

No. 23-636

IN THE
Supreme Court of the United States

ATIF AHMAD RAFAY,

Petitioner,

v.

ERIC JACKSON, WARDEN,

Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF WASHINGTON INNOCENCE
PROJECT AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE*¹

The Washington Innocence Project (WashIP) was the third organization established in the United States to work exclusively on claims of actual innocence.² An independent nonprofit organization, WashIP provides *pro bono* legal and investigative services to prisoners with viable claims of actual innocence that may be established through the presentation of evidence in the post-conviction phase. WashIP has secured the release of 20 innocent men and women who served more than 300 years in prison, pre-trial detention, and post-release restrictions for crimes they did not commit.

False inculpatory statements are one of the primary contributing factors to the conviction of innocent people in Washington State, accounting for 12 of the 53 documented exonerations in the state since 1989.³ “False confession” cases often involve false statements made by a subject in response to deceptive

¹ No counsel for any party has authored this brief in whole or in part, and no person other than *amici*, its members, or its counsel have made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2, *amici* provided timely notice of intent to file an *amicus curiae* brief to the parties’ counsel of record.

² Centurion Ministries (New Jersey) was established 1983, the Innocence Project (New York) was established in 1992, and Washington Innocence Project – formerly known as “Innocence Project Northwest” – was established in 1997.

³ Exoneration Detail List, Filtered by state (WA) and contributing factor (false confessions), National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=ST&FilterValue1=WA&FilterField2=FC&FilterValue2=8%5FFC>.

police tactics, a phenomenon to which juveniles and young adults are particularly vulnerable.

Given the circumstances surrounding the statements at issue in this case—including an elaborate law enforcement ruse and Mr. Rafay’s particular vulnerability—WashIP has a strong interest in ensuring that this Court understands the prevalence of false inculpatory statements by juveniles and young adults in coercive contexts when evaluating the constitutional issues raised by Mr. Rafay.

SUMMARY OF ARGUMENT

In 1995, the Royal Canadian Mounted Police (RCMP) exploited its power and resources to engineer a suffocating social world within which teenaged Atif Rafay believed he was under the constant surveillance of a violent and dangerous group of men. Doc.27 14–15. This tactic, called a “Mr. Big” operation, violated Mr. Rafay’s due process rights due to its use of psychologically coercive police activity which, when understood under the totality of the circumstances, overbore Mr. Rafay’s “rational intellect and free will,” rendering his resulting confession involuntary. *See Brown v. Horell*, 644 F.3d 969, 983, 979 (9th Cir. 2011); *see also Arizona v. Fulminante*, 499 U.S. 279, 285 (1991); *Withrow v. Williams*, 507 U.S. 680, 689 (1993).

The “investigation” techniques the RCMP deployed pose profound risks of inducing false confessions, which are a distressingly common feature in wrongful convictions. Further, Mr. Rafay’s case bears many other common indicia of wrongful conviction,

including a police investigation characterized by “tunnel vision” that focused exclusively on Mr. Rafay and Mr. Burns to the exclusion of meaningful evidence implicating another entity. Taken together, these factors create an unacceptable risk that Mr. Rafay was denied his Fifth Amendment right against self-incrimination, and consequently sentenced to serve life in prison for a crime he did not commit. These factors in turn provide a compelling justification for this Court’s review.

FACTUAL AND PROCEDURAL BACKGROUND

Nineteen years before the Supreme Court of Canada declared all confessions resulting from Mr. Big operations presumptively inadmissible, the RCMP began its investigation against Mr. Rafay. *See R. v. Hart*, 2 S.C.R. 544, ¶102 (Can. 2014). Undercover officers therefore acted with impunity in manufacturing and extracting Mr. Rafay’s confession through Mr. Big strategies throughout their “investigation.” The state’s investigators combed through 4,400 hours of surveillance by wiretaps and other listening devices, yet failed to uncover a single statement which could incriminate Mr. Rafay. The search for physical evidence tying Mr. Rafay to the crime were similarly fruitless. Instead of exploring the obvious alternative explanation—that Mr. Rafay was not involved—officers doubled down, relying on coercive interrogation techniques rather than skillful investigation to convict Mr. Rafay. Doc.27 13–14, 10–11.

Officers masked themselves as gang members and murderers with incentive to maim or kill those who

threatened their criminal operations and ensured that Mr. Rafay believed he was in their crosshairs. These officers subjected teenaged Mr. Rafay and his friend, Sebastian Burns, to several months of covert and highly intrusive surveillance, fabricated evidence, proclamations that they were imminently doomed to incarceration, irate rejections of the teens' repeated assertions of innocence, and threats of violence and death for "noncompliance." Doc.27 15, 18–21.

The RCMP's scheme against Mr. Rafay followed a similar playbook to the typical Mr. Big operation. First, undercover officers contrive an opportunity to "coincidentally" cross paths with the target(s). The officers then play up the illusion of a shared criminal history and befriend the target, who is subsequently employed by the fake gang and compensated for increasingly serious criminal tasks. This functions to intensify the social influence factors of reciprocity and consistency, powerful social norms increasing the likelihood that one will feel obligated to repay favors and maintain uniformity between current and past behaviors, respectively. The ploy also serves as blackmail. "Mr. Big," an officer playing the role of gang boss, then informs the target that his imminent arrest poses a threat to the organization's security. Ultimately, "Mr. Big" assures the target that by confessing and providing details of the crime, he can use members "on the inside" to destroy evidence or otherwise exculpate the target, securing the target's freedom and the organization's continued well-being. See Kirk Luther et al., *Lingering Problems with the Mr. Big Technique*, 8 *Crest Sec. Rev.* 23, 23–24 (2018).

In investigating Mr. Rafay’s case, officers orchestrated twelve distinct “scenarios” played out in front of the teens involving increasing violence over time, a common tactic in Mr. Big operations. This practice “demonstrates to the target that ‘the criminal organization would resort to deadly force to deal with persons who betrayed it.’” Doc.27 14; Timothy E. Moore, et al., *Deceit, Betrayal, and the Search for Truth: Legal and Psychological Perspectives on the Mr. Big Strategy*, 55 Crim. L. Q. 348, 351 (2009) (hereinafter *Deceit*). For example, in the fourth scenario, an undercover officer pulled out pistols, implied they had just been used in a shooting, and “Mr. Big” himself—Officer Haslett—told Mr. Burns that those with knowledge to implicate him in criminal activity “[are] not around anymore.” Doc.27 16–17.

After presenting the pistols to Mr. Burns in the fourth scenario, officer Haslett told him he needed to know if he was “trustworthy,” and bemoaned that Mr. Burns was putting “Mr. Big” at risk because Mr. Burns would “give [‘Mr. Big’] up” when arrested. Doc.27 17. In the RCMP’s fabricated narrative, “Mr. Big” impressed on the teens that the only way he could protect himself from being turned in by the young men in exchange for leniency from police was for the teens to confess to him immediately; if they refused, he would have them killed to protect himself. Doc.27 15. Despite this overriding pressure to confess, the teens nonetheless consistently maintained their innocence for months.

The RCMP recognized that they needed to increase pressure to secure confessions from Mr. Burns or Mr. Rafay. The undercover officers, masquerading

as violent organized crime members, cited nonexistent hair and DNA evidence tying Mr. Burns to the murders and offered to have the evidence destroyed in exchange for a confession; this failed, despite “Mr. Big” himself commanding Mr. Burns to “[s]top the fucking bullshit” and “out and out fucking lying to [him].” Doc.27 19. Mr. Burns confirmed he understood very well that lying to “Mr. Big” would invite a “bullet in [his] head.” Doc.27 19–20.

Officers strove to push the teens harder. The RCMP coordinated a press release with the Bellevue Police Department to present a manufactured memo detailing this purported evidence tying Mr. Burns to the murders, which “Mr. Big” presented to Mr. Burns. Doc.27 20. “Mr. Big” asserted that Mr. Burns and Mr. Rafay would be arrested immediately, and that by confessing, Mr. Burns could secure help from “Mr. Big” to have the evidence destroyed. Doc.27 20–21. This, too, failed; Mr. Burns still urgently maintained that he did not know anything about the murders. *Id.*

Eventually, though, the undercover officers’ relentless pressure led to Mr. Burns’ false confession after months of maintaining his innocence. Mr. Burns indicated previously he believed he would be dead if he did not cooperate with “Mr. Big,” underscoring the coercive and threatening nature of the operation. Mr. Burns implicated Mr. Rafay under the same extraordinarily coercive circumstances. Contending with Mr. Burns’ false confession and an atmosphere of terror, Mr. Rafay had no choice but to fall in line and demonstrate his “trustworthiness” at the risk of appearing uncooperative. Mr. Rafay therefore offered his own false confession. Doc.27 22, 24.

The Ninth Circuit rejected Rafay’s contention that the Washington state courts applied the wrong legal standard in assessing the voluntariness of the confessions. Pet. App. 5a. He had argued both that the state court’s decision was premised on Canadian, rather than U.S., law and that in assessing voluntariness, the last state court decision on the merits applied a state standard different from the federal voluntariness standard. Doc.27 44. The Ninth Circuit, however, failed to address one of Rafay’s substantive claims—that the police technique is objectively unreasonable—a claim the state trial court rejected based on the Canadian courts’ resolution of that claim under foreign law, and which the last state court decision entirely ignored.

This brief addresses how the state misconduct at the heart of the Mr. Big operation at issue here coerces confessions and leads to wrongful convictions.

ARGUMENT

I. OFFICIAL MISCONDUCT IS A SIGNIFICANT SOURCE OF WRONGFUL CONVICTIONS.

Official misconduct is a driving force behind wrongful convictions. A 2020 report prepared by the National Registry of Exonerations, for example, found that misconduct by government officials contributed to the wrongful convictions of a majority of the 2,400 exonerated defendants included in the study. *See* National Registry of Exonerations, *Government Miscon-*

duct and Convicting the Innocent: The Role of Prosecutors, Police, and other Law Enforcement iii–iv (2020) (hereinafter *Government Misconduct*). Some 54% of those defendants were the victims of a form of official misconduct, with misconduct by police officers contributing to wrongful convictions in 35% of cases.

The pattern is even starker in murder cases, where official misconduct played a role in fully 72% of the wrongful convictions by the National Registry of Exonerations. *Id.* at 10. Murder investigations are particularly vulnerable to produce wrongful convictions because the severity of the crime leads “police and prosecutors [to] work harder to secure murder convictions in cases with weak evidence than they do for lesser crimes.” *Id.* at 17. The pressure to solve murder cases can create a “strong impulse to secure convictions [that] can also lead to misconduct.” *Id.* It is thus unsurprising that interrogators who “work close to the line often step over it,” making “aggressive use of legitimate moves.” *Id.* at 60.

A. State Coercion Causes False Confessions.

The issue here, a false confession obtained by means of coercive police practices, is a particularly common contributor to wrongful convictions. According to data compiled by the Innocence Project, nearly one-third of DNA exonerees had falsely confessed. See Emily West & Vanessa Meterko, *Innocence Project: DNA Exonerations, 1989-2014: Review of Data and Findings from the First 25 Years*, 79 Albany L. Rev. 717, 762 (2015) (hereinafter *DNA Exonerations*). 57%

of false confessions were obtained by misconduct in interrogations—violence, or the threat of violence, was the most common type of misconduct in the interrogations that produced false confessions (violence and threats of violence were used in 64% of interrogations with misconduct). *See Government Misconduct* at 50. Notably, the rate of false confessions in exonerated murder cases is nearly four times that of other cases. *Id.* at 47.

The National Registry of Exonerations’ report establishes that over half of DNA exonerations involved cases with codefendants where *more than one person falsely confessed*. *See DNA Exonerations* 762. This pattern is shockingly prevalent in homicide cases: nearly three-quarters of exonerations with incriminating codefendant confessions were murder cases. *Id.* at 61–62. Thirty-five percent of false codefendant confessions were obtained by official misconduct *Id.* Three-quarters of these coerced codefendant confession cases resulted in multi-defendant exonerations. *Id.* at 63. This overrepresentation of “group exonerations” in false confession cases “highlights the pressures placed on defendants when police round up multiple suspects and pit them against one another to obtain incriminating statements.” *DNA Exonerations* 762.

B. False Confessions Cause Wrongful Convictions.

The troubling prevalence of confirmed false confessions exposes an unacceptable degree of risk of wrongful conviction in high-stakes cases where coercion is

used to extract confessions, particularly in cases like this with multiple suspects and extreme levels of duress. This is an urgent concern because false confessions are “likely to lead to unjust deprivations of liberty” due to the well-known deference that juries give confession evidence, which “usually outweighs strong evidence of a defendant’s innocence.” See Irina Khasin, *Honesty is the Best Policy: A Case for the Limitation of Deceptive Police Interrogation Practices in the United States*, 42 *Vanderbilt L. Rev.* 1029, 1034 (2021) (hereinafter *Honesty*).

Confessions, even when unsound, have a powerful effect on juries. Along with mistaken identification evidence, the use of false confession evidence against an innocent defendant “is the predominant cause of factually wrong convictions.” *Deceit*, 348, 384–85. Mock jury studies have shown that confessions have more impact than eyewitness and character testimony and that they tend to overwhelm alibis and other forms of exculpatory evidence, resulting in a “chain of adverse legal consequences—from arrest through prosecution, conviction, and incarceration.” Saul Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?* 60 *Am. Psych.* 215, 222 (2005). It is thus predictable, though no less tragic, that 22% of those DNA exonerees whose cases involved false confessions had exculpatory DNA evidence available at the time of trial but were still wrongfully convicted. See *DNA Exonerations* 717.

II. MR. BIG OPERATIONS ARE COERCIVE AND ARE KNOWN TO PRODUCE FALSE CONFESSIONS AND WRONGFUL CONVICTIONS.

The particulars of Mr. Big operations create an atmosphere rife with risk of false confession. Undercover operatives exercise “invasive and persistent” control over their targets, usually lasting for several months. *Deceit* 349. Because the target suspect is not in police custody, investigators often feel unconstrained by the safeguards associated with in-custody interrogations. The state-manufactured circumstances in Mr. Big operations “minimize[e] or eliminat[e] the perceived risk of negative consequences” to confession and strongly incentivize acquiescence to the purported criminal gang’s threats. *Id.* at 350–51. Confession in this context is not the traditional statement against self-interest; rather, “in the inverted moral universe that the operatives have created the confession *is* in the target’s self-interest . . . he is motivated to lie to the ‘boss,’ and to lie convincingly.” *Id.* at 388. Confessions obtained through Mr. Big strategies are thus fundamentally different and less reliable than a confession obtained through traditional, in-custody interrogation. Put plainly, Mr. Big operations incentivize false confessions by leading the targets to believe they must falsely confess to protect their physical safety, and that they will accrue an important social advantage by being perceived by the criminal organization as a person willing or able to commit violent crimes, even if they did not actually commit them.

The design of Mr. Big operations capitalizes on the impact of immediate or proximal factors on human behavior. Innocent suspects may fall victim to “interrogation myopia,” where their choices are driven by immediate social influences operating on them rather than long-term interests. See Stephanie Madon et al., *Temporal Discounting: The Differential Effect of Proximal and Distal Consequences on Confession Decisions*, 36 Law & Hum. Behav. 13, 19 (2012) (hereinafter *Temporal Discounting*). This is even more acute in a Mr. Big operation, where the proximal factors include potentially fatal retribution imbued with the fear and apprehension of violence fostered by the undercover officers for months; the distal consequences, on the other hand, appear to the target either remote or unlikely to materialize—by design. In fact, targets are encouraged to believe there will be no consequences whatsoever to confession.

The Mr. Big environment is akin to a well-recognized source of false confessions, the Reid technique, but applied beyond that technique’s most egregious extreme. The Reid technique as utilized in suspect interrogation encourages investigators to minimize the seriousness of the offense (and therefore the sentencing expectations) and maximize the strength of the State’s evidence or the magnitude of the consequences for noncompliance. This approach is a powerful driving force behind false confessions: a 2005 study found that the use of minimization and maximization strategies in tandem led to an increase in true confessions by 35% at the cost of a seven-fold increase in false confessions. See *Deceit* 351; see also Gisli H. Gudjonsson, *The Psychology of False Confessions. Forty Years*

of Science and Practice, 12 *Frontiers in Psy.* 1, 5 (2021); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 *N.C. L. Rev.* 891, 912 (2004); Richard A. Leo & Steven A. Drizin, *The Three Errors: Pathways to False Confession and Wrongful Conviction* 9–30, in *American Psychological Association, Police Interrogations and False Confessions*, (eds. G. Daniel Lassiter & Christian A. Meissner C. A.) (2010).

Researchers agree that the typical approach to interrogation can be reduced to three psychological features: isolation (remove the target from sources of support and increase anxiety and desperation), confrontation (convey facts indicating culpability, produce evidence—real or not—and block attempts at denial), and minimization (which includes underrating the consequences of a confession). See Steven Smith, Veronica Stinson, & Marc Patry, *Using the “Mr. Big” Technique to Elicit Confessions: Successful Innovation or Dangerous Development in the Canadian Legal System?* 15 *Psych., Pub. Pol’y, & L.* 168, 183 (2009). These psychological features “set the stage for the suspect to believe that confessing is a viable means to escape the aversive situation.” *Id.*

The palpable similarity between the expansive and powerful machinery operating behind law enforcement and that working behind the scenes of high-ranking gang operatives is relevant here; indeed, this manifests at the very core of the Mr. Big strategy. Each of the psychological features discussed above is present in its utmost severity in the typical Mr. Big operation, yet the target is stripped from any sense of institutional safeguarding or the belief that

he would be physically safe to wait for his innocence to eventually be borne out. Further, here, “Mr. Big” made it clear to Mr. Burns and Mr. Rafay that he had criminal members “on the inside” of the local police department, further collapsing the flawed conceptual distinction made between the *inherently* coercive aspect of law enforcement interrogation and the coercive powers acting on the teenagers investigated here. Doc.27 19.

A. Mr. Big Operations Have a Checkered History of Wrongful Convictions.

Mr. Big operations employ coercive strategies known to engender false confessions. In holding that confessions arising from Mr. Big strategies are presumptively inadmissible, the Supreme Court of Canada considered that while “people do not normally confess to crimes they have not committed,” Mr. Big tactics at base “undermine that supposition.” *R. v. Hart*, 2 S.C.R. 544, ¶102 (Can. 2014). A few examples of the many wrongful charges and convictions produced by Mr. Big unreliable confession evidence illustrate the problem:

- Kyle Unger was convicted of murder after undercover officers initiated a Mr. Big operation against him, despite significant physical evidence connecting a third party to the scene. Unger, at the behest of “Mr. Big,” falsely confessed to the murder, providing a stilted and inconsistent recounting of the events. Thirteen years

after his conviction, DNA evidence exonerated Unger. *See Deceit*, 404.

- Nelson Hart was convicted of murdering his two daughters after falsely confessing to undercover operatives, who had shared “terrible things” they had done in the past and asked for a reciprocal confession to establish Hart’s trustworthiness. On appeal, Hart’s confession was held inadmissible, and his murder charges were withdrawn due to lack of evidence. Hart was released after serving nine years in prison. *See Hart, supra*, ¶151.
- John Buckley was charged with first-degree murder after undercover officers, posing as criminals, told Buckley they had information he was about to be charged with his mother’s death. The officers claimed if he confessed to them, they could ensure he would not be charged. Though Buckley repeatedly denied involvement, the officers indicated they would only help him if he confessed, and he predictably did so. The charges against Buckley were dropped after the confession was deemed inadmissible in light of the lack of physical evidence connecting Buckley to the murder. The Canadian Press, *First-degree Murder Charge Dismissed Against N.S. Man in Case Involving Mr. Big Sting*, *The Globe and Mail* (Jan. 22, 2018).
- Clayton Mentauk was charged with murder after confessing to undercover police. Mentauk was told that “Mr. Big” was angry with him for

being dishonest about his involvement in the crime, and that a terminally ill person would take the fall for the crime once he confessed. Mentauk denied involvement in the murder over a dozen times, but the denials just made “Mr. Big” angrier. The charges against Mentauk were dropped four years later, after his confession was deemed inadmissible. *See* Keenan Bookman, *Mr. Big: Undercover Operations in Canada* 12–15 (2010).

- Andrew Rose was convicted of murdering two people despite an absence of any physical evidence tying him to the crime. He was granted a re-trial, during which DNA evidence implicated an unknown third party. The police nonetheless instigated a Mr. Big sting, where undercover officers plied Rose with alcohol and offered their help to exonerate him in exchange for his confession. Rose repeatedly denied involvement, but eventually confessed to secure help from the relentless investigations against him. After ten years in prison, Rose was exonerated based on conclusive DNA evidence. *Id.* at 7–11.

These wrongful convictions exemplify the fallibility of confessions derived from Mr. Big strategies. Notably, none of these cases are from jurisdictions within the United States, because evidence derived from such practices would be excluded. By incorrectly applying the Canadian standard rather than that established under the United States Constitution, the

trial court failed to provide Mr. Rafay the protection to which he was entitled under the Fifth Amendment.

B. The Mr. Big Operation Against Mr. Rafay Typifies the Due Process Concerns with Mr. Big “Investigative” Strategies.

The specific tactics employed by Mr. Big operatives are varied and pervasively corrosive to the reliability of the confessions they yield. The undercover officers targeting Mr. Rafay and Mr. Burns, as in many Mr. Big stings, utilized implicit and explicit threats to induce confession. Throughout this project, the RCMP employed its resources and power to craft a domineering social landscape in which the teenagers were in chronic states of trepidation, and both teens were made aware that displeasing “Mr. Big” could unleash deadly force on them. Doc.27 19–20; 23–24. Indeed, in reviewing the conduct by undercover agents targeting Mr. Burns, the Washington District Court found that, “given the image of [“Mr. Big”] and the criminal organization conveyed to [Mr. Burns and Mr. Rafay], the implicit threat of violence was credible.” *Burns v. Warner*, No. C14-850-MJP-JPD, 2015 WL 9165841 (W.D. Wash. July 2, 2015) (unpublished).

Additionally, as in Mr. Rafay’s case, Mr. Big operatives often produce false evidence to increase pressure on their targets. There is an important distinction between lying about the strength of a case—where the potential to cause distress is usually dependent on a target’s fear that incriminating facts

may be uncovered—and the presentation of false evidence condemning the target. Faced with seemingly definitive proof of guilt, innocent suspects are forced to weigh the risks of maintaining an apparently impossible innocence with all circumstances stacked against them (and here, against the volatile presence of a “Mr. Big” figure who remains resolutely unreceptive to denials or exculpatory explanations). See *Honesty* 1041–43; *Deceit* 387.

Even more, the fabricated memo produced by the undercover operatives in Mr. Rafay’s case stated that Mr. Rafay and Mr. Burns would be arrested imminently. Doc.27 20. Thus, the memo not only precluded a viable plea for innocence (citing nonexistent hair and DNA evidence condemning the teens), but also manufactured an unyielding timeline—intensifying the exigency of the teens’ proximal factors and thereby undermining their ability to exercise rational thought. Doc.27 19; see *Temporal Discounting* 19.

The RCMP’s weaponization of these coercive tactics is all the more alarming in the context of Mr. Rafay’s particular vulnerabilities associated with susceptibility to give a false confession. While experiencing the fatal peril of Mr. Big’s threats, Mr. Rafay was subsumed in traumatic grief over the loss of both his parents and his sister—trauma symptoms are a risk factor for false confession, and bereavement with regard to the victim is empirically concomitant with false confession. See Gisli Cudjonsson, *The Science-Based Pathways to Understanding False Confessions and Wrongful Convictions*, 12 *Frontiers in Psych.* 1, 6 (2021). Mr. Rafay was a teenager without experience with the criminal system and had no access to legal advice or adult guidance when confronted by “Mr.

Big”; to be sure, “young age is a well-recognized vulnerability to false confession requiring special procedural safeguards.” *Id.* at 2.

Mr. Rafay’s confession was coerced in the most obvious sense: he and his friend were faced with a credible threat of imminent physical harm and death. Neither Mr. Burns nor Mr. Rafay could reasonably have felt free to extricate themselves from the control of the “gang” of criminals at the time they confessed. Given the false reality created for them by RCMP officers, they believed their very lives were in danger if they did not tell the “Mr. Big” figure what he wanted to hear. This was especially so for Mr. Rafay, who had even less choice than Mr. Burns—the only one with a relationship of trust with the undercover RCMP officers—when he made the excruciating bargain to confess in exchange for his safety.

Further, Mr. Rafay’s decision to make a false inculpatory statement was made without custodial Miranda protections. “The state’s agents are not rendered impotent simply because they are pretending *not* to be state agents,” and their resources, power, and trickery “can be every bit as subversive of an individual’s mental liberty when the suspect is not in physical custody as when he or she is in a prison cell.” *Deceit* 378, 384.

III. ADDITIONAL SUBSTANTIAL PROBLEMS ALSO UNDERMINE THE RELIABILITY OF MR. RAFAY’S CONVICTION.

Other issues in the case raise serious misgivings about Mr. Rafay’s guilt. In many cases, wrongful con-

victions result from an inadequate police investigation which suffers from “tunnel vision”—*i.e.*, reaching a premature conclusion about a defendant’s guilt, followed by a failure to examine evidence that might discredit that theory. This sort of investigative failure can “be most damaging” in the initial stages of a criminal case, “because all later stages of the process feed off the information generated in the police investigation.” Keith A. Findley & Michael S. Scott, *Tunnel Vision in Criminal Cases*, 2 Wis. L. Rev. 291, 295 (2006). Here, police detectives suspected Mr. Rafay in the immediate aftermath of the murders and thereafter failed to investigate potential leads that might have discredited the narrative they had adopted in the first days after the murders.

After Mr. Rafay and Mr. Burns discovered the brutal murders, they called 911, gave statements on the scene for several hours, and were fully cooperative: the teens assented to gunshot residue testing, provided their clothes to the officers for testing, and agreed to further questioning at the Belleview Police Department (BPD). Doc.27 9. The investigating officers proceeded to confirm the teens’ alibis with staff at each location where the teens said they visited the night of the murders: a local restaurant, a theater screening *The Lion King*, and a late-night food stop. Doc.27 6–8. Staff at these locations confirmed Mr. Rafay and Mr. Burns’ alibis, affirming that neither of the teens displayed anything unusual about their appearance or behavior. Doc.27 6–7.

Mr. Rafay’s neighbors’ testimony about the murder corroborated Mr. Rafay’s alibi: suspicious sounds like “hammering” and moaning began approximately

five minutes before *The Lion King* started playing at the movie theater at 9:50 p.m. Doc.27 7–8. Neighbors reported that the sounds ended by 10:15 p.m., while the teens were at the cinema. *Id.* Importantly, the theater employees specifically recalled that Mr. Burns reported an equipment malfunction at 10:00 p.m., plainly placing Mr. Burns and Mr. Rafay at the theater during the murder. Doc.27 7. Rather than accept as fact the timeframe corroborated by neighbors in two different nearby homes, police came up with an elaborate scheme in which *both* neighbors must have been independently mistaken about the timing of the noises, while Mr. Rafay and Mr. Burns—two teenage boys—created an elaborate alibi for themselves during the same time frame.

There was also a lack of substantial physical evidence tying either Mr. Burns or Mr. Rafay to the crime. Though investigators did discover a trace amount of blood on the cuff of Rafay’s pants, it is very likely that Mr. Rafay would have been in proximity with his family’s blood upon discovering their bodies, considering the brutality of the murders. Doc.27 10–11. Notably, investigators found no evidence of blood splatter on Rafay’s clothes which he had provided for testing—an unthinkable result if he had beaten three people to death with a bat, as the state alleged. Doc.27 9. Investigators also found Mr. Burns’ hair in a shower drain in the home; however, this was a shower Mr. Burns had been using for several days as a guest in the Rafay home. Doc.27 11. Therefore, there is no reasonable correlation between the presence of that hair and the relevant timeline of the murders.

While investigators failed to uncover meaningful physical evidence tying either of the teens to the crime scene, they uncovered myriad evidence that another unknown male may have been present. Detectives discovered that there was another male's blood mixed with Mr. Rafay's father's blood in the downstairs shower—this blood belonged to neither Mr. Rafay nor Mr. Burns. Doc.27 11. Additionally, investigators found a course hair on the sheets of the bed where Mr. Rafay's father was murdered, and this hair was, again, neither Mr. Rafay's nor Mr. Burns'. *Id.* BPD failed to follow up on these leads.

BPD also ignored two leads provided independently by unrelated parties which implicated the same entity. The first lead came from a reliable FBI informant named Douglas Mohammed, who contacted BPD to discuss the probability that an extremist Muslim group in the community had singled out the Rafay family for assassination. Doc.27 12. Mr. Mohammed had personal knowledge as a member of the community in question and reported that this extremist group bore animus against Mr. Rafay's father due to opposition to his religious teachings. *Id.*

Mr. Mohammed also reported that a member of this extremist group approached him to ask if he had seen the baseball bat used in the murders. Crucially, Mr. Mohammed reported this to BPD *before it was public* that the Rafays had been killed with a bat. *Id.* In fact, Mr. Mohammed reported this before the police determined for themselves that a bat was used. *Id.* Though Mr. Mohammed was a powerful tool in the investigators' arsenal as someone with personal knowledge of the extremist group in question and

whose statement had been corroborated with independent evidence, investigators ignored this tip. *Id.*

The second lead came from a Seattle Police Department Intelligence Unit detective, who had heard about the Rafay murders and contacted BPD to share his view that the crime was linked to an Islamic terrorist group in the area. Doc.27 13. This detective described the group as active, organized, and known for “contract assassinations.” *Id.* BPD also ignored this lead.⁴

In the end, the quality of the evidence against Mr. Rafay was weak and unreliable. Despite the noteworthy “other suspect” evidence, the investigators nonetheless engaged in a single-minded endeavor to obtain meaningful evidence against Mr. Rafay. 4,400 hours of surveillance by wiretaps and other listening devices failed to uncover a single incriminating statement. Doc.27 13–14. When Mr. Burns and Mr. Rafay finally gave in to the relentless demands that they confess, the confessions were inconsistent and incongruous with one another as well as with the physical evidence obtained by investigators. Doc.27 22, 24–25.

In fact, Mr. Burns’ initial confession is better understood as a joint statement with “Mr. Big,” or Officer Haslett, as Haslett had to repeatedly ask leading questions to “correct” nonsensical parts of his account. Doc.27 22. Without Haslett’s intervention, Mr. Burns’ confession would have claimed simultaneously that

⁴ The Seattle detective’s view seems to have been borne out: the successor president of the Pakistan-Canada Friendship Association and a friend of Mr. Rafay’s father was assassinated in 2003. See Robert Matas, *Pakistani Community Leader Shot to Death in B.C.*, *The Globe & Mail* (Jan 7, 2003).

he had tossed his clothes in dumpsters after the murders, that he committed the murders naked, that he committed the murders wearing just his underwear, and that he was wearing shoes. Doc.27 22.

Even with Officer Haslett's direction, the confessions between the two teens contained significant contradictions. Mr. Burns claimed that both teens threw their clothes and a VCR in a dumpster; Mr. Rafay claimed that he threw his clothes out of a window. Doc.27 24. Mr. Burns stated that the teens found the baseball bat at the house, while Mr. Rafay stated that they bought the bat together in Bellingham. *Id.*

The confessions also ran contrary to evidence uncovered by police: law enforcement did not find clothes or a VCR in any dumpster or around the house. The accounts further contradicted expert testimony from the prosecution that there were likely three attackers who killed Mr. Rafay's father. Cf. Doc.27 24–25.

The contradictions between the evidence and the confessions is alarming because “the risk of wrongful convictions due to false confessions . . . may be particularly pronounced in cases where there is little or no evidence to support the confession and where the facts of the confession do not fit the known circumstances surrounding the offense.” *Deceit* 351.

CONCLUSION

Wrongful convictions strike at the very core of our system of criminal justice, allowing the guilty to escape while inflicting severe punishment on the innocent. See *United States v. Agurs*, 427 U.S. 97, 111

(1976). Although habeas is a limited remedy, “the prime objective of collateral attack should be to protect the innocent,” and “[where the state lacks substantial evidence], considerations of finality should not keep a possibly innocent man in jail.” Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 151 n. 37, 163–64 (1970).

The facts of this case underscore a substantial risk that Mr. Rafay falsely confessed under duress, and that this false confession prejudiced the jury preventing it from meaningfully considering the weakness of the State’s case against Mr. Rafay. The young Mr. Rafay was subsumed in a brutally coercive environment when he confessed. Mr. Rafay was also subject to significant vulnerabilities while the RCMP targeted him: he was a teenager unfamiliar with the criminal justice system navigating prolonged manipulation and fear, all the while operating under the miasma of the profound psychological influence of traumatic grief. Additionally, there are striking indicia of inadequate investigation and of Mr. Rafay’s innocence. Under these circumstances, Mr. Rafay’s conviction is untenable.

Unfortunately, the issues this case presents are not unique to Mr. Rafay. This Court should grant the petition to prevent the miscarriage of justice of leaving Mr. Rafay and others like him, innocent of the crimes of which he has been convicted, to spend the rest of his life in prison.

Respectfully submitted,

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