No. 23A___

In the Supreme Court of the United States

ATIF AHMAD RAFAY,

Petitioner,

v.

ERIC JACKSON,

Respondent.

APPLICATION TO EXTEND TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI FROM OCTOBER 5, 2023, TO DECEMBER 4, 2023

To the Honorable Elena Kagan, as Circuit Justice for the Ninth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, Atif Ahmad Rafay respectfully requests that the time to file a petition for a writ of certiorari be extended 60 days from October 5, 2023, to and including December 4, 2023. The Ninth Circuit issued its initial panel opinion on March 30, 2023. App. A, at 1. The court denied a timely petition for panel rehearing/rehearing en banc on July 7, 2023. App. B. Absent an extension, the petition would be due on October 5, 2023. This application is being filed at least 10 days before that date. *See* Sup. Ct. R. 13.5. This Court will have jurisdiction to review the petition under 28 U.S.C. § 1254.

1. This case presents important questions under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. Specifically, the case raises the questions (a) whether a state court applies law "contrary to" this Court's precedents when it resolves a coerced-confession claim under a foreign legal

standard that is different from the one applied under the U.S. Constitution, and (b) whether courts may decline to address one of the primary grounds for relief asserted by a habeas petitioner. As to the first issue, the Ninth Circuit held that, regardless of whether the Washington trial court applied the wrong legal standard in adjudicating petitioner's claim, the Washington Court of Appeals did not violate AEDPA by reviewing that decision under a deferential standard of review. As to the second issue, although the state trial court rejected petitioner's claim that the police techniques used in this case rendered his incriminating statements inadmissible as a matter of law, neither the state court of appeals nor the Ninth Circuit addressed the claim.

Respondent is the warden of the Washington state prison where petitioner is serving three life sentences without the possibility of parole. This case arises from petitioner Atif Rafay's conviction in Washington state court of a triple homicide, based on incriminating statements he and his co-defendant Sebastian Burns made to undercover Canadian police officers who were posing as threatening gangsters. Nearly all the testimonial and forensic evidence pointed *away* from Atif or Sebastian as the killers. *See* Brief of Amicus Curiae Washington Innocence Project in Support of Petitioner, Doc. 76, at 17-22. The real killers were very likely the "unidentified males" whose blood was mixed with the victim's blood and whose hair was found at the crime scene—blood and hair that did not match the DNA profile of any victim nor Atif or Sebastian. *Ibid.*; *see* C.A. E.R. 1285-86; 1651-52; 1658-59; 1664-65; 1668-77.

Using an undercover investigative technique called "Mr. Big," the Royal Canadian Mounted Police created a fake underground criminal organization with

deep reach and a penchant for murdering those they believed would betray them. C.A. E.R. 1723-28; 1746-52; *see* Amicus Brief of the Criminal Lawyers' Association of Ontario, Canada in Support of Petitioner-Appellant Atif Ahmad Rafay, Doc. 29-2. The entire point of the operation was to intimidate the teens into making incriminating statements. The technique has never been acceptable in the United States, and Canada's Supreme Court has since found that any confessions elicited using these techniques are "presumptively inadmissible" due to the extreme risk of coercion. *See* Amicus Brief of the Criminal Lawyers' Association, Doc. 29-2, at 1 (quoting *R. v. Hart*, [2014] 2 S.C.R. 544 (Can.)). Without the statements extracted through the foreign operation, no reasonable jury could have convicted Atif or Sebastian of killing Atif's family when they were teenagers.

The Mr. Big operation in this case involved twelve "scenarios," which were planned interactions between the targets (Atif and Sebastian) and undercover Canadian officers. App. C, at 11. The elaborate scheme coerced Sebastian and later Atif into involuntarily "confessing" by convincing the teens that Mr. Big believed they were facing imminent arrest, that he believed the only way he could protect *himself* from being turned in by the teens in exchange for leniency was for the teens to confess to him immediately so he could help them, and that if they refused to confess he would have them killed in order to protect himself from the teens turning him in. After entwining Sebastian into their fake organization and then springing the trap, Sebastian eventually made contradictory and even internally inconsistent incriminating statements to avoid the perception that he would turn on Mr. Big. *See*

App. C, at 12-13. Once Sebastian had falsely implicated both teens in the murders, Atif had even less of a choice. At that point, the only way for Atif to avoid the perception that he was a risk to Mr. Big was to falsely implicate himself as well. *See* App. C, at 13.

Atif challenged the admissibility of his statements, arguing that the statements were coerced in violation of the Fifth and Fourteenth Amendments because (a) he made the statements out of fear in response to undercover officers' credible threats of violence, such that admitting the statements violated *Arizona v. Fulminante*, 499 U.S. 279 (1991), and (b) in any event, the "inquisitorial" police technique rendered the statements inadmissible as a matter of law under *Miller v. Fenton*, 474 U.S. 104 (1985). As further described below, the Washington trial court rejected both claims under Canada's legal standards, which differ from our own. And the Washington Court of Appeals (the state court that rendered the last reasoned opinion in the case) and Ninth Circuit rejected the first claim, without addressing the second—despite Atif raising both challenges at every stage of the case.

2. Under AEDPA, a petitioner must show that the state court's adjudication of the claim either "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). When the state court fails to apply the correct legal standard, AEDPA's rule of deference does not apply. Rather, this Court

requires that the petitioner's claim be reviewed de novo. That is because applying the wrong legal rule or framework is "contrary to" federal law. *See Williams v. Taylor*, 529 U.S. 362, 405 (2000).

Under the federal constitutional standard, courts "employ the totality-of-circumstances approach when addressing a claim that the introduction of an involuntary confession has violated due process." *Withrow v. Williams*, 507 U.S. 680, 689 (1993). And the "abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness," but also "on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Spano v. New York*, 360 U.S. 315, 320-21 (1959). "The use of coerced confessions, whether true or false, is forbidden because the method used to extract them offends constitutional principles." *Lego v. Twomey*, 404 U.S. 477, 485 (1972). This Court's "consistently held view" is "that the admissibility of a confession turns as much on whether the techniques for extracting the statements … are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne." *Miller*, 474 U.S. at 116. Thus, the term "voluntary" in this context "applies either to the conduct of the police, or to [the suspect's] subjective reaction to police overreaching." *Collazo v. Estelle*, 940 F.2d 411, 426 (9th Cir. 1991) (en banc) (citing *Miller*, 474 U.S. at 116).

In contrast, the relevant Canadian standard asks a very different question. Under the standard that Canada applied to Atif and Sebastian in their foreign proceedings, the only way to render a "confession" inadmissible was to (a) meet a threshold showing that it was made to a person the defendant knew to be "in authority," in other words, a person the defendant reasonably believed was an officer, or (b) that it was obtained using tactics so "shocking" to the conscience of an informed Canadian that its admission would "bring the administration of justice into disrepute." *Burns v. United States*, 1997 CanLII 2914 (BC CA), at ¶¶ 7-9, 11.

3. The state trail court allowed Atif's and Sebastian's statements to be admitted over their objections, ruling that neither teen was subjectively coerced by threats of violence, and that, as a matter of law, the Canadian police techniques were not otherwise per se coercive because "under Canadian charter rights" there was "nothing under Canadian police standards that would bring the administration of justice into disrepute." *See* App. C, at 14-15 (quotation marks omitted).

The State had the burden of proving, by a preponderance, that Atif and Sebastian voluntarily confessed. *Lego*, 404 U.S. at 489. But the State's prosecutors argued that "the Court of Appeals in Canada in its committal proceeding did entertain that very notion, which is why we didn't spend any time briefing it here." C.A. E.R. 457. They quoted the Canadian court's findings that "'the undercover officers' conduct'" was not "'shocking or outrageous, although they were deceitful, persistent, and aggressive.'" *Ibid.* The prosecutors pressed the state trial court to make the same finding that "'the officers['] conduct, viewed objectively, would not … shock the sensibilities of an

informed community considering the brutality of the crime then under investigation and would not bring the administration of justice into disrepute.'" C.A. E.R. 457-58. The trial court agreed, making "the same finding" as the Canadian court "in reviewing the self[-]same issue under Canadian charter rights." *See* App. C, at 14 (quotation marks omitted).

4. The Washington Court of Appeals, which rendered the last reasoned state court decision in the case, affirmed.

The state court of appeals recognized that the trial court found no evidence of coercion either factually or as a matter of law under Canada's legal standard, that the trial court made the same finding, and that the trial court then "entered minimal written findings and conclusions" of law to the same effect. App. C, at 14-15, 19. But the court of appeals concluded, without explanation, that the trial court "resolved the claim of coercion independently" of the Canadian court and its "expression of agreement with the Canadian court's conclusion does not reflect a failure to apply the proper legal standard." App. C, at 19.

Atif argued that the court of appeals was required to review the record de novo and determine, under its own totality-of-the-circumstances analysis, whether the statements were inadmissible, either because they were not voluntarily and freely given or because the police technique was objectively coercive. *See* App. C, at 15; C.A. F.E.R. 53-54, 64. But the court of appeals rejected an independent review of the record, deferring to the trial court under a "substantial evidence" standard of review

that required the appellate tribunal to view the record in the light most favorable to the trial judge's conclusion. App. C, at 15.

The Washington Court of Appeals applied that deferential standard of review because the Washington Supreme Court has explicitly rejected the de novo standard of review this Court requires in coerced-confession cases. In *State v. Broadaway*, the Washington Supreme Court held that although the U.S. Supreme "Court has adhered to its rule" that federal appellate courts must "make an independent review of the record" in confession cases, Washington's appellate courts must instead review trial court voluntariness determinations deferentially. 133 Wash. 2d 118, 131 & n.3 (1997) (expressly rejecting "independent review" standard set forth in collected U.S. Supreme Court cases). Relying on *Broadaway*, the state court of appeals held that "'the rule to be applied in confession cases is that findings of fact'" are "'verities on appeal if unchallenged, and, if challenged, they are verities if supported by substantial evidence in the record.'" App. C, at 15 (quoting 133 Wash. 2d at 129).

Thus, the state court of appeals held that the only question for it to decide was "whether there is substantial evidence in the record from which the trial court *could have found* that the confession was voluntary by a preponderance of the evidence." App. C, at 15 (quotation marks omitted; emphasis added). Applying that deferential standard, the court of appeals held that the record "supports the trial court's conclusion that the confessions were voluntary and not coerced" under *Arizona v. Fulminante*, 499 U.S. 279 (1991), and its progeny. App. C, at 16-19.

The court of appeals expressly declined to address Atif's other claim. Atif argued that regardless of whether the teens subjectively felt coerced, the statements were inadmissible, because the Mr. Big technique is incompatible with our accusatorial system. C.A. F.E.R. 54, 64 (Atif arguing that teens' incriminating statements were inadmissible under *Miller v. Fenton*, 474 U.S. 104 (1985), because the Mr. Big technique is "inquisitorial" and "inherently coercive"). Sebastian did not make the argument, yet the court of appeals adjudicated both teens' coerced-confession claims as one. Instead of addressing this claim, the court of appeals held that Atif's separate contentions were "essentially identical to those raised by appointed counsel," and that they would "not be addressed." App. C, at 22. Instead, the Washington Court of Appeals upheld the trial court's voluntariness determination based on its view that Sebastian "managed the relationship" with the undercover officers "on behalf of the defendants," and "exhibited a remarkable resilience to continued pressure" and "was not intimidated" by them. App. C, at 18. In other words, the court jointly rejected both teens' claims because it found that given Sebastian's remarkable resilience, his will was not subjectively overborne. The court of appeals did not address Atif's different circumstances, including whether he had even less of a choice than Sebastian once Sebastian implicated the teens in the crimes to the supposed mobsters, or because Sebastian—not Atif—was the one that had the relationship of trust with the fake criminal organization.

5. The federal district court rejected Atif's habeas petition bringing these claims, among others, under AEDPA. App. A, at 1-2.

The Ninth Circuit affirmed. App. A, at 2. The panel did not dispute that the state trial court applied the wrong legal standard when it "review[ed] the self[-]same issue under Canadian Charter rights," and under that standard "found no duress" and "found nothing under Canadian police standards that would bring the administration of justice into disrepute." App. C, at 14 (quotation marks omitted). And the panel recognized that "Canada's law of coercion differs from that of the U.S." App. A, at 3 n.3. Nor did the panel dispute that the state court of appeals applied a deferential standard of review, despite the trial court's failure to apply the correct legal framework. App. C, at 15. Yet the panel held that because the court of appeals "correctly noted that voluntariness of a confession depends on the totality of the circumstances" and then purported to rely on and apply that standard, its decision was not contrary to, nor an unreasonable application of, this Court's precedents as required to grant habeas relief under AEDPA. App. A, at 3-4.

The court did not address petitioner's separate, consistently asserted claim that admitting the statements violated *Miller v. Fenton*, 474 U.S. 104 (1985), because the undercover police techniques used were inquisitorial rather than accusatorial, and thus coercive as a matter of law. *See* Opening Br., Doc. 27, at 59; Reply Br., Doc. 58, at 3-4, 11, 24-25.

5. Atif filed a petition for panel rehearing/rehearing en banc. He argued that panel rehearing was warranted because the panel "overlooked" his claim that the undercover operation was objectively coercive such that defendants' statements were automatically inadmissible. Rehearing Petition, Doc. 74-1, at 2 (quoting Fed. R. App.

P. 40(a)(2)). He also sought en banc review, arguing that the panel's decision conflicts with this Court's clearly established precedent, requiring de novo review when the state court applies the wrong legal standard. *Ibid.* (citing Fed. R. App. P. 35(b)(1)(A)).

On July 7, 2023, the Ninth Circuit denied rehearing. App. B.

Reasons For Granting An Extension Of Time

The time to file a Petition for a Writ of Certiorari should be extended for 60 days for the following reasons:

1. The forthcoming petition is likely to be granted. The Washington Court of Appeals and Ninth Circuit entirely failed to address one of the primary habeas claims that petitioner has made since the outset of the case. Thus, at a minimum, the petition should be granted, the panel decision vacated, and the case remanded to the Ninth Circuit to address the claim de novo. *See Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (federal court must review issue the state court "never reached" de novo).

And on the claim that the panel *did* address, the court of appeals failed to apply this Court's precedents, meriting plenary review. Atif challenged the admission of his incriminating statements as unconstitutionally coerced under the Fifth and Fourteenth Amendments. Those amendments require courts to fairly weigh "the totality of the circumstances" to determine whether the statements were "the product of a free and unimpaired will." *Withrow*, 507 U.S. at 712. No court ever considered Atif's claim under that standard—the state trial court applied Canadian law and did not weigh *any* of the relevant circumstances; the state court of appeals deferred to the trial court under a "substantial evidence" standard of review that required the

appellate tribunal to view the record in the light most favorable to the trial judge's conclusion; and the Ninth Circuit believed itself bound by AEDPA deference.

This Court has clearly established that when a trial judge makes a determination under an improper legal standard, the appellate court cannot review that determination deferentially, as the Washington Court of Appeals did here. *See Price v. Vincent*, 538 U.S. 634, 640 (2003) (explaining that de novo review is required when the lower court "'applies a rule that contradicts the governing law set forth in our cases'" (quoting *Williams*, 529 U.S. at 405-06). Even assuming the State were permitted to have a deferential standard of review in coerced-confession cases generally, *but see Miller*, 474 U.S. at 110-12 (requiring appellate courts to conduct "independent evaluation of the record" in coerced-confession cases, because voluntariness is both an objective legal and subjective factual question), it has long been clearly established that a trial court's application of the wrong legal standard requires de novo review of the issue on appeal, *see Price*, 538 U.S. at 640.

The panel decision also conflicts with this Court's opinion in *Rogers v. Richmond*, 365 U.S. 534 (1961). There, the Court held in a coerced-confession case that any "facts 'found' in the perspective framed by an erroneous legal standard cannot plausibly be expected to furnish the basis for correct conclusions if and merely because a correct standard is later applied to them." *Id.* at 546-47. Doing so violates Due Process. *Ibid.* This means that even if the Washington Court of Appeals *had* applied the correct standard of review, it *still* would not be a basis to uphold the trial court's determination because the trial judge applied the wrong standard. Opening Br., Doc.

27, at 37-38, 45-46; Reply Br., Doc. 58, at 14. The panel failed to address this argument.

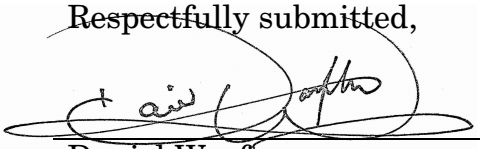
2. The press of other matters before this and other courts makes the existing deadline on October 5, 2023, difficult to meet, including (among others) two opening briefs before the U.S. Court of Appeals for the District of Columbia Circuit on October 2, 2023, and another petition for a writ of *certiorari* before this Court on October 8, 2023. Further time is required to allow counsel to consider the voluminous record and prepare a concise petition for the Court's review.

3. Whether or not the extension is granted, the petition will be considered—and, if plenary review is granted, the case will be considered on the merits—this Term. The extension thus will not substantially delay the resolution of this case or prejudice any party.

Conclusion

For the foregoing reasons, the time to file a petition for a writ of certiorari in this matter should be extended for 60 days to and including December 4, 2023.

Respectfully submitted,



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