should never serve as a substitute for a court's independent evaluation of an interrogator's tactics. But that is exactly what lower courts are allowing to happen by relying on the dicta from *Seibert* and *Berkemer*. *See, e.g.,* App. A at 14-15; *United States v. Douglas*, 688 F. App'x 658, 663 (11th Cir. 2017); *Norwood v. State*, 810 S.E.2d 554, 559 (Ga. 2018).

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[6] *See, e.g.*, Kyle C. Scherr, et al., *Knowingly But Naively: The Overpowering Influence of Innocence on Interrogation Rights Decision-Making*, 42 LAW & HUM. BEHAV. 26, 33 (2018) ("[P]re-interrogation rights, such as *Miranda* rights, are not effectively fulfilling their intended function.") (citations omitted); Saul M. Kassin, et al., *Police-Induced Confessions: Risk Factors & Recommendations*, 34 LAW & HUM. BEHAV. 3, 5, 7-9 (2010) ("Practically speaking, however, research has suggested that the Court's presumption concerning the protections afforded by *Miranda* warnings is questionable.").

[7] *False Confessions*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/False-Confessions-.aspx (June 12, 2016).

[8] *See* Drizin & Leo, *supra*, at 951 (explaining that approximately 65% of the proven false confessions studied from 1971 to 2002 did not actually result in conviction).

Second, the Fourth Circuit's reliance on a *Miranda* waiver as a strong indication of voluntariness contradicts the original meaning of the Fifth Amendment privilege against self-incrimination. As understood in its original context, the privilege against self-incrimination operates as a direct restraint on the federal judiciary, not the executive.[9] This means that the clause was meant to act only as an indirect check on the executive—through the Court's independent evaluation. By finding that a *Miranda* waiver "strongly indicates" voluntariness, the Fourth Circuit effectively transferred its obligation to protect Mr. Hayes against self-incrimination to the detectives who interrogated Mr. Hayes. App. A at 14. (stating that the waiver was "critical" to its finding of voluntariness). Such deference is incompatible with the original meaning of a court's role in protecting against undue efforts of interrogators to elicit self-incriminating evidence. Because of that, Mr. Hayes respectfully asks this Court to grant his petition and clarify the degree of scrutiny appropriate when a valid *Miranda* waiver is found.

Conclusion

The minimization tactic used by the detectives here is known to produce false confessions, and everyone agrees that Mr. Hayes' confession was false. Whether he falsely confessed because of that tactic is a question that deserves close scrutiny. But close scrutiny was not employed here. Instead, the Fourth Circuit said that Mr.

[9] *See, e.g.*, *Bram v. United States*, 168 U.S. 532, 546–48, (1897) (explaining the Founders' reliance on the English common-law principle that judges may refuse to record an unreliable confession); Thea A. Cohen, *Self-Incrimination and Separation of Powers*, 100 GEO. L.J. 895, 915 (2012) ("The Self-incrimination Clause ensures that even if executive actors act outside legal and constitutional boundaries, the judiciary will not allow their misdeeds to come to fruition.").

Hayes' *Miranda* waiver was a strong indication of a voluntary confession and that the detectives' minimization tactic did not matter because their misleading statements were nevertheless true. Mr. Hayes respectfully asks this Court to grant his petition to review that decision. Given what we now know about the pressure of custodial interrogations, the effects of the minimization tactic that detectives regularly use during them, and the rate of false confessions that result, lower courts need further guidance on how to examine this important issue.

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