No. 23-___

IN THE

Supreme Court of the United States

ATIF AHMAD RAFAY,

Petitioner,

v.

ERIC JACKSON,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner was convicted of committing a triple homicide as a teenager and condemned to spend the rest of his life in prison based on false incriminating statements. Nearly all the other testimonial and forensic evidence exonerated him—including the blood and hair of other, unidentified males at the crime scene. He gave his false statements to undercover police officers who were posing as violent mobsters. He did so because he believed if he refused to "confess" to the murders he did not commit, he would be killed. Even so, the state trial court denied petitioner's motion to suppress his statements. The trial court (1) found he did not confess because of credible threats of violence, and (2) held that the police tactics were not inherently coercive. The state court of appeals failed to address the second claim. And the Ninth Circuit simply overlooked it.

Thus, no court has ever seriously considered petitioner's claim that the undercover operation was per se coercive. There is obvious merit to the claim under clearly established federal law, and profound consequences for petitioner, who might otherwise spend the rest of his life in prison for crimes he didn't commit. Given the persistence of wrongful convictions based on false confessions, it is vital for courts to ensure that a defendant's "confession" was not obtained by inherently coercive official misconduct if the confession is to be used to convict him. The question presented is:

> Should this Court summarily reverse the Ninth Circuit for failing to address petitioner's preserved claim that his conviction was premised on a confession coerced by police tactics that are inherently coercive?

RELATED PROCEEDINGS

Direct:

State v. Burns, NO. 95-1-05433-8 SEA, 95-1-05434-6, COA NO. 55218-0-I, 55217-1-I, Superior Court, Washington, County of King. Jury verdict entered May 26, 2004; sentence imposed Oct. 24, 2004.

State v. Rafay, Nos. 55217-1-I, 55218-0-I, 57282-2-I, 57283-1-I, Court of Appeals of Washington, Division 1. Judgment entered June 18, 2012.

State v. Rafay, No. 87802-1, Supreme Court of Washington. Petition for review denied Mar. 7, 2013.

Rafay v. Washington, No. 12-10772, Supreme Court of the United States. Petition for certiorari to the Court of Appeals of Washington, Division 1, denied Oct. 7, 2013.

State habeas:

Rafay v. State, No. 92770-9-I, Court of Appeals of Washington, Division 1. Personal restraint petition dismissed Oct. 8, 2015.

Rafay v. State, No. 75055-1-I, Court of Appeals of Washington, Division 1. Personal restraint petition dismissed June 2, 2017.

Federal habeas:

Rafay v. Obenland, No. 2:16-cv-01215-RAJ, U.S. District Court for the Western District of Washington, at Seattle. Judgment entered Oct. 8, 2020.

Rafay v. Jackson, No. 20-35963, U.S. Court of Appeals for the Ninth Circuit. Judgment entered Mar. 30, 2023; order denying panel rehearing/rehearing en banc entered July 7, 2023.

Co-Defendant Sebastian Burns's Federal habeas:

Burns v. Warner, No. C14-850 MJP, U.S. District Court for the Western District of Washington, at Seattle. Judgment entered Dec. 16, 2015.

Burns v. Warner, No. 16-35031, U.S. Court of Appeals for the Ninth Circuit. Judgment entered Apr. 20, 2017.

Burns v. Obenland, No. 17-5210, Supreme Court of the United States. Petition for certiorari to the U.S. Court of Appeals for the Ninth Circuit denied Oct. 2, 2017.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that the Court summarily reverse the Ninth Circuit and remand. Alternatively, petitioner respectfully requests a writ of certiorari for plenary review.

OPINIONS BELOW

The Ninth Circuit's opinion (Pet.App.1a-6a) is unpublished but available at 2023 WL 2707187. The district court's opinion (Pet.App.7a-14a) is unpublished but available at 2020 WL 5982000. The state court of appeals' opinion (Pet.App.15a-146a) is published at 285 P.3d 83. The state trial court's opinion (Pet.App.147a-169a) is unpublished. The Ninth Circuit's opinion in co-defendant's habeas case (Pet.App.170a-172a) is unpublished but available at 689 F. App'x 485. The district court's opinion in co-defendant's habeas case (Pet.App.173a-190a) is unpublished but available at 2015 WL 8969538. The Ninth Circuit's order denying rehearing (Pet.App.194a-195a) is unpublished.

JURISDICTION

The Ninth Circuit issued its opinion on March 30, 2023, and denied a timely rehearing petition on July 7, 2023. On September 27, 2023, Justice Kagan extended the time to file this petition to December 4, 2023. No. 23A271. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

The Fifth and Fourteenth Amendments to the U.S. Constitution are reproduced at Pet.App.191a-193a.

INTRODUCTION

Petitioner Atif Rafay and his co-defendant Sebastian Burns were wrongfully convicted of murdering Atif's family as teenagers and sentenced to spend the rest of their lives in prison. Nearly all the testimonial and forensic evidence proved they could not have been the killers—including the blood and hair of unidentified males at the crime scene, which did not match the DNA profile of any victim, Atif, or Sebastian. Indeed, investigators ignored several probative leads pointing to Islamic extremists as the murderers, including a tip that came in just days before the murders that one such crime group had put out a $20,000 murder contract for an East Indian Family originally from Vancouver now living in Bellevue, Washington—an exact description of the Rafays—and another just days after that identified a baseball bat as the murder weapon long before the police had drawn the same conclusion.

Yet the jury found no reasonable doubt that Atif and Sebastian were the murderers, based solely on false "confessions" they gave to undercover officers posing as violent gangsters. 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. The sole object of the operation was to entrench Sebastian into the organization and then intimidate both teens into confessing. The operation was so plainly coercive that the Bellevue, Washington investigators on the case testified they could never get away with it on our soil. And after the teens were extradited, the Supreme Court of Canada held that

confessions obtained from this inherently coercive method are "presumptively inadmissible." *See R. v. Hart*, [2014] 2 S.C.R. 544 (Can.), https://tinyurl.com/26jd7ntw.

Even so, the state trial court found that neither teen subjectively felt intimidated when they made their incriminating statements. Atif's counsel separately argued that regardless, a confession is inadmissible if obtained by tactics that are inherently coercive as an objective matter. The trial court rejected that argument too, holding that "under Canadian charter rights," there was "nothing under Canadian police standards that would bring the administration of justice into disrepute." Pet.App.163a. The state court of appeals failed to reach the second claim and affirmed the trial court's voluntariness finding under a deferential standard of review. Pet.App.30a. The Ninth Circuit then denied Atif's habeas petition without addressing Atif's claim that the Mr. Big technique is per se coercive.

This Court should summarily reverse for the Ninth Circuit to consider the claim it overlooked. No court has ever seriously considered Atif's per se coercion claim. The state trial court summarily rejected the argument under Canadian law. And the state court of appeals and Ninth Circuit failed to address it. There is obvious legal and factual merit to the claim and profound consequences for Atif, who might otherwise spend the rest of his life in prison for crimes he didn't commit. And the issue is deeply important, given the prevalence of wrongful convictions obtained using false confessions that often result from official misconduct.

STATEMENT OF THE CASE

I. Factual Summary

Atif Rafay was the youngest in his family of four. He had two parents and an older sister. *See* C.A.E.R.500-01.[1] They were practicing Sunni Muslims, and Atif's father Tariq was very active in the local Muslim community. C.A.E.R.838-41. Tariq was also a founder and president of the Pakistan-Canada Association.

The Rafay family had faced hostility from extreme members of the Muslim community for years. *Cf.* C.A.E.R.960-62. And days before the Rafays were brutally murdered with a baseball bat, a confidential informant working with the Royal Canadian Mounted Police (RCMP) learned that an organized crime group had put out a $20,000 murder contract for an East Indian Family originally from Vancouver now living in Bellevue, Washington—a description of the Rafays. C.A.E.R.997-1000.[2]

A. The crime

1. In the summer of 1994, Atif was an 18-year-old Cornell University college student who had never been in a schoolyard fight—much less accused of any crime—back home with his family in Bellevue. C.A.E.R.716, 1052-53. His friend and high-school

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[1] The Excerpts of Record and Further Excerpts of Record below are cited as "C.A.E.R." and "C.A.F.E.R.," respectively.

[2] Tariq's successor as president of the Pakistan-Canada Association and another of its founders, Riyasat Ali Khan, was assassinated in 2003. *See* Robert Matas, *Pakistani Community Leader Shot to Death in B.C.*, The Globe & Mail (Jan. 7, 2003), https://tinyurl.com/bdfem9pa; *see also* C.A.E.R.2647-48.

classmate Sebastian Burns, who also had no criminal record or history of violence, was visiting the family and staying in a spare bedroom. C.A.E.R.1053, 1092.

On the evening of July 12, Atif and Sebastian went out to dinner and then to a movie theater. C.A.E.R.897-98, 1111. It is undisputed that when Atif and Sebastian left home, Atif's family was alive. When Atif and Sebastian returned late that evening, they found both of Atif's parents murdered and his older sister barely clinging to life. She later died at the hospital.

Neighbors on both sides of the Rafay home reported hearing sounds from the attack during the same narrow range of time, when Atif and Sebastian were at the movie, as confirmed by multiple witnesses. C.A.E.R.747-78, 754-55, 791-93.

Atif and Sebastian left their home around 8:30 PM and arrived at a restaurant about fifteen minutes later. C.A.E.R.716-17, 1093. Servers testified that the two were there until about 9:25 PM, and that they seemed relaxed and exhibited nothing unusual in their behavior. C.A.E.R.1146-50. They then crossed the street to the movie theater for the 9:50 PM showing of *The Lion King*. C.A.E.R.716-17, 1093, 1145. Cinema employees testified that they remembered Atif and Sebastian purchasing tickets and buying snacks at the concession stand shortly before the film. C.A.E.R.1164-70, 1172-73, 1177-78, 1188-89. And employees testified that Sebastian was one of the patrons who informed them that the curtain had failed to go up after the previews (around 10:00 PM). C.A.E.R.1156-57, 1179-80.

One of the Rafays' neighbors testified that she heard the attack around 9:45 PM—minutes before the start of the showing Atif and Sebastian were attending. C.A.E.R.739-40, 754-55. A different neighbor who was standing in his driveway told the police that he heard the attack during the same period, between 9:40 PM and 9:50 PM. C.A.E.R.791-92, 814, 1203-04. Both described the light at the time of the attack matching conditions at the end of civil twilight (9:43 PST on July 12, 1994): One said it was too late for work outside, but her neighbor's house was still visible, C.A.E.R.767-69, while the other said it was dark, but not completely dark, C.A.E.R.776-77, 779. Both were certain it was quiet by 10:15 PM, C.A.E.R.754-55, 794-95—shortly after Sebastian spoke with theater employees.

After the movie was over around 11:30 PM, Atif and Sebastian drove to downtown Seattle to a 24-hour restaurant and popular hangout. C.A.E.R.1159-62, 1191. Employees testified that they remember the teens arriving after midnight. C.A.E.R.1124, 1128-29, 1193-95. They ordered food, and servers testified that nothing seemed unusual about their appearance or behavior. C.A.E.R.1120-22. One employee testified that she spoke to them multiple times—first between 12:00 AM and 12:30 AM, and last between 1:15 AM and 1:30 AM. C.A.E.R.1397, 1400-01, 1403. They then tried to go to a local club, but it was closed, so they returned to the restaurant to use the restroom, where employees testified seeing the teens arrive around 1:40 AM, C.A.E.R.1125-26, then left for Atif's home.

2. When Atif and Sebastian arrived to find the crime scene, they immediately called 911 (at 2:01 AM). C.A.E.R.615. The police found the teens "shaking," "on

the verge of tears," and "incoherent, almost," screaming "blood" and "bodies." C.A.E.R.1254-63, 1268-72. Both fully cooperated with the police, answering questions and handing over their clothing. C.A.E.R.696-99, 1095.

The teens each gave an account of their evening consistent with the testimony above. C.A.E.R.716-17, 1093-95. Atif, according to an officer on the scene, was "subdued, stunned," "shocked," and "cooperative," with "a 1,000[-]yard stare." C.A.E.R.1407-08, 1414-15. The teens gave their statements on the scene for several hours, where they underwent gunshot residue testing, and were eventually transported to the Bellevue police station. C.A.E.R.702-04, 1412-13, 1480-82, 1486-87. They were interviewed again and checked for evidence, including blood spatter, C.A.E.R.1487-90, 1492-93, 1520-21, 2476-77, after which police put them up in a motel, C.A.E.R.1304.

In the days to come, investigators went to each of the locations the teens said they'd been the night of the murders. Witnesses from each confirmed that Atif and Sebastian had been there, at the times they said they'd been. C.A.E.R.1309-39, 1345-53, 1355-56, 1362-66. Soon after, a Canadian consular officer arranged for their return to Sebastian's home in Canada. *See* C.A.E.R.512, 1376-78.

3. Despite an inordinate amount of blood at the scene and the brutality of the murders, nothing pertinent was found on either teen or the clothing they'd been wearing all night. *See* C.A.E.R.616-17, 1492-95, 1520-21. The most police were eventually able to identify was a trace amount of blood on the cuff of Atif's pants, C.A.E.R.2624-27, which—given the

absence of any other blood on either of their clothing—was consistent with the teens stumbling onto the scene after the crime.

Police later identified evidence of a *different* "unknown male's" blood mixed with the blood splatter from Tariq in the downstairs shower, which did not match either Atif's or Sebastian's DNA. C.A.E.R.1651-52, 1668-77. And a coarse hair from an "unknown male" was found on the sheets of the bed where Tariq was murdered—which also did not match the DNA of Atif or Sebastian. C.A.E.R.1285-86, 1658-59, 1664-65.

Police initially believed that this hair could only have come from the killer. C.A.E.R.2653. The police completely reversed themselves when their testing proved that the hair belonged to neither Atif nor Sebastian. C.A.E.R.2641-42. The only supposedly hard evidence officers could point to was Sebastian's hair in the drain of the shower he had been using for several days as the Rafays' guest. *See* C.A.E.R.2636.

B. Other suspects

Undeterred by the teens' strong, corroborated alibi and the utter lack of physical evidence against them, the police set their sights on Atif and Sebastian as the murderers. The police continued to do so despite other, more compelling leads.

A confidential informant had reported just days before the crime that a well-known criminal organization had put out a hit on a family matching the Rafays' description. C.A.E.R.997-1000. Then, just days after the murders, an established, reliable FBI informant named Douglas Mohammed contacted police and informed them of an extremist Muslim

group in the local community that opposed the beliefs and teachings of Atif's father. C.A.E.R.1579, 1584, 1589, 1591-92.

According to Mohammed, this extremist faction advocated a violent interpretation of the Quran and had singled Tariq out for death. C.A.E.R.724, 1580-81, 1583, 1593-94, 1599-1601, 1606-07. Mohammed also reported that a member of the group approached him shortly after the crime, seeming concerned and nervous, to ask whether Mohammed had seen a baseball bat in a group member's car. C.A.E.R.1581, 1608. When Mohammed replied that he had not, the individual told Mohammed to "forget about it." C.A.E.R.724-25, 1581-82, 1593, 1601, 1607-08, 1614-15. Remarkably, Mohammed gave the police this tip *before* it was public that the Rafays had been killed with a bat, and indeed, long before even the police had made that determination. C.A.E.R.1608, 1614; *see also* C.A.E.R.518-20. Still, the police decided Mohammed's detailed tip was never worth investigating. C.A.E.R.1585-86, 1601-02, 1609, 1614-15.

Soon after, police received yet a third tip, this one from a Seattle Police Department Intelligence Unit detective who had heard about the Rafay murders and believed that the crime was linked to an Islamic terrorist group. *See* C.A.E.R.76. The Seattle police provided detailed information about an organized terrorist group known to engage in "contract assassinations" and active in the area where the murders took place. *Ibid.* Bellevue police never pursued this lead either.

C. The "Mr. Big" operation

Bellevue detectives sought to prove their theory that Atif and Sebastian were the killers by seeking assistance from the RCMP, which agreed to conduct an elaborate two-pronged investigation. C.A.E.R.598-614, 1686-90, 1692-93. The first involved covert surveillance, wiretaps, and listening devices to eavesdrop on Atif and Sebastian and their two housemates. C.A.E.R.657-58. The nearly *4,400 hours* of surveillance it yielded contained *nothing* incriminating. C.A.E.R.1711-15.

The second was an undercover operation called "Mr. Big." C.A.E.R.1746-47. As will be elaborated in the forthcoming amicus brief of the Criminal Lawyers' Association of Ontario, Canada, Mr. Big operations induce targets to join what purports to be a powerful criminal organization, and then elicit (often false) incriminating statements by offering them escalating enticements and sometimes, as here, threats of physical harm and death. Targets are told that confessing will help advance them in the organization, earn Mr. Big's trust and respect, and bring financial reward. If that fails, Mr. Big tells targets they face imminent arrest, jeopardizing Mr. Big himself, but that he can make the damning evidence disappear if they tell him the details of how they committed the crime, purportedly so that his accomplices can find and destroy the evidence. C.A.E.R.1723-28, 1747-52. But this operation went distinctly beyond the standard playbook, even though Atif and Sebastian were among the youngest individuals ever targeted.

This Mr. Big operation involved twelve "scenarios," which were planned interactions between

the targets and undercover officers, Sergeant Al Haslett as Mr. Big himself and Corporal Gary Shinkaruk as a thug working for him. C.A.E.R.687-91, 1720-22, 1746. The elaborate scheme coerced Sebastian and Atif into "confessing" by convincing the teens that Mr. Big believed they were facing imminent arrest, that the only way he could protect *himself* from being turned in by the teens was for them to tell him how they committed the crime so he could help them, and that if they refused to do so he would have them killed to avoid arrest himself.

Eventually, Sebastian made contradictory and even internally inconsistent incriminating statements to avoid the perception that he would turn on Mr. Big. Once Sebastian had falsely implicated them both in the murders, Atif had even less of a choice. Atif did not have the same relationship of trust with the organization as Sebastian, so 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.

i. Undercover officers induced petitioner's co-defendant into the "Mr. Big" organization.

In the first scenario, undercover officer Shinkaruk orchestrated a "chance" encounter with Sebastian, asking him for a ride after pretending that his keys were locked in his car. C.A.E.R.1778-87. Their conversations led to Sebastian agreeing to meet "Mr. Big" (undercover officer Haslett) at a pub, C.A.E.R.1788-93, where Haslett asked Sebastian if he wanted to make money by doing "some stuff" with Shinkaruk from time to time, C.A.E.R.1843, 1847. No

one suggested that Sebastian would be asked to commit any crimes. *Ibid.*

In the second scenario a few days later, the undercover officers persuaded Sebastian to drive a "stolen" car for them over his extreme hesitation. C.A.E.R.1769, 1800-01. He was not told, ahead of time, that he was expected to participate in a theft. C.A.E.R.1808. And when Haslett finally told Sebastian about the plan, he was "very scared and pale white" and said he didn't want to be involved, but eventually agreed to drive the car after Shinkaruk first pretended to break into it and drove it out of the parking lot. C.A.E.R.1812-16, 1826-27.

Over the coming scenarios, the officers then worked to entrench Sebastian into a fake underground world he believed he couldn't escape. *See, e.g.*, C.A.E.R.528-30 (also entwining roommate Jimmy Miyoshi into the organization).

ii. Mr. Big and his accomplice convinced petitioner's co-defendant that they kill those who might flip on them.

In the fourth scenario, which took place a few weeks after Sebastian had already been folded into the enterprise, Haslett and Shinkaruk made their first substantial display of the organization's extreme violence. While Shinkaruk and Sebastian made small talk in a room at a Four Seasons Hotel, another undercover officer arrived, pulled out two pistols, and stated that one was "pretty hot like she's uh, I don't mean hot like stolen, I mean still warm." C.A.E.R.1771, 1836-38, 1897-98, 1901-02.

Sebastian then tried to distance himself from the group, expressing fear over getting further involved. C.A.E.R.1950-53. In response, Shinkaruk explained that he had once "fuckin' toasted a guy," and that when it came time for his trial, Haslett had ensured that "the person that could finger me, they're not around anymore." C.A.E.R.1955; *see* C.A.E.R.1918. Then Haslett tried to push Sebastian into confessing to the Rafay murders, saying he needed to know Sebastian was "trustworthy." C.A.E.R.1993. Sebastian responded that he did not want to work for the organization. C.A.E.R.1993-94. When that standard ploy failed, Haslett explained that he thought Sebastian was putting him at risk, because Haslett was the "first person" Sebastian would "give up" when arrested. C.A.E.R.2001-02. This was right after Shinkaruk had intimated that Haslett had murdered someone who could have exposed him. C.A.E.R.1955.

"I got two things to lose," Haslett explained, "a lot of money, and a chance of me going to jail." C.A.E.R.2012. "There's two things I ain't gonna fuckin' do in my life," he repeated, "go to jail, or lose money." *Ibid.* "And you always remember that," he told Sebastian. *Ibid.* "That's the fuckin' way to live." *Ibid.*

Sebastian repeatedly insisted that police must have been fabricating evidence against him. C.A.E.R.2069. So Haslett told Sebastian to read every newspaper article on the murders to figure out the evidence the Bellevue police had in their possession. *Ibid.* "[R]ead 'em and read between every line," Haslett said, "they have something there." *Ibid.*

iii. Mr. Big convinced petitioner and his co-defendant that the only way to reassure him they were not a risk to him was to implicate themselves in the crime.

1. On June 28, months after establishing a relationship with Sebastian, Haslett told Sebastian that the Bellevue police had him "in a pretty big fucking way down there," and "the report I read knows you did it," referring to nonexistent hair and DNA evidence tying Sebastian to the murders. C.A.E.R.2188. This account of the police's thinking was plausible—despite the teens' innocence—because Sebastian had been living in the Rafays' home. Haslett offered to have the evidence destroyed, but to help Sebastian, Haslett said he needed to know the details of the crime to determine what evidence the Bellevue Police had. C.A.E.R.2189-93. Sebastian responded that he had no idea, even after being pressed. C.A.E.R.2194.

When Sebastian provided no details of the crime, C.A.E.R.2192-98, Haslett sprung the trap:

> Listen to me for one second. Obviously, you're new at this game, I fuckin' ain't. When I ask for a fuckin' answer or a fuckin' question, I need an answer 'cause I'm asking for a reason. I'm not asking for the good of my fucking health 'cause I can go out there and ask anybody on the fuckin' street a question and probably get an answer. I'm asking you for one reason, to protect my own ass, I'm going to be making money off my fucking actions and somebody down there or somebody in

> someplace when I ask them to do something for me isn't going to be stickin' their fuckin' neck in the dark. There's no sense going out with your head in the dark and only knowing half the fuckin' story you're trying to find something out. Somebody gets fuckin' bit. And nobody that works for me is going to get bit. If they get bit I get bit. You know what I mean?

C.A.E.R.2198-99.

That was the turning point, and Sebastian finally gave in. But before saying anything remotely inculpatory, Sebastian conveyed *why* he was finally giving Mr. Big the information he'd been pressing for:

> I just assume that, you know, you with your connections and, uh, whatever, and all of your money and power and stuff that … if I were to fuck you around, okay, I would just assume that I would wake up one day with a bullet in my head. … I'm not going to fuck you around. Okay. But the point is that is the power you have over me, okay, is that you're going to guarantee that I'm not going to fuck you around for that very goddamn reason. … [I]f I went to jail or something I'm sure I could still be gotten to, whatever, alright? That-that's my attitude towards you alright is that if I were to do something to you, anything, try and, like, set you up or whatever that I would be fucked, okay? And, now, I can talk to you about the time, you know, yeah, uh, because it defies my-my value so that I wouldn't do that but, I mean, that's your fuckin' guarantee, okay, that-that's my attitude,

> alright. Um, like, uh, what I'm saying to you is, uh, you got power over me so I'm not going to fuck you around. … I know enough not to fuck you around.

C.A.E.R.2199-2200.

Haslett said not one word to disabuse Sebastian of any of this. Quite the opposite. He replied, "I want it fuckin' clear" that "when I ask a question I'm askin' you 'cause I fuckin' wanna know." C.A.E.R.2200. Haslett repeated that he needed to know everything "'[c]ause I'm not sending people down there dark," "'[c]ause if they get bit in the ass, I get bit in the ass." *Ibid.* "I get bit in the ass," Haslett warned, "it hurts." *Ibid.*

Even still, Sebastian repeated his innocence. And when Sebastian said he didn't know whether there was any blood on any of the teens' clothing, Haslett got angry and ordered Sebastian to "[s]top the fuckin bullshit" and "out and out fucking lying to me." C.A.E.R.2219. Sebastian responded, "I'm not goddamn lying to you." *Ibid.* But Haslett was having none of it:

> [Haslett]: You aren't fuckin' givin' me this song and dance and everything you just told me. That you told me last time I talked to you that, which I don't know fuck all about. You come back and found these fuckin' bodies. The report I fuckin' read. Fuckin' basically spells out black and white. That, the police fuckin' know you killed these people. The fuckin' DNA is being cultured right now and they're puttin' together a fuckin', a big fuckin' case against you. So, I'm not putting up with this bullshit, you lying to me now, or fuckin' uh,

> you come back and found these fuckin' bodies. You must think I come down on last night's rain. The minute you start thinkin' about me, …
>
> [Sebastian]: Jesus Christ,
>
> [Haslett]: … And this fuckin', …
>
> [Sebastian]: You're misunderstanding me, okay you're misunderstanding me alright? I, uh,
>
> [Haslett]: Then make it clear so I don't misunderstand you because I'm not havin' fuckin' my ass get bit here.

C.A.E.R.2219-20 (ellipses original). If Sebastian "[went] down" on a murder charge, Haslett emphasized yet again, he would go down too. C.A.E.R.2256.

2. Still dissatisfied with Sebastian's inability to give details about the murders, the undercover officers eventually went even further.

Right before meeting with Sebastian a few weeks later, the RCMP coordinated a press release with Bellevue police to confirm Haslett's narrative that the police were ready to arrest the teens, C.A.E.R.242-43, and fabricated an internal police department memorandum detailing the purported evidence tying Sebastian to the Rafay murders, C.A.E.R.1774; *see* C.A.E.R.2188-2327. At the meeting, Haslett confirmed that Sebastian had reviewed all the newspaper and television coverage about the case, *see* C.A.E.R.2338, which reported the details of the coordinated fake press release.

Haslett then showed Sebastian the fictitious memo, which indicated that he would be charged with murder once the "culturing" of the DNA was completed. C.A.E.R.2190. *Still* Sebastian tried to explain that police must have been fabricating evidence against him, while again acknowledging that Haslett would kill him if Haslett felt betrayed. C.A.E.R.2341. Indeed, Sebastian believed he might be killed if he did anything at all to displease Haslett. Haslett testified to this himself: "Q: It's obvious that Sebastian thought that if he did anything to displease you, he risked death, right? [Haslett]: Yes. He had that impression, sure." C.A.E.R.264.

The threats were made explicit multiple times. Haslett had expressed that the only "reason" he was offering help was "to protect my own ass." C.A.E.R.2198. Haslett made explicit that he believed if Sebastian and Atif "take a fall," then he would also "go[] down." C.A.E.R.2243-44. He made clear that if Sebastian or any of his "fuckin' friends try to sell me short," Sebastian "being in the middle is gonna hurt." C.A.E.R.2257. He told Sebastian he had Sebastian's "fuckin' future in the palm of my fuckin' hand." C.A.E.R.2254.

With no way to dissuade Haslett from perceiving the teens as a threat, Sebastian made the only rational, seemingly costless choice: He concocted a story that he committed the murders with Atif present. C.A.E.R.2345-66. Sebastian claimed he committed the murders even though multiple witnesses testified the teens were at the theater at the time. He also made many other statements that were later contradicted, either by himself, Atif, or the evidence. For example, Sebastian variously claimed

during the same conversation to have tossed his clothes in dumpsters, to have committed the murders naked, to have committed them in underwear alone, and to have been wearing shoes, C.A.E.R.2356-59, 2375-76, changing his story as Haslett asked pointed questions revealing parts of the story that made no sense, *e.g.*, C.A.E.R.2359.

After Sebastian's statements, Haslett said he would have the evidence destroyed, but first needed to hear from Atif and their roommate Jimmy Miyoshi—who had also been drawn into doing criminal work for Mr. Big, *e.g.*, C.A.E.R.528-30 (Miyoshi and Sebastian doing "money laundering" for Mr. Big)—to make sure they were trustworthy too. C.A.E.R.2364-66. Sebastian reiterated that he, Atif, and Miyoshi all knew that if they ever "fucked [anyone] around" in the organization, they would be dead. C.A.E.R.2382.

3. Once Sebastian confessed, Atif believed he had to do so too. Haslett had made clear his distrust, asking Sebastian "[h]ow solid's Atif?," C.A.E.R.2352, and stating: "I'm still worried about little ole fuckin' Atif," C.A.E.R.2360, and "Fuck all on Atif, right," C.A.E.R.2255. "I don't got no best friend," Haslett said; "People I deal with, people I work with.... I just hope they don't give you up." C.A.E.R.2271. "In my fuckin' world," Haslett explained, "you always gotta be concerned about that." *Ibid.*

The day after Sebastian made incriminating statements, Haslett had Shinkaruk bring Atif to him and stressed that the reason he helped accomplices like Sebastian avoid arrest was that Haslett saw the risk he faced should an accomplice go to jail. C.A.E.R.2430. And he said Atif was close to going to

jail himself: "You read the papers the last couple weeks," he asked Atif, "You and Sebastian are in a little bit of trouble." C.A.E.R.2431. Haslett then had Sebastian describe the contents of the fake police memo. C.A.E.R.2431-32.

Having heard the details of these discussions all along from Sebastian, Atif had no option. To avoid seeming like a substantial liability, Atif affirmed Sebastian's tale that he was present during the murders, had pulled out the VCR to make it look like a burglary—just as the papers had reported—and that the murders were for financial gain. C.A.E.R.2433-35.

The teens contradicted each other multiple times. Sebastian claimed he and Atif had thrown their clothes and the VCR in the dumpster of the diner they were at before the movie (and before the crime had been committed), while Atif claimed he had "hucked" his clothes out of a window. *See* C.A.E.R.2349, 2440. (The police found no clothes nor a VCR in either location.) Sebastian denied purchasing the baseball bat, saying he and Atif found the murder weapon at Atif's house; Atif claimed they bought it together in Bellingham, WA. *See* C.A.E.R.2361, 2450-51. Their story also contradicted the State's forensic expert, who testified that based on the blood splatter, it is likely two individuals violently attacked and killed Atif's father while a third stood on the other side of the bed. C.A.E.R.554-55.

II. Procedural History

A. State criminal trial

On July 31, 1995, Atif and Sebastian were arrested for murder and eventually extradited to

Washington for trial. C.A.E.R.545 & n.9. Miyoshi was arrested for conspiracy to commit murder, based on his own "confession" to Mr. Big to avoid the perception that he was a liability. *See* C.A.E.R.545. Prosecutors granted him complete immunity in exchange for his testimony against Sebastian and Atif, saying "it's either them or you." C.A.E.R.545-46. Sebastian and Atif were convicted and sentenced to three life terms without the possibility of parole. C.A.E.R.490, 500.

Their attorneys tried to suppress their incriminating statements, arguing psychological coercion. C.A.E.R.547-59. Sebastian testified in his own defense, explaining that he and Atif made incriminating statements because they feared for their lives. C.A.E.R.549-52. The court ruled that Atif and Sebastian were not coerced because they gave their statements "in a noncustodial setting"—Mr. Big's hotel room—where the teens were apparently "free to speak or not," "free to leave or not," and "free to consult their Canadian counsel or not, as they chose." Pet.App.163a.

Atif's counsel separately claimed that the Mr. Big operation was per se coercive. The "best witnesses to this," Atif's counsel argued, were the Bellevue investigators who in their testimony "basically said that's crazy, we can't do that kind of stuff," so "there's no doubt and no disagreement it violates … the federal constitution." C.A.E.R.443. There is "no doubt" that "this type of operation," she argued, violates the Fifth and Fourteenth Amendments. *Ibid.*

The trial court rejected this argument too, applying foreign law that is different from the voluntariness standard under the U.S. Constitution. It

is no surprise the trial court applied the wrong law, because despite the State's burden to prove voluntariness by a preponderance of the evidence, *Lego v. Twomey*, 404 U.S. 477, 489 (1972), Washington's prosecutors did not even respond to the teens' coercion claims. Instead, prosecutors argued that the issue had already been "squarely decided in the court in Canada." *See* C.A.E.R.206.

In the prosecutor's words, "the Court of Appeals in Canada in its committal proceeding did entertain that very notion" that the statements were "involuntary and coerced," which "is why" the prosecutors "didn't spend any time briefing it" themselves. C.A.E.R.457. Rather, the prosecutors quoted from the Canadian court's opinion that the foreign tribunal did "not find the undercover officers' conduct in this case shocking or outrageous," and there was thus "no duress." *Ibid.*; *see also* C.A.E.R.457-58 (prosecutor quoting Canadian court's holding that the RCMP's conduct "would not in [Canada's] view 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").

Accepting the prosecution's argument, the trial court then rejected Atif's claim that the undercover operation was per se coercive. "The Canadian court, in reviewing the self[-]same issue under Canadian charter rights, found no duress, found nothing under Canadian police standards that would bring the administration of justice into disrepute." Pet.App.163a. The trial court "ma[de] the same finding." *Ibid.*

The court incorporated these rulings into findings of fact and conclusions of law. *See* Pet.App.28a-29a.

B. State court of appeals direct review

Both teens appealed their convictions, which the Court of Appeals of Washington upheld.

The court of appeals rejected Atif's contention that voluntariness is a legal issue requiring de novo review. Instead, the court held that voluntariness is a factual finding requiring affirmance when "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." Pet.App.30a (quoting *State v. Broadaway*, 942 P.2d 363, 370 (Wash. 1997) (en banc)). Under the State's "substantial evidence" standard, the court of appeals scoured the record for anything that *could* support the trial court's voluntariness determination. The court of appeals held, under that standard, that the record "support[ed] the trial court's conclusion that the confessions were voluntary and not coerced." Pet.App.26a.[3]

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[3] It is highly doubtful whether the court of appeals could apply a deferential standard of review based on the State's understanding that voluntariness is merely a factual question. "Without exception, the Court's confession cases hold that the ultimate issue of 'voluntariness' is a legal question requiring independent" review. *Miller v. Fenton*, 474 U.S. 104, 110 (1985). Counsel has combed Westlaw and consulted Washington defense attorneys, and as far as undersigned is aware, the only Washington appellate case *ever* to reverse a trial court's voluntariness determination under the State's deferential standard—out of hundreds of cases—did so only because the prosecution confessed error. *See State v. Sparger-Hurt*, 91 Wash. App. 1049, at *3 (1998) (unpublished). That was 25 years ago.

Treating the teens' involuntary confession claims as one, the court rejected their claims based on Sebastian's supposed "remarkable resilience to continued pressure." Pet.App.38a. According to the court, the record supported the trial court's finding that Sebastian was "not intimidated" by the undercover officers and had effectively "resisted Haslett's repeated attempts to extract information about the murders." *Ibid.*

The court did not doubt that Sebastian "expressly raised the subject" of "fear of physical injury" on "several occasions," even "asserting his expectation that someone in the organization would shoot him if [Haslett] ever felt betrayed." Pet.App.38a. And the court accepted that Sebastian had "appeared scared and nervous" at times. *Ibid.* Still, the court rejected the claim that the teens gave incriminating statements in response to a credible threat of violence, because *after* Sebastian confessed, Haslett gave Sebastian assurances. Pet.App.38a-39a ("*Near the end* of the confession recording, Burns assures Haslett that he can trust him because otherwise 'some guy [would come and] blast me in the head,'" and in "response, Haslett insists that he is 'not a killer'") (brackets original; emphasis added).

Aside from appointed counsel's arguments about subjective coercion, Atif further argued in a pro se submission that the Mr. Big operation was inherently coercive under *Miller*, 474 U.S. at 116. *See* C.A.F.E.R. "The right against self-incrimination," Atif argued, "is intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt." C.A.F.E.R.64 (quotation marks omitted). "It is to be

hoped that this Court will never adjudicate a more inquisitorial operation than the one in this case, which, having failed to obtain the desired admissions by the inducements now known to have elicited false confessions in several cases, resorted to the threat of murder and the promise of exoneration." *Ibid.* "This is hardly a technique 'compatible with a system that presumes innocence and assures that conviction will not be secured by inquisitorial means.'" *Ibid.* (quoting *Miller*, 474 U.S. at 116). "It is, rather a technique premised on leaving the suspect no rational reason to maintain innocence." *Ibid.*

The court accepted Atif's pro se submission. *See* Pet.App.139a-146a. But the court viewed his coercion arguments as "essentially identical to those raised by appointed counsel," even though Atif's appointed counsel did not raise the objective-coercion claim. Pet.App.141a-142a. Thus, the court of appeals did not address the argument that Mr. Big is an inherently coercive police tactic.

The Supreme Court of Washington denied the teens' petitions for discretionary review.

C. Co-defendant's federal habeas

Sebastian filed a federal habeas petition, asserting that his statements to the undercover police were coerced.

The district court denied the petition despite concluding there was "no question that Haslett sought to create the impression that he would either kill [Sebastian] or have him killed if [Sebastian] betrayed him." Pet.App.187a. "Nor," the district court found, "is there any question that [Sebastian] believed that, if he

betrayed Haslett, he would be killed." *Ibid.* But the district court held that the state courts had not unreasonably adjudicated the claim because Haslett never directly "stated that 'If you are arrested, you will be killed.'" Pet.App.188a. Instead, according to the court, Sebastian was merely "given the general impression that Haslett and Shinkaruk were violent men who were not above killing to achieve their ends." *Ibid.* And because Sebastian appeared "relaxed and at ease" when he finally incriminated himself and "discussed his understanding that Haslett would have him killed if he were to betray him," the court determined that he was not coerced. Pet.App.189a. The court also adopted the magistrate judge's reasoning that even though Haslett suggested Sebastian's "arrest would be a betrayal … because it would ultimately result in Haslett's arrest," it was not unreasonable to find that Sebastian "did not confess out of fear of physical injury" because of his "insistence that he would not betray Haslett." *Burns v. Warner*, 2015 WL 9165841, at *14 (W.D. Wash. July 2, 2015).

The Ninth Circuit affirmed, holding that Sebastian "did not apparently confess in direct response to a credible threat of physical violence." Pet.App.172a (distinguishing *Arizona v. Fulminante*, 499 U.S. 279, 287-88 (1991)). Sebastian did not argue, and the Ninth Circuit did not address, whether the undercover operation was inherently coercive.

D. Petitioner's federal habeas

Atif sought state habeas relief, and the state courts summarily dismissed his coerced confession claims as having already been sufficiently addressed by the trial court and on direct review. *See*

C.A.E.R.496-99. He then filed the federal habeas petition here, which the district court denied. Pet.App.7a-14a.

The Ninth Circuit affirmed. The panel did not dispute that the state trial court applied the wrong legal standard. *See* Pet.App.4a n.3. Nor did the panel dispute that the state court of appeals deferentially reviewed the trial court's voluntariness finding. *See* Pet.App.30a. Yet the panel held that the decision was not contrary to, nor an unreasonable application of, this Court's precedents as required to grant habeas relief. Pet.App.4a. "The state court reasonably relied on the totality of the circumstances," according to the Ninth Circuit, "to conclude that … there was no 'credible threat of physical violence' sufficient to overbear Rafay's will." *Ibid.* (citation omitted).

The court did not address petitioner's separate, consistently asserted claim that the Mr. Big operation was per se coercive. So Atif timely petitioned for rehearing, seeking resolution of this claim that the panel "overlooked." *See* Doc. 74-1. The Ninth Circuit denied the rehearing petition. Pet.App.194a-195a.

This petition follows.

REASONS TO GRANT THE PETITION

The Court should summarily reverse for the Ninth Circuit to consider the claim it failed to address.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal court must grant habeas relief from a state conviction "with respect to any claim that was adjudicated on the merits in State court proceedings," which "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." 28 U.S.C. § 2254(d)(1). It is clearly established that certain police techniques are per se coercive, such that evidence obtained using those methods are automatically excluded. The state trial court adjudicated the merits of Atif's objective-coercion claim, and he has pressed it ever since. The Ninth Circuit was not free to leave it unresolved.

The issue is profoundly important to Atif and has obvious legal and factual merit. The trial court summarily rejected the claim based on what the Canadian courts held in his extradition proceedings. Since then, Canada's Supreme Court has held that confessions obtained using the technique are "presumptively inadmissible," given the inherent risk of coercion and alarming number of wrongful convictions that have resulted from the method.

And it is vital to reaffirm that using a confession obtained by inherently coercive police tactics to secure a conviction violates Due Process. Official misconduct often leads to false confessions. And even demonstrably unreliable confessions lead to convictions. "A confession is like no other evidence," and "may tempt the jury to rely upon that evidence alone in reaching its decision." *Fulminante*, 499 U.S. at 296. "Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.'" *Ibid.* (citation omitted).

This case is a perfect illustration. Despite all the testimonial and forensic evidence pointing *away* from Sebastian and Atif as the killers—including the blood and hair of other unidentified males at the crime

scene—the jury still found no reasonable doubt that the teens murdered Atif's family. Without this Court's intervention, Atif may spend the rest of his life in jail for crimes he did not commit, without any court having given serious consideration to his substantial claim for habeas relief.

I. Summary Reversal Is Warranted.

Since this case began, Atif has asserted that the police technique the RCMP used to obtain his incriminating statements is per se unlawful under the Fifth and Fourteenth Amendments. The Ninth Circuit overlooked the claim. This Court should summarily reverse for the Ninth Circuit to resolve it.

1. "This Court has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment," without inquiry into the subjective reaction of the defendant. *Miller v. Fenton*, 474 U.S. 104, 109 (1985). When "the police conduct [is] 'inherently coercive,'" any incriminating statements obtained therefrom must be suppressed. *See ibid.* (quoting *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944)). That is because, "[w]ithout exception, the Court's confession cases hold that the ultimate issue of 'voluntariness' is a legal question." *Ibid.* That question asks "whether the State has obtained the confession in a manner that comports with due process." *Ibid.*

"[C]onfessions obtained by violence," for example, are automatically excluded from use in a criminal trial. *Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (quotation marks omitted). "It would be difficult to

conceive of methods more revolting to the sense of justice than those taken to procure the confessions" by violence, "and the use of the confessions thus obtained as the basis for conviction and sentence [i]s a clear denial of due process." *Ibid.* This Court has never hinted that prosecutors may use a confession beaten out of a suspect so long as they can convince a court that the beating did not overcome the suspect's free will.

This Court has held the same as to "continuous cross examination" of a defendant "for thirty-six hours without rest or sleep in an effort to extract a 'voluntary' confession." *Ashcraft*, 322 U.S. at 154. "We think a situation such as that is so inherently coercive," the Court held, "that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear." *Ibid.* The same goes for on-and-off questioning of a confined suspect over five days, absent formal charges. "Due process of law," this Court admonished, "commands that no such practice … shall send any accused to his death." *Chambers v. Florida*, 309 U.S. 227, 241 (1940). Even "continued incommunicado detention" combined with "the promise of communication with and access to family" if the suspect confesses is inherently coercive, the Court has held. *Haynes v. State of Wash.*, 373 U.S. 503, 514 (1963).

2. Atif repeatedly argued below that the Mr. Big operation was inherently coercive under these precedents and, as a result, his confession was inadmissible without regard to prosecutors' claim that the tactics did not overbear his free will. The Ninth Circuit did not dispute that the Due Process Clause

prohibits some interrogation tactics as inherently coercive without inquiry into their subjective effects. And it did not contest that this law was clearly established. Instead, the court simply failed to address the question.

But because Atif preserved the claim since the outset of the case, the Ninth Circuit would not have been at liberty to ignore it even if *no* state court had resolved it. If the state courts "never reached" a claim that the conviction was obtained in violation of federal law, the federal habeas court must resolve it de novo. *Rompilla v. Beard*, 545 U.S. 374, 390 (2005).

Here, the trial court reached the merits of the claim, while the state court of appeals did not. Thus, the Ninth Circuit should have "'look[ed] through'" to the trial court's decision to determine whether *its* resolution of the claim was contrary to, or involved an unreasonable application of, clearly established federal law. *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018) (citing 28 U.S.C. § 2254(d)(1)).

Given the substantial merit to Atif's claim that the Mr. Big technique is per se coercive, and the de novo review required to review that claim, *infra* pp.34-35, summary reversal is warranted.

II. There Is Substantial Merit To The Habeas Claim The Ninth Circuit Overlooked.

No court has ever seriously considered Atif's per se coercion claim. Had the Ninth Circuit addressed the argument, it would have been compelled to order relief.

1. As to Atif's objective-coercion claim, the state trial court held: "The Canadian court, in reviewing the

self[-]same issue under Canadian charter rights, found no duress, found nothing under Canadian police standards that would bring the administration of justice into disrepute." Pet.App.163a. In its finding of fact 15, the trial court elaborated:

> During the course of the extradition proceedings in Canada, the Court of Appeals of British Columbia found the undercover technique used by the RCMP and the resulting interception and recording of the defendants' communications did not violate the defendants' rights under Canada's Charter of Rights and Freedoms, nor did it offend the sensibilities of the Canadian citizenry. The Court of Appeals for British Columbia further found that there was no duress or coercion employed by the RCMP during the undercover scenarios in order to obtain the defendants' admissions. The Supreme Court of Canada did not disturb this finding. This Court agrees with the Canadian courts and finds the same.

Pet.App.28a-29a.

There can be no doubting that applying Canada's law of coercion, which "differs from that of the U.S.," *see* Pet.App.4a n.3, is contrary to clearly established law.

In the United States, a confession is involuntary *either* when "the police conduct was 'inherently coercive,'" or, "in the particular circumstances of the case, the confession is unlikely to have been the product of a free and rational will." *Miller*, 474 U.S. at 110 (citation omitted). Courts look to "the totality of

the circumstances" to decide whether "the challenged confession was obtained in a manner compatible with the requirements of the Constitution." *See id.* at 112.

At the time, though, the only way to render a "confession" inadmissible in Canada was to either meet a threshold showing that (1) it was made to a person the defendant reasonably believed was a law-enforcement officer, or (2) 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), ¶¶7-9, 11, https://tinyurl.com/2uww7p54.

Atif and Sebastian argued that the Canadian court should apply a standard like the one in the United States. "In the case at bar," they urged, their statements had to be suppressed because they "believed that Haslett and Shinkaruk were underworld figures and that they had the power of life and death over the[m]." *Burns*, 1997 CanLII 2914, ¶7. According to the Canadian court, that belief doomed their claim, as it "would amount to a significant change in the common law." *Id.* ¶9. Canada's "confession rule" had "no application to the statements obtained by the undercover officers" *because* the teens did not believe they were speaking to the cops, so their statements could "be admitted into evidence and it would be for the jury to determine what weight should be given them." *Id.* ¶10.

The Canadian court's approval of the Mr. Big technique also applied a standard at odds with the U.S. Constitution. Under the Canadian standard, the official conduct must be so "shocking or outrageous"

when "viewed objectively," that it would "shock the sensibilities of an informed community" and "bring the administration of justice into disrepute." *See Burns*, 1997 CanLII 2914, ¶11. The "officers' conduct viewed objectively," according to the court, 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." *Id.* ¶11; *see also id.* ¶14 ("The Crown's position, with which we agree, is that the public would endorse rather than be shocked by the efforts of the undercover agents in this case.").

That obviously is not the legal standard used to evaluate voluntariness in the United States. This Court does not look to whether an informed Canadian would approve of police efforts to solve a particularly heinous crime. The severity of the crime is irrelevant. Instead, the question is whether the officers' methods are inherently coercive such that they violate Due Process, no matter the brutality of the allegations. *Supra* pp.29-30.

2. On remand, the Ninth Circuit's review will be de novo.

The court of appeals must "look[] through" to the decision of the trial court—the only opinion to resolve the objective-coercion claim. *See Wilson*, 138 S. Ct. at 1192. And that court applied the wrong legal standard. Applying the wrong legal framework is "contrary to" federal law. *Williams v. Taylor*, 529 U.S. 362, 405, 412-13 (2000). When the state court applies a legal rule that is contrary to federal law under this Court's precedents, a "federal court must then resolve the claim without the deference AEDPA otherwise

requires." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007).

And even if AEDPA deference applied, Atif would still win. No reasonable jurist could agree with the trial court's determination that the Mr. Big operation was not objectively coercive, such that using the incriminating statements elicited from it to convict Atif violated his right to Due Process.

III. It Is Vital For Courts To Consider Whether Certain Investigative Techniques Are "Inherently Coercive."

As will be elaborated in the forthcoming amicus brief of the Washington Innocence Project and amicus brief of Law Enforcement Training & Interrogation Experts, false confessions that result from official misconduct are a significant source of wrongful convictions. It is thus crucial for this Court to reaffirm that courts must consider, on top of whether a suspect's individual will was in fact overborn, whether certain police techniques are inherently coercive.

This Court has long recognized that false confessions are notoriously difficult for a jury to "unhear." *See Fulminante*, 499 U.S. at 296. "A confession is like no other evidence," and "may tempt the jury to rely upon that evidence alone in reaching its decision." *Ibid.* "Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.'" *Ibid.* (citation omitted).

A layperson does not believe she would go so far as to falsely confess that she committed a murder. *Contra* Pet.App.64a (trial court rejecting defense

expert who would have testified to phenomenon of false confessions because laypeople understand "that people for a variety of reasons limited only by the human imagination, tell lies, little lies and big lies"). That is why false confessions are such a significant source of wrongful convictions.

This case is a perfect illustration. Every one of the coercive tactics described in the forthcoming amicus briefs—permissible and not—was leveraged by the undercover officers against Atif and Sebastian for months. They were not the murderers, as the record establishes, and as meticulously explored in the premiere episodes of an acclaimed documentary series devoted to investigating false confessions. *The Confession Tapes* (Netflix 2017) (season 1, episode 1, *True East Part 1*, episode 2, *True East Part 2*). The tragedy of this case is that, rather than investigate the other-suspect leads that might have led to the actual murderers, police focused on Atif and Sebastian. Despite forensic and testimonial evidence exonerating them, the State used the teens' coerced, implausible statements to wrongfully convict them.

The State did not argue below that their incriminating statements were, in fact, voluntary. It only defended the state courts' judgments as debatable. As a result, two innocent men have been in prison since they were teenagers. And unless this Court intervenes, both will likely remain in prison for the rest of their lives. All the while, the real killers remain free from justice for the Rafay family murders—very likely the "unknown males" whose blood and hair were collective at the crime scene but never identified or pursued by the Bellevue police.

Atif asks for no more than that a court seriously address a substantial federal claim he has made since the outset of his case—a claim that only the state trial court considered and summarily rejected under a legal rule incompatible with our understanding of Due Process.

CONCLUSION

This Court should summarily reverse for the Ninth Circuit to consider petitioner's unaddressed habeas claim. Alternatively, this Court should grant the petition for plenary review.

Respectfully submitted,

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