

No. 23-636

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 United
States Court of Appeals for the Ninth Circuit

**BRIEF OF LAW ENFORCEMENT TRAINING AND
INTERROGATION EXPERTS AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

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INTEREST OF THE *AMICI CURIAE*¹

We are interrogation trainers, social science researchers, and law enforcement experts who are focused on promoting evidence-based and ethical interrogation practices to law enforcement officers in the United States and throughout the world. Our goal is to convince interrogators that they can obtain inculpatory admissions, confessions, and other valuable and reliable evidence that can lead to convictions with these techniques without running as high a risk of obtaining false confessions as more standard, traditional interrogation tactics present. Our work is grounded not only in our experience but also in peer-reviewed social science research which has been replicated. We aim to unite those who produce this scholarship with practitioners to foster collaboration and to share positive developments in interrogation science, policy and practice.

We have worked with the support of and in collaboration with various government agencies, including local, state, and federal law enforcement in the United States and around the globe, the Department of Defense (“DOD”), and the High-Value Detainee Interrogation Group (“HIG”), a three-agency entity involving the FBI, CIA, and DOD that brought together intelligence experts to conduct interrogations that strengthen national security and are consistent with the rule of law. The HIG contracted with world-renowned researchers known for their expertise in interrogation and other re-

¹ No counsel for any party authored this brief in whole or in part, and no party, counsel, or person other than *amici*, their members, and their counsel contributed money to fund the preparation or submission of this brief. The parties were provided with timely notice of *amici*'s intent to file this brief.

lated fields to test existing techniques and develop new techniques that may be more effective.

We have decided to join together in this brief because we have grave concerns about the psychological coercion and deception embedded in the “Mr. Big” technique and the risk that this tactic can increase the risk of false confessions. We are united in our belief that “Mr. Big” should not be used in the United States and that the results of this coercive technique should not be admissible in court—regardless of whether the relevant Mr. Big operation was carried out in the United States or abroad. At a time when relationships between the law enforcement community and the public they are sworn to serve are frayed, the use of “Mr. Big” may exacerbate these tensions and further diminish the credibility of law enforcement in the eyes of the public.

The following organizations and individuals join this brief as *amici curiae*.

The International Association of Interviewers (IAI) was founded in 2012 as a professional organization to create standards, a code of ethics and educational opportunities for the interview and interrogation community. The association includes thousands of members across the globe from law enforcement, federal agencies, private sector organizations, scholars and legal professionals. The association hosts an annual educational conference, publishes a quarterly periodical and is partly led by a diverse advisory board consisting of experts within this field. The association is also the governing body of the Certified Forensic Interviewer (CFI) designation, maintaining a code of ethics and educational standard for those that obtain the credentials.

Project Aletheia (founded in 2020) is a platform, in partnership with John Jay College of Criminal Justice, that bridges the gap between science and practice in interrogation. The Project is founded on the idea that science can be enhanced by collaboration with practitioners, and conversely, that practice can be enhanced by collaboration with scientists. Members and advisors of the Project include research scholars, students and established practitioners in the law enforcement space. The representation of the law enforcement community includes investigators from local, state and federal agencies. Scholars from across the globe also contribute their research to the Project in the interest of elevating the standards of interrogation protocol. Members and founders have testified on legislative propositions and presented at numerous conferences to support their objectives.

Wicklander-Zulawski & Associates is a leading law enforcement consulting and training organization specializing in evidence-based investigative interview or interrogation methods. WZ's core mission is to educate and assist law enforcement professionals in interview and interrogation techniques consistent with research, legal and ethical standards. WZ conducts hundreds of seminars each year and has trained over 200,000 investigators, including law enforcement personnel from state, local and federal agencies in the United States. Curriculum developed by WZ is used by law enforcement agencies, private sector organizations, and universities across the country as well as to advocate for legislative change regarding confession evidence.

Forensic Interview Solutions (FIS®) are the Leading Global Provider of P.E.A.C.E. Investigative In-

interviewing scenario-based training courses. This methodology is embraced in science, law, and ethics. The Méndez Principles United Nations, May 2021 proposed “a concrete alternative to interrogation methods that rely on coercion to extract confessions. They improve the results of investigations, fully respect human rights and enhance trust in the State”. The P.E.A.C.E. framework embodies the drive for fact finding using scientifically endorsed interview methods. The P.E.A.C.E. framework since 1992 embraces new developments in investigative interviewing. Since 2016 we have been training the P.E.A.C.E. framework to law enforcement agencies and private sector organizations across the country.

Hayley Cleary, MPP, PhD, is an Associate Professor of Criminal Justice and Public Policy at Virginia Commonwealth University in Richmond, Virginia. Dr. Cleary’s research examines adolescent behavior and decision making in legal system contexts, and the cornerstone of her research program involves police interrogation of young people. Her research has been funded by the National Science Foundation and Annie E. Casey Foundation and featured in national media outlets, including the New York Times and New Yorker magazine. Dr. Cleary is frequently sought as an expert witness in disputed confession cases involving adolescent defendants. She has also provided written and live testimony in support of evidence-based legislation in several states. Dr. Cleary has been invited on numerous occasions to share her work with academic, law enforcement, legal, and public audiences, including the FBI National Academy, Virginia General Assembly, International Association of Interviewers, and attorney organizations in several states.

Mark Fallon is the Director of ClubFed, LLC, Strategic Consultant Services, and has been an expert consultant on interrogation and counterterrorism investigations for the Department of Defense (DOD) Military Commissions Defense Organization (MCDO) since 2016. While a Visiting Scholar at John Jay College of Criminal Justice, Mark Fallon Co-Founded Project Aletheia, a center established to bridge the gap between the science and practice of interrogation. Mark is on the Advisory Council of the Center for Ethics and the Rule of Law (CERL) at the University of Pennsylvania, where he served ten months as the Interim Executive Director. Mark is a member of the 15-person Steering Committee of Experts that oversaw the development of the *Méndez Principles on Effective Interviewing for Investigations and Information Gathering*, which has been endorsed by the American Bar Association and is available in ten languages. Mark Fallon is Past-Chair of the High-Value Detainee Interrogation Group (HIG) Research Committee and the International Managers of Police Academy and College Training (IMPACT) Section of the International Association of Chiefs of Police (IACP). Mark Fallon is the author of *Unjustifiable Means* (ReganArts 2017) and is Co-Editor of *Interrogation and Torture: Integrating Efficacy with Law and Morality* (Oxford University Press 2020) and *Interviewing and Interrogation: A Review of Research and Practice Since WWII* (TOAEP 2023).

Mark Fallon retired from the U.S. government as a member of the Senior Executive Service (SES) after 31 years of service and was a career Naval Criminal Investigative Service (NCIS) Special Agent. His vast assignment profile included serving as the NCIS Deputy Assistant Director for Counterterrorism, NCIS Training Academy Director and the Chief of Counterintelligence

Operations for the Europe, Africa, and Middle East Division. Following the attack on the USS Cole (DDG-67) in Yemen in 2000, Mark Fallon led the NCIS USS Cole Task Force. Following the terrorist attacks of September 11, 2001, Mark Fallon was appointed the Special-Agent-in-Charge and Deputy Commander of the Pentagon Task Force established to bring suspected terrorists to justice before Military Commissions. Mark Fallon has served as the Assistant Director for Training of the Federal Law Enforcement Training Center (FLETC), overseeing ten training divisions and a staff of over 600 instructors. In 2023, Mark testified before the Guantanamo Bay Military Commissions about the challenges of leading during crisis and policing in the aftermath of terrorist attacks. Mark Fallon is a Department of Justice/Bureau of Justice Assistance-approved training provider and serves as a consultant and instructor to national security and public safety professionals, and an expert on interrogation and effective interviewing.

Christopher E. Kelly, PhD, is a Professor of Sociology and Criminal Justice. For over a decade, Dr. Kelly has been studying humane and effective interrogation methods with support for his research provided by the U.S. Departments of Justice, Defense, and Homeland Security. Further, Dr. Kelly has collaborated with police departments in Los Angeles, Philadelphia, and Las Vegas on issues related to science-based interviewing, and he is a sought-after expert from diverse organizations such as the United States Federal Law Enforcement Training Center (FLETC) to the Royal Canadian Mounted Police (RCMP) in British Columbia to the United Nations Office of Drugs and Crime (UNODC) in Central Asia.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The goal of an interrogation should *not* be to obtain a confession—it should be to obtain reliable information. Those two things are not the same. “There is a new awareness among scholars, legislators, courts, prosecutors, police departments, and the public that innocent people falsely confess, often due to psychological pressure placed upon them during police interrogations.” Brandon L. Garrett, *The Substance of False Confessions*, 62 *Stan. L. Rev.* 1051, 1052–53 (2010). As experts who train law enforcement on interrogation techniques, we constantly strive to avoid inherently coercive interrogation techniques and to instead identify and teach interrogation methods that are likely to elicit reliable information, not just a confession.

We were, to put it bluntly, shocked when we reviewed the Mr. Big operation that the Royal Canadian Mounted Police (RCMP) carried out in this case. Mr. Big operations are, as a general matter, highly problematic given their inherently deceptive nature. The RCMP invented the Mr. Big technique and began to use it frequently in the 1990’s. Because of its success in generating confessions, the technique became extremely popular and soon spread to other countries, including Australia, New Zealand, and the Netherlands. In a Mr. Big operation, undercover officers pose as members of a criminal syndicate run by “Mr. Big.” The operation initially seeks to extract a confession by enticing the target, through luxury and flattery, to seek to join the syndicate—and making a confession a condition for syndicate membership. But if that does not work, the officers/criminals may resort to threats of violence. The ultimate goal of a Mr. Big operation is to obtain a con-

fession—period. For that reason, we would never recommend this technique to our law enforcement partners.

Despite its coercive nature, the Supreme Court of Canada blessed the Mr. Big technique for many years because, under Canadian law, effectively *any* confession was admissible if the defendant did not know he or she was speaking to law enforcement. But in 2014, faced with growing concern that these coercive operations were prone to generating false confessions, the Supreme Court of Canada reversed course, holding that Mr. Big confessions are presumptively *not* admissible.

Atif and Sebastian were subjected to a Mr. Big operation before the Supreme Court of Canada’s 2014 about-face. But even within the world of Mr. Big operations, the extent of the coercion the Royal Canadian Mounted Police exerted in this case is breathtaking. Atif and Sebastian were incredibly vulnerable. They were young: Atif was 19 years old, returning home from his first year of college at Cornell; Sebastian was Atif’s high school friend who was visiting Atif’s family. Neither Atif nor Sebastian had any exposure to violence. And Atif had recently found his entire family murdered. Yet the RCMP used one of the most aggressive Mr. Big operations imaginable. Most notably, the officers-posing-as-criminals effectively threatened to kill Sebastian if he disobeyed them. Indeed, the primary officer in the operation admitted, under oath, that it was “obvious” that “Sebastian thought that if he did anything to displease you, he risked death.” C.A.E.R. 264. If that were not enough, the police went so far as to create fake public documents and hold staged, fraudulent press conferences suggesting that they had incriminating evidence that *did not exist*. Pet. 17-18.

To us, it is clear that this level of pressure exerted in this case is inherently coercive—it targeted incredibly vulnerable adolescents with explicit threats of violence and relied on blatantly fabricated public documents and knowingly false public representations. We would never recommend such a coercive operation to our law enforcement partners, and we would never view any “confession” obtained through such an operation as reliable.

We would therefore urge this Court to grant the petition, vacate the decision below, and remand for the Ninth Circuit to actually address Atif’s argument that his “confession” was the product of an inherently coercive—and hence unconstitutional—interrogation.

ARGUMENT

The question before this Court is whether the Ninth Circuit erred by failing to consider whether the Mr. Big operation that the Royal Canadian Mounted Police carried out in this case was “inherently coercive” under *Miller v. Fenton*, 474 U.S. 104, 109 (1985). Pet. 29-30. To us, as experts in interrogation who train law enforcement on interrogation techniques, it is clear that the Mr. Big operation at issue was, in fact, inherently coercive. Given the coercive nature of the Mr. Big operation at issue, and the Ninth Circuit’s failure to address the issue of inherent coercion, we urge this Court to grant the petition, vacate the decision below, and instruct the Ninth Circuit on remand to address the inherent coercion issue before Atif is forced to spend the rest of his life in jail based on a coercive and unreliable “confession.”

I. The Mr. Big technique is, as a general matter, extremely coercive.

As the Supreme Court of Canada has put it, “[t]he Mr. Big technique is a Canadian invention.” *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544, para. 56 (Can.).² “Although a version of the technique appears to have been used by the police as far back as 1901, its modern use began in the 1990s and has continued since then.” *Id.* at para. 56. The technique, according to the Supreme Court of Canada, “tends to follow a similar script”:

Undercover officers conduct surveillance on a suspect in order to gather information about his or her habits and circumstances. Next, they approach the suspect and attempt to cultivate a relationship. The suspect and the undercover officers socialize and begin to work together, and the suspect is introduced to the idea that the officers work for a criminal organization that is run by their boss — “Mr. Big”. The suspect works for the criminal organization and is assigned simple and apparently illegal tasks — serving as a lookout, delivering packages, or counting large sums of money are common examples....

As the operation wears on, the suspect is offered increasing responsibility and financial rewards. By flying the suspect across the country, putting him up in hotels, and taking him to expensive restaurants, undercover officers show the suspect that working with the group provides a life

² Available at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14301/index.do>.

of luxury and close friendships. All the while, the suspect is constantly reminded that his or her ultimate acceptance into the group depends on Mr. Big's approval....

Throughout the operation, the suspect is also told that the organization demands honesty, trust and loyalty from its members. An aura of violence is cultivated to reinforce these values. Officers teach the suspect that those who betray the trust of the organization are met with violence. They do this by telling the suspect that the organization kills "rats", or by exposing him to simulated acts of violence perpetrated by members of the organization against other undercover officers as punishment for imagined betrayals.... *R. v. Hathway*, 2007 SKQB 48, 292 Sask. R. 7, provides a stark example. In that case, undercover officers simulated an assault on a woman who had crossed the criminal organization. During the beating, officers threatened to kill the woman, her husband, and her infant child. The accused watched as undercover officers threw the bloodied woman into the trunk of a car.

Once the stage is set, the operation culminates in a meeting, akin to a job interview, between the suspect and Mr. Big. Invariably during these meetings, Mr. Big expresses concern about the suspect's criminal past and the particular crime under investigation by the police. As the meeting unfolds, it becomes clear that confessing to the crime provides a ticket into the criminal organization and safety from the police. Suspects may be told that Mr. Big has conclusive evidence

of their guilt and that denying the offence will be seen as proof of a lack of trustworthiness. In another variation, suspects are told that Mr. Big has learned from contacts within the police that a prosecution for the offence is imminent based on new evidence. The organization offers to protect the target through a variety of means — by offering to eliminate a witness or by having someone else confess to the crime — if the suspect confesses to Mr. Big. Throughout the interrogation, any denials of guilt are dismissed as lies, and Mr. Big presses for a confession.

Id. at para. 57-60 (citing T. 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 (2009)³; K. T. Keenan & J. Brockman, *Mr. Big: Exposing Undercover Investigations in Canada* (2010)).

Over the years, this technique came under increasing scrutiny. For one thing, an increasing number of studies debunked the longstanding, traditional view that underlay the Mr. Big operation: no one would ever confess to a crime they did not commit. *See, e.g.*, 1 J. Wigmore, *Evidence in Trials at Common Law* §§ 835, 867 (2d ed. 1923) (false confessions are “scarcely conceivable” and “of the rarest occurrence”). It is now widely accepted that this traditional view is flatly incorrect. One study showed that, of 252 people who were exonerated based on DNA testing, forty-two of them—approximately 17%—had confessed to rapes and murders they had not, in fact, committed. Garrett, *supra*, at 1052-1053; *see also* Saul M. Kassin et. al., *Police-Induced Confessions: Risk Factors and Recommenda-*

³ Available at <https://www.glendon.yorku.ca/timmoore/wp-content/uploads/sites/222/deceit-betrayal-Mr-Big.pdf>.

tions, 34 *Law & Hum. Behav.* 3, 3 (2010) (“Although the precise incidence rate is not known, research suggests that false confessions and admissions are present in 15-20% of all DNA exonerations.”). These false confessions are largely driven by coercion in the interrogation process. *See, e.g.*, Garrett, *supra*, at 1053 (“innocent people falsely confess, often due to psychological pressure placed upon them during police interrogations”); Kassin, *supra*, at 4 (“Wrongful convictions based on false confessions raise serious questions concerning a chain of events by which innocent citizens are judged deceptive in interviews and misidentified for interrogation; waive their rights to silence and to counsel; and are induced into making false narrative confessions that form a sufficient basis for subsequent conviction.”).

Additional studies focused specifically on the Mr. Big technique and criticized the massive amount of coercion that is inherently present in a Mr. Big operation. *E.g.*, Moore et al., *supra*, at 378-83; Keenan & Brockman, *supra*, at 7-19; Wendy E. Dawson, *The Use of “Mr. Big” in Undercover Operations*, in *Continuing Legal Education Society of British Columbia, Criminal Law: Special Issues, Paper 5.2* (2011); *see also* Deborah Davis et al., *Interrogation by Proxy: The Growing Role of Lay and Undercover Interrogators in Eliciting Criminal Confessions*, 59 *Criminal L. Bulletin* 395, 442-461 (2023) (explaining the Mr. Big technique, including its application in this case, and how it creates “the potential that suspects will offer false confessions”).

In our view, that criticism of the Mr. Big technique was clearly warranted. While some form of undercover investigations is necessary and not unduly coercive, the absence of *any* judicial scrutiny of the Mr. Big technique allowed the police to exert effectively limitless co-

ercion on suspects, including on young and otherwise vulnerable suspects. The result was a technique that was not designed to (and often does not) obtain reliable information, but instead a technique that was designed to obtain a *confession*, regardless of its reliability and regardless of the coercion employed to obtain that confession.

In 2014, the Supreme Court of Canada recognized these concerns and significantly cut back on law enforcement's ability to use the Mr. Big technique. The Court recognized that “[t]he purpose of these operations is to induce confessions, and they are carefully calibrated to achieve that end.” *Hart*, 2 S.C.R. 544, para. 68. Because the technique is focused only on extracting a confession, “concerns arise as to the reliability of the confessions they produce.” *Id.* “Unreliable confessions,” the Court explained, “present a unique danger. They provide compelling evidence of guilt and present a clear and straightforward path to conviction. Certainly in the case of conventional confessions, triers of fact have difficulty accepting that an innocent person would confess to a crime he did not commit. And yet our experience with wrongful convictions shows that innocent people can, and do, falsely confess. Unreliable confessions have been responsible for wrongful convictions — a fact we cannot ignore.” *Id.* at para. 6.

Moreover, “Mr. Big operations create a risk that the police will resort to unacceptable tactics in their pursuit of a confession. As mentioned, in conducting these operations, undercover officers often cultivate an aura of violence in order to stress the importance of trust and loyalty within the organization. This can involve — as it did in this case — threats or acts of violence perpetrated in the presence of the accused. In these circum-

stances, it is easy to see a risk that the police will go too far, resorting to tactics which may impact on the reliability of a confession, or in some instances amount to an abuse of process.” *Id.* at para. 78.

Given these problems with the Mr. Big technique, the Supreme Court of Canada deemed Mr. Big confessions “presumptively inadmissible,” placing the burden on the government to prove why “the probative value of the confession outweighs its prejudicial effect.” *Id.* at para. 85. The Court specifically emphasized that, in undertaking this balancing, courts should focus on the extent of the coercion employed, including the “age of the accused.” *Id.* at paras. 102-103. Younger people, the Court noted, “present a much greater risk of falsely confessing,” hence “[a] confession arising from a Mr. Big operation that comes from a young person ... will raise greater reliability concerns.” *Id.* at para. 103. The Court also emphasized the importance of “confirmatory evidence” supporting the truth of the confession. *Id.* at para. 105.

In our view, the Supreme Court of Canada was right to rein in the Mr. Big technique given its inherently coercive nature. The unrestricted version of the Mr. Big technique used against Atif and Sebastian is not something that we would ever consider using with our law enforcement partners for exactly the reasons the Supreme Court of Canada recognized: It is designed to employ coercion to extract a confession, not reliable information. It therefore does not actually help law enforcement and risks undermining, not supporting, efforts to identify and convict the actual person who is guilty of committing a crime.

II. The specific Mr. Big operation at issue in this case is, in our opinion, inherently coercive; it is among the most coercive police interrogation operations we have ever encountered.

For the reasons discussed, we are troubled by Mr. Big operations in general. But we were shocked to learn about the specific Mr. Big operation in this case. Practically every feature that makes a Mr. Big operation problematic is present in this case, especially the targets' youth and vulnerability, the explicit threats of violence, the other extreme coercion including the falsification of public documents and knowingly false representations to the public, and the utter lack of evidence confirming the reliability of the ultimate confessions.

Start with vulnerability—and, most importantly, Atif and Sebastian's youth. As the Supreme Court of Canada recognized, Mr. Big operations are particularly problematic when they target vulnerable people, and young people are particularly vulnerable. Indeed, there has been increasing recognition, since 2014, that, due to their ongoing neurobiological development, teens have difficulty controlling their impulses, self-regulating their emotions and behavior, and engaging in deliberative decision-making in emotionally charged situations. *See generally* National Academies of Sciences, Engineering, and Medicine, *The Promise of Adolescence: Realizing Opportunity for All Youth* (2019)⁴; *see also*, *e.g.*, *People v. Stewart*, 512 Mich. 472, 492 (2023) (holding that eighteen-year-old “defendant’s age made him more susceptible to suggestions from law enforcement and less likely to engage in reasoned decision-making”); *Commonwealth v. Mattis*, __ N.E.3d __, 2024 WL

⁴ Available at <https://doi.org/10.17226/25388>.

118188, at *5 (Mass. 2024) (“Advancements in scientific research have confirmed what many know well through experience: the brains of emerging adults are not fully mature.... [S]tructural and functional differences make emerging adults, like juveniles, particularly vulnerable to risk-taking that can lead to poor outcomes.”). Perhaps in recognition of the inherent vulnerability of emerging adults, one empirical study of Mr. Big operations suggested that only twenty-three percent of Mr. Big operations targeted those under twenty-five years old. Adelina Iftene & Vanessa L. Kinnear, *Mr. Big and the New Common Law Confessions Rule: Five Years in Review*, 43 *Manitoba L. J.* 295, 313 (2020).

Atif and Sebastian were thus particularly vulnerable and susceptible to being coerced into giving a false confession. Atif was a teenager—home from his first year of college at Cornell—when he was targeted by a Mr. Big operation. For Atif, this vulnerability was amplified given that he had just found his entire family murdered. *See generally* Hayley M.D. Cleary et al., *How Trauma May Magnify Risk of Involuntary and False Confessions Among Adolescents*, 2 *Wrongful Conviction L. R.* 173 (2021).⁵ To the extent a nineteen-year-old should ever be targeted with a Mr. Big operation (let alone a nineteen-year-old who had just experienced extreme trauma), it should be one that employed particularly low levels of coercion.

The coercion here, however, was anything but low. Most importantly, the threats of violence were extreme. The empirical report discussed above suggested that threats of and exposure to violence were actually used in only eight percent of Mr. Big operations. Iftene &

⁵ Available at <https://wclawr.org/index.php/wclr/article/view/53/84>.

Kinnear, *supra*, at 310. As explained in detail in the petition, however, the officers in this case quite explicitly threatened Sebastian and Atif with violence. Pet. 10-20. This was, in fact, the officers' intent. Officer Haslett, one of the key officers in the Mr. Big operation, admitted as much under oath:

Q: It's obvious that Sebastian thought that if he did anything to displease you, he risked death, right?

A: Yes. He had that impression, sure.

C.A.E.R.264. It is hard to imagine a more coercive environment for a teenager than being told he needed to confess by officers-posing-as-criminals who also intentionally gave him the impression that, if he displeased them, he "risked death."

But that was not all. The officers also created the false impression that Sebastian and Atif were about to be indicted through the fabrication of public documents and making knowingly false public statements. *See* Pet. 17-18. The creation of false public documents—including fabricating an internal police department memorandum detailing non-existent evidence against Sebastian and Atif—was particularly extreme. We are not aware of *any* other Mr. Big operation in which law enforcement not only lied to the target about the existence of incriminating evidence, but actually fabricated official documents in order to exert maximum coercion on the target to extract a confession. The coercive nature of such a fabricated document should be obvious: Anyone faced with threats of physical violence if he does not confess is far more likely to confess falsely if he believes, based on a seemingly official internal police memorandum, that the police are about to indict him

based on a trove of (nonexistent) evidence. And the risk of a false confession is amplified significantly given that Sebastian and Atif were teenagers—and, in Atif’s case, a teenager who had just found his entire family murdered. *See* pp. 16-17, *supra*; *see also* Davis et al., *supra*, at 443 (“By the time police initiated the [Mr. Big operation] in Canada, [Atif and Sebastian] were vulnerable and well-primed to seek social acceptance at all costs.”).

The final factor that took us aback with this case was the utter lack of confirmatory evidence. The empirical study discussed above reported that, in *seventy percent* of Mr. Big operations, the confession was supported by some confirmatory evidence. Iftene & Kinnear, *supra*, at 321. Here, there was essentially nothing. As the petition explains in detail, there was strong evidence that Atif and Sebastian were nowhere near the house at the time of the murders. Pet. 4-6. There was also blood found at the scene of the crime that matched neither Sebastian, Atif, nor the victims. *Id.* Moreover, the police wiretapped Atif and Sebastian’s home, obtaining nearly 4,400 hours of surveillance that yielded *no* evidence supporting their guilt. Pet. 10. Making matters worse, Atif and Sebastian’s confessions were both internally contradictory and inconsistent with a wealth of physical evidence. Pet. 20; *see also* Davis et al., *supra*, at 443-44 (explaining that “both confessions are internally inconsistent and each contradicts the other’s confession regarding what Burns was wearing, what they did with the incriminating evidence, and where they obtained the murder weapon,” and that the “confessions were contrary to the crime scene evidence”).

The result is that two vulnerable teenagers confessed only after being threatened with violence if they

did not confess and eased into confessing through the fabrication of false public documents suggesting that they would be prosecuted regardless whether they confessed. The resulting confessions—unsurprisingly, in our opinion—contradict, not support, the other evidence in the record. Nevertheless, Atif may spend the rest of his life in jail based entirely on a confession he gave under these incredibly coercive circumstances.

CONCLUSION

For all of these reasons, it is our firm view that the Ninth Circuit should be required to consider whether the Mr. Big operation at issue in this case was “inherently coercive.” We therefore urge the Court to grant the petition, vacate the decision below, and remand for the Ninth Circuit to undertake that critical inquiry.

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