No. 23-636

In the Supreme Court of the United States

ATIF AHMAD RAFAY,

PETITIONER,

v.

ERIC JACKSON,

RESPONDENT.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court summarily reverse the Court of Appeals' denial of habeas relief under 28 U.S.C. § 2254(d) based on a claim that Petitioner never raised in state court and that is not based on clearly established precedent from this Court?

PARTIES

The petitioner is Atif Ahmad Rafay. The respondent is Jack Warner, Superintendent of the Monroe Correctional Complex. Mr. Warner is the successor in office to Eric Jackson, who was the custodian of Mr. Rafay and the respondent-appellee in the Ninth Circuit. Mr. Warner is substituted pursuant to Rule 35.3.

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INTRODUCTION

There is no basis to grant certiorari in this case, as the petition implicitly concedes by instead arguing for summary reversal. But there is also no basis for summary reversal, because the Ninth Circuit properly applied this Court's precedent.

A jury convicted Petitioner Atif Rafay and his co-defendant Sebastian Burns of murdering Rafay's parents and sister. The jury heard a wide range of evidence, including testimony from a close friend of Rafay and Burns that they had confided their plan to him before executing it. The jury also heard confessions that both Rafay and Burns made to undercover officers in Canada. Before admitting those confessions into evidence, the trial court reviewed hours of video and audio recordings, carefully applied this Court's clearly established "totality-of-circumstances" test, and concluded that Rafay's confession was voluntary. In particular, the trial court observed Rafay's entire confession on video, including his "jovial delight" in revealing details about the murder and "calm explanation" that murdering his family was a necessary "sacrifice" to "achieve what [he] wanted to achieve in this life." Pet. App. at 39a-40a.

After Rafay's conviction, he appealed, arguing that his confession should have been excluded under the totality-of-circumstances test. Washington courts carefully considered and rejected this argument, applying this Court's precedent. At no point did Rafay argue for a separate inquiry into whether the tactics undercover officers used were "inherently coercive."

Rafay then filed a federal habeas petition, again arguing that his confession should have been excluded under the totality-of-circumstances test and making no separate argument about an inherently coercive standard. After the district court denied his request, Rafay renewed the same argument in his opening brief to the Ninth Circuit, finally arguing for the first time in his reply that the state courts had erred by not separately analyzing whether the undercover tactics used were inherently coercive. The Ninth Circuit panel unanimously rejected his claim, with no judge calling for rehearing en banc.

Rafay now asks this Court to summarily reverse the Ninth Circuit's holding for failing to consider his inherent coercion argument, but this argument fails for multiple independent reasons. The federal habeas statute and this Court's precedent permit habeas relief from state court convictions only when state courts unreasonably apply clearly established law. Here, no clearly established law required the state courts to conduct an independent inquiry into whether the tactics used were inherently coercive as opposed to simply applying this Court's well-established totality-of-circumstances test. Even if precedent required such an inquiry, no clearly established law holds that the tactics Canadian authorities used here were inherently coercive. And even if there were case law showing that, Washington courts could not have unreasonably applied that precedent because Rafay never made this argument in state court. Finally, clear precedent forecloses this Court from granting review and announcing a new rule in this case. The Court should deny the petition.

STATEMENT

A. Rafay and Burns Killed Rafay's Family

In 1994, Atif Rafay and Sebastian Burns, both age 18, murdered Rafay's parents, Tariq and Sultana Rafay, and his disabled sister Basma Rafay, in their Bellevue, Washington home. Rafay and Burns shared their plan beforehand with their close friend, Jimmy Miyoshi. Pet. App. at 25a. After establishing an alibi by going to dinner and pretending to attend a movie, Rafay and Burns returned to the Rafay home where Burns used a baseball bat to bludgeon the victims. Pet. App. at 17a-18a, 24a. Rafay did not personally swing the bat, but he and Burns planned and committed the murders together "to 'become richer and more prosperous and more successful.'" Pet. App. at 24a. Basma did not die immediately, and Burns admitted that her killing "'took a little more bat work' than he had expected." Pet. App. at 24a. Rafay and Burns took several items from the home to make it look like the murders had occurred during a burglary. Pet. App. at 18a, 24a. After the killings, both men drove to a restaurant and a nightclub to further establish their alibi. Pet. App. at 18a. Rafay and Burns then drove back to the home, where Burns called 911 to report a "break-in." Pet. App. at 17a.

Police arrived and found Sultana and Tariq dead, but Basma still clinging to life, gasping for breath. Pet. App. at 17a. Basma later died of severe head wounds. Pet. App. at 17a. Rafay and Burns denied any involvement in the murders. Pet. App. at 17a-18a. A few days later, Rafay and Burns fled to

Canada without informing the police. Pet. App. at 18a. Rafay did not attend the funeral for his parents and sister. Pet. App. at 18a. Rafay and Burns eventually rented a house in Vancouver, B.C., with a friend, Miyoshi. Pet. App. at 18a.

B. Rafay Confessed to the Murders During an Undercover Operation Conducted by Canadian Police

The police investigation initially focused on leads suggesting Islamic extremists carried out a murder-for-hire plot targeting the Rafay family. They also looked into possible organized crime elements based on an informant tip. However, the leads did not develop any viable suspects. The police also unsuccessfully attempted to contact Rafay and Burns in Canada. Pet. App. at 18a.

In 1995, an investigation by Canadian police eventually resulted in Rafay and Burns confessing to the murders. Pet. App. at 19a-24a. Posing as leaders of a fictitious criminal organization, Canadian police officers spent months building rapport with Burns. Pet. App. at 19a-24a. During this period, Burns was free to break off contact at any time. On one occasion, weeks passed without any contact. Pet. App. at 37a. Throughout the time period, Rafay and Burns pursued their own activities without any interference from the officers. Pet. App. at 39a. And it was Burns and Rafay who repeatedly pursued interaction with the officers, expressing their willingness to commit crimes, including violence, on behalf of the organization. Pet. App. at 39a. For example, Burns expressed willingness to be a "hit man" and that "he would not have 'any dilemma' about killing someone for the organization[.]" Pet. App. at 20a, 21a. When

Burns casually suggested that he might be killed or injured if mistakes were made, the officer responded he was "not a killer," and that the parties could walk away if there was any lack of trust and "that'll be the end of it." Pet. App. at 38a-39a. One officer repeatedly told Burns he was free to talk to his lawyer. Pet. App. at 39a.

Burns initially distrusted the undercover officers, and resisted answering questions about the Washington murders, but he eventually warmed to them and, after several meetings, he admitted to killing the Rafay family members. Pet. App. at 23a. Burns then asked Rafay to meet them at a hotel in Victoria, where Rafay too eventually admitted his own role in the murders. Pet. App. at 24a.

Unlike Burns, who had multiple interactions with the undercover officers, Rafay had only limited interaction with the undercover officers. Specifically, while Burns met with the undercover officers on numerous occasions, Rafay met with the officers for the first time on July 19, 1995, the day he actually confessed to his participation in the murders of his parents and his sister.

Rafay and Burns provided detailed information about their roles in the murders. Captured on hidden camera, Rafay and Burns described the sequence of events, family dynamics, motive, purchase of the murder weapon, and attempts to disguise the crimes as a burglary gone wrong. Pet. App. at 24a. Their sometimes jocular tone while recounting the gruesome details of the killings troubled police. Pet. App. at 184a.

In addition to the confessions, Rafay's friend, Miyoshi, also told the police that he had known about the planned murders, having discussed the plan with Burns and Rafay about a month prior to the killings. Pet. App. at 24a-25a. Miyoshi also said that after the murders, when Burns and Rafay returned to Canada, they had told him details about the killings. Pet. App. at 25a.

C. The Trial and Evidentiary Rulings

The Washington prosecutor charged Burns and Rafay with three counts of aggravated murder. Pet. App. at 25a. The trial lasted six months. Pet. App. at 25a-26a.

Prior to trial, Rafay and Burns moved to suppress their statements to the Canadian officers. The trial judge conducted extensive hearings over several months, receiving testimony from multiple witnesses, reviewing the recordings of the undercover meetings, and hearing oral argument from counsel. Pet. App. at 26a-27a. The judge denied the motion to suppress. Pet. App. at 27a-30a.

The judge prefaced the ruling by stressing the importance of the voluminous testimony he had reviewed that detailed the conduct of the investigation and the recordings of the defendants' statements. Pet. App. at 149a. The judge then rejected the argument that the Canadian investigation was a joint venture with Washington police. Pet. App. at 155a. As to the voluntariness of the statements, the judge found the statements were noncustodial, Pet. App. at 150a, that nothing in the conduct of the police during the investigation "shocked the judicial conscience," Pet. App. at 162a, and that Rafay and

Burns were free to speak or not speak, and free to leave or not leave. Pet. App. at 163a. The judge found no evidence of coercion. Pet. App. at 163a. The judge concluded that admission of the statements did not violate Rafay's and Burns's right against self-incrimination.

Rafay sought to introduce evidence of "other suspects" for the murders, which included alleged militant and radical Muslim groups, to establish the existence of another perpetrator and to impeach the adequacy of the police investigation. Pet. App. at 84a-93a. The judge excluded the evidence as too speculative because Rafay did not lay a proper foundation by sufficiently connecting the potential "other suspects" to the commission of the murders. Pet. App. at 84a-93a. The judge, however, did allow Rafay to challenge the adequacy of the police investigation. Pet. App. at 92a.

During trial, the prosecution presented substantial evidence in addition to the confessions, including video testimony from Miyoshi. Pet. App. at 25a. Miyoshi described how one month before the killings, Rafay and Burns revealed their plan to murder Rafay's family to access an inheritance, trust funds for Rafay's disabled sister, and life insurance proceeds from Rafay's father. Burns specifically discussed bludgeoning them to death in their beds with a baseball bat. After the murders, Rafay and Burns gave Miyoshi additional specifics that corroborated aspects of their confessions, such as how they disposed of the murder weapon and staged a burglary by stealing electronics.

Forensic evidence also corroborated Rafay's and Burns's statements to the undercover officers. For example, police eventually discovered Burns's hairs in the Rafay home shower drain, one of his fingerprints on a box, and traces of blood on Rafay's clothing. The state's expert opined that blood patterns surrounding Rafay's father indicated an attack by two assailants, just as Burns had confessed. Further discrediting their initial accounts, neither Burns nor Rafay informed police before abruptly fleeing to Canada two days after the killings, and neither attended the Rafay family funeral despite being in town. Rafay even rebuffed a detective's efforts urging him to contact relatives about services for his murdered parents and sister.

The jury found both Rafay and Burns guilty. Pet. App. at 26a. The superior court sentenced Rafay and Burns to life imprisonment without parole. Pet. App. at 26a.

D. The State Courts Affirmed the Convictions on Direct Appeal and Collateral Review

The Washington appellate courts affirmed the convictions on direct appeal and denied two separate collateral attacks. In 2012, the state court rejected the claim challenging Rafay's confession. Pet. App. at 15a-146a. Applying clearly established federal law, the appellate court held that the judge correctly applied the totality-of-circumstances test to determine voluntariness. Pet. App. at 26a-42a. The court found no evidence that the undercover officers

threatened Rafay, and found ample proof that Rafay willingly engaged with the fake criminal organization while ignoring opportunities to walk away. Pet. App. at 26a-42a.

The Washington courts subsequently denied two personal restraint petitions that Rafay filed collaterally challenging his convictions, rejecting Rafay's attempts to re-litigate the issues related to his confession.

Despite Rafay's claims to the contrary, neither his counsel nor he in his pro se pleading ever presented to the Washington Court of Appeals a separate argument that the confession should have been suppressed because the investigative techniques were per se or inherently coercive. Rather, Rafay relied on established Supreme Court precedent in arguing that the totality-of-circumstances test showed that the confessions were coerced. *E.g.*, CA9.FER.945, 953-66 (reply brief submitted by counsel for Rafay applying totality-of-circumstances to determine if confessions voluntarily made without identifying separate test for per se inadmissibility); CA9.FER.49-68 (pro se brief generally arguing that confessions were coerced). The portions of the pro se brief cited in the petition addressed whether the distinction between threats and promises was determinative, not whether a separate per se test must be applied. *See* Pet. at 24-25 (citing CA9.FER.64).

E. The District Court Denied Habeas Relief and the Ninth Circuit Affirmed, Because the State Court Adjudication of the Claim Was Not Unreasonable

In 2016, Rafay filed the instant habeas petition in federal district court alleging four grounds for relief, including reassertion of his involuntary confession and right to present a defense claims. The district court denied the petition, fully concurring with the magistrate judge's recommendation that Rafay failed to show the state court adjudication was unreasonable. Pet. App. at 7a-14a. The petition did not identify as a separate ground that the state courts had failed to address an argument regarding inherently coercive investigative techniques. *See* CA9.ER.559-66. Instead, it largely argued that the state courts had failed to correctly apply this Court's decision in *Arizona v. Fulminante*, 499 U.S. 279 (1991).[1]

Rafay appealed to the Ninth Circuit. In briefing the claim before the Ninth Circuit, Rafay argued that his confession was involuntary under the totality-of-circumstances standard. Rafay argued that the Ninth Circuit should review the claim *de novo*, and grant relief, because the state court failed to apply this totality-of-circumstances standard clearly established

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[1] For example, Rafay argued in his habeas petition: "Courts apply a 'totality of the circumstances test' to determine whether a confession was coerced. *Fulminante*, 499 U.S. at 286. The threats or coercive activity must causally relate to the confession." CA9.ER.560. Rafay also argued that the Washington Court had unreasonably applied the totality-of-circumstances test because "the Washington Court of Appeals made an unreasonable determination of the facts." CA9.ER.564.

by *Fulminante*. In his Reply, Rafay raised the issue that intolerable police techniques would be unconstitutional even if they did not overcome the will of a particular suspect, but only in the context of arguing his claim that there had been a credible threat of violence in this case, despite the trial court having found no duress or coercion. CA9.DktEntry.58, at 4; Pet. App. at 163a.

The Ninth Circuit affirmed, denying habeas relief because the state court did not unreasonably apply the totality-of-circumstances standard. Pet. App. at 1a-6a. Rafay filed a petition for panel rehearing and rehearing en banc, and for the first time clearly identified a "per se coercive" test that he alleged courts had previously failed to address. CA9.DktEntry.74-1, at 3. The panel denied reconsideration. Pet. App. at 194a. No judge called for rehearing en banc.

REASONS FOR DENYING THE WRIT

This case meets none of this Court's criteria for granting certiorari. Rafay implicitly concedes as much by never arguing otherwise and instead asking for summary reversal based on alleged errors unique to his case. But fact-bound error correction is not the role of this Court, and even if it were, the Ninth Circuit committed no error here. Rafay claims that the Ninth Circuit ignored clearly established law prohibiting admission of inherently coercive confessions, but there are at least three fatal flaws in this argument: (1) there is no clearly established law from this Court requiring lower courts to separately consider whether investigative techniques were inherently coercive in addition to applying the totality-of-circumstances test

established in this Court's cases; (2) even if there were such a rule, there is no clearly established law holding that undercover techniques like those used here would qualify as inherently coercive; and (3) in any event, Rafay cannot show that Washington courts unreasonably applied federal law on this issue because he never raised this inherently coercive argument in state court to give state courts the opportunity to consider it (indeed, he didn't raise it at all until his reply brief to the Ninth Circuit). To the extent Rafay asks this Court to adopt a new inherently coercive rule now, this Court's clear precedent prohibits adopting new rules on collateral review.

A. Rafay Never Attempts to Show a Conflict in Lower Courts Necessitating this Court's Review, and None Exists

Rafay fails to demonstrate or even allege any conflicting circuit court authority supporting this Court's review. Instead, he asserts that it is "crucial" for this Court to "reaffirm that courts must consider" whether certain police techniques are inherently coercive, citing amicus briefs discussing the prevalence of false confessions. Pet. at 35. That is no basis for certiorari under this Court's rules.

Rafay cites no federal appeals court decisions either approving or disapproving of interrogation methods analogous to the undercover operation here. He offers no indication that courts currently apply federal due process protections in an inconsistent manner regarding allegedly coercive police methodologies. At most, he speculates that courts have not "seriously considered" claims

that particular investigatory tactics are inherently coercive. Pet. at i, 3, 31. But even if that were true, a lack of discussion in the lower courts counsels *against* this Court's review, not in favor of it. *Cf. McCray v. New York*, 461 U.S. 961, 961, 963 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari) ("[I]t is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court."). As Rafay's argument implicitly concedes, the petition falls far short of meeting this Court's normal certiorari standards.

B. There Is No Basis for Summary Reversal Because Rafay Fails to Show an Unreasonable Application of Clearly Established Law

The Ninth Circuit considered whether the Washington appellate court unreasonably applied the totality-of-circumstances test from *Fulminante* to determine the voluntariness and admissibility of Rafay's confession. The Ninth Circuit affirmed the denial of habeas relief under 28 U.S.C. § 2254(d) because the state court adjudication did not unreasonably apply the law clearly established in *Fulminante*.

Rafay claims that the Ninth Circuit erred by failing to separately consider whether the interrogation tactics used here were inherently coercive, but nothing in this Court's precedent clearly establishes a requirement for such a separate inquiry, and even if it did, nothing in this Court's case law clearly establishes that the techniques used here would qualify as inherently coercive. Even if Rafay

could overcome those problems, his argument would fail because he never presented his inherently coercive theory in state court, so the state courts could not have "unreasonably applied" the law on an issue never presented to them. There is no basis for summary reversal.

1. No clearly established law requires courts to separately consider whether investigative techniques are inherently coercive

Rafay acknowledges, as he must, that the Ninth Circuit applied this Court's leading precedent on the voluntariness of confessions, *Fulminante*, 499 U.S. 279, but he argues that the court clearly erred by failing to separately consider whether the investigative techniques used here were inherently coercive. No precedent from this Court clearly establishes a requirement to engage in that separate inquiry.

"[A] federal court may grant habeas relief on a claim 'adjudicated on the merits' in state court only if the decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Waddington v. Sarausad*, 555 U.S. 179, 190 (2009) (quoting 28 U.S.C. § 2254(d)(1)). This Court has repeatedly held: "A legal principle is 'clearly established' within the meaning of this provision only when it is embodied in a holding of this Court." *Thaler v. Haynes*, 559 U.S. 43, 47 (2010). Implications that purportedly follow from a prior holding are insufficient to create clearly established federal law. *Kane v. Espitia*, 546 U.S. 9, 10 (2005);

Mickens v. Taylor, 535 U.S. 162 (2002). Thus, "'if a habeas court must extend a rationale before it can apply to the facts at hand,' then by definition the rationale was not 'clearly established at the time of the state-court decision.'" *White v. Woodall*, 572 U.S. 415, 426 (2014) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004)). Even implications that may purportedly flow from a holding of the Court are insufficient to create clearly established federal law for purposes of 28 U.S.C. § 2254(d). *Glebe v. Frost*, 574 U.S. 21, 23-25 (2014).

The Court's standard for voluntariness of confessions is well established, and it is the totality-of-circumstances test applied by the courts below. *E.g.*, Pet. App. at 3a (Ninth Circuit opinion citing *Fulminante*, 499 U.S. 279; *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)); Pet. App. at 30a-31a (Washington Court of Appeals citing, inter alia, *Fulminante*, 499 U.S. at 285-86). That test considers, among the totality-of-circumstances, the coercive nature of the investigative techniques. Pet. App. at 31a (Washington court of appeals citing *State v. Unga*, 196 P.3d 645, 648 (Wash. 2008), which in turn cited *Withrow v. Williams*, 507 U.S. 680, 693 (1993)).

Rafay can point to no clearly established precedent from this Court that requires, in addition to applying the totality-of-circumstances test, an extra inherently coercive standard, which likely explains why he never explicitly argued for a separate test until just recently (as further detailed below).

Rafay relies on *Miller v. Fenton*, 474 U.S. 104 (1985), but the holding in *Miller* concerned whether voluntariness was a question of fact or law, because that question determined the level of appellate review. *Miller* did not announce any new standard for evaluating voluntariness of confessions, and explicitly stated that the correct standard to apply was "whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution[.]" *Id.* at 112. To be sure, *Miller* included within the totality of circumstances to be considered certain interrogation techniques, such as "beatings and other forms of physical and psychological torture," that were "revolting to the sense of justice" and thus could not be used to secure a conviction. *Id.* at 109 (quoting *Brown v. Mississipi*, 297 U.S. 278, 286 (1936)). But *Miller* did not create some new, separate voluntariness test, and in any event, as explained below, none of the fact patterns it discussed are remotely similar to those in this case.

Rafay similarly relies on *Brown*, 297 U.S. 278, Pet. at 29, but again that case fails to establish the bright line Rafay proposes between the totality-of-circumstances test and his new inherently coercive test. In *Brown*, the state court determined that confessions obtained through physical torture "'were not made voluntarily but were coerced.'" *Brown*, 297 U.S. at 281. This Court did state that "the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence[,]" *id.* at 286, but this Court has never treated *Brown* as creating a separate category of inherently coercive techniques evaluated

separately from the *Fulminante* totality-of-circumstances test. Indeed, *Fulminante* itself involved "a credible threat of physical violence unless Fulminante confessed," yet the Court applied the totality-of-circumstances test. *Fulminante*, 499 U.S. at 287.

The other cases relied on by Rafay similarly involve blended discussions of coercion and whether the confessions were voluntarily made rather than the siloed tests Rafay proposes. *See Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944) (stating that continuous interrogation for thirty-six hours without sleep was so coercive that it was "irreconcilable with the possession of mental freedom by a lone suspect[,]" and resulted in a "not voluntary but compelled" confession); *Chambers v. Florida*, 309 U.S. 227, 239-40 (1940) (custodial interrogation over six days "'broke' petitioners' will and rendered them helpless to resist their accusers further[]"); *Haynes v. Washington*, 373 U.S. 503, 513-14 (1963) (applying totality-of-circumstances to determine "'whether the defendant's will was overborne at the time he confessed'" (quoting *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963))).

Simply put, there is no clear precedent that courts must apply an extra inherently coercive test after having applied the totality-of-circumstances test. And as further detailed below, even if this Court were to someday adopt an inherently coercive standard for future cases, 28 U.S.C. § 2254(d) prohibits application of such a rule in this case. *Greene v. Fisher*, 565 U.S. 34 (2011).

2. Even if this Court had previously adopted a separate inherently coercive standard, it had never applied it to anything remotely like the facts of this case, so the state court adjudication was not an unreasonable application of this Court's precedent

Even if this Court determined that its prior precedent requires courts to independently evaluate whether techniques are inherently coercive in addition to applying the totality-of-circumstances test, Rafay cannot establish any unreasonable application of existing precedent.

Because this Court has never addressed the type of undercover operation tactics utilized in this case, and has never held that such tactics alone are so inherently coercive as to render a confession per se inadmissible, the state court adjudication cannot be an unreasonable application of federal law.

28 U.S.C. § 2254(d) limits the power of the Court to grant relief to a prisoner confined under a state court judgment. *Williams v. Taylor*, 529 U.S. 362, 399 (2000). It is not enough even if the Court finds the state court conclusion was clearly erroneous. *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003). Rather, the Court may grant habeas corpus relief "only if the decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Sarausad*, 555 U.S. at 190 (quoting 28 U.S.C. § 2254(d)(1)).

Under this standard, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough*, 541 U.S. at 664). The petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103. In other words, the petitioner bears the burden of showing "there was no reasonable basis for the state court to deny relief." *Id.* at 98.

None of the cases Rafay relies on involve remotely similar facts, and thus they do not demonstrate an unreasonable application of clearly established precedent from this Court. To the contrary, this Court has rejected the proposition that undercover operations are so inherently coercive as to render a confession involuntary, even when those operations employ deception or appeal to a suspect's self-interest. *See Illinois v. Perkins*, 496 U.S. 292, 296-99 (1990) (where the suspect does not know that his questioner is a police agent, such questioning does not amount to an inherently coercive environment requiring application of *Miranda*). The Court has never categorically barred the use of deception or encouragement by undercover officers to obtain a confession.

Indeed, every case Rafay has cited involving allegedly inherently coercive techniques involved custodial interrogations, not out-of-custody suspects like those here. Pet. at 29-30 (*Miller*, 474 U.S. 104;

Haynes, 373 U.S. 503; *Ashcraft*, 322 U.S. 143; *Chambers*, 309 U.S. 227; *Brown*, 297 U.S. 278). And those cases do not involve facts remotely similar to those here.

For example, Rafay argues that confessions obtained by violence are automatically inadmissible, citing *Brown*, 297 U.S. at 286. Pet. at 29. In *Brown*, the criminal defendant confessed after being physically tortured while in police custody, and the lower court opinion determined that "'the confessions were not made voluntarily but were coerced.'" *Id.* at 281. The Court quoted at length from the findings below to demonstrate the "extreme brutality of the measures to extort the confessions," which included repeatedly hanging a black man from a tree and then whipping him while threatening to continue whipping him until he confessed. *Id.*

Here, by contrast, there is no evidence that the Canadian police used violence to obtain Rafay's confession. Pet. App. at 37a. To the contrary, the officers repeatedly told Burns that, if things did not work out, the parties were free to walk away. Pet. App. at 38a-39a. The officers even told Burns numerous times that he was free to consult his lawyer. Pet. App. at 39a.

Rafay also compares his situation to a marathon custodial interrogation like the one in *Ashcraft*. Pet. at 30. But unlike the cases Rafay cites, Burns could have broken off contact with the officers at any time and, on one occasion, went weeks without contact. Pet. App. at 37a. Burns pursued the relationship and eagerly expressed willingness to commit crimes on behalf of the organization, including

acts of violence. Pet. App. at 39a. The Washington courts reasonably found that his "actions throughout suggest[ed] deliberate attempts to impress Haslett, not fear of physical injury." Pet. App. at 39a.

And although Burns had continuous contact with the undercover officers over the course of multiple meetings, Rafay himself only had a short meeting with the undercover officer when he confessed. Neither defendants' statement occurred during a custodial interrogation.

Moreover, no Supreme Court precedent addresses the type of specific undercover techniques employed here, including the staged induction into a fictitious criminal organization, veiled threats regarding potential betrayal of the organization, or promises to destroy evidence in exchange for information about past crimes. *Cf.* Pet. App. at 33a (Washington Court of Appeals opinion noting: "Neither side has identified any case involving facts remotely approaching the scope of the Project Estate undercover operation."). The absence of a Supreme Court holding on the issue defeats any suggestion that the state court's rejection of Rafay's claim "was so lacking in justification that there was an error . . . beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. While aspects of the undercover operation may raise policy questions, the constitutionality of the techniques under current law remains a point on which fairminded jurists could disagree. The Washington appellate court acted

reasonably when declining to expand the law to a new context. The decision was therefore not an unreasonable application of clearly established federal law.

Far from unreasonably applying clear precedent from this Court, the Washington Court of Appeals followed this Court's direction and, in a thorough opinion, applied the governing totality-of-circumstances standard for voluntariness of confessions. In doing so, the court concluded that the undercover operation did not vitiate Rafay's ability to make a rational choice. Pet. App. at 31a-40a. That fact-bound determination, which considered Rafay's meetings with undercover officers, private conversations, and willingness to engage in criminal activity, was not unreasonable. Nor does Rafay even allege, much less show, the state court's decision rested on an unreasonable factual determination under 28 U.S.C. § 2254(d)(2). The state courts reviewed extensive evidence from the recordings of Rafay's statements, and Rafay presents no clear and convincing evidence, as required by 28 U.S.C. § 2254(e)(1), to rebut the state court factual findings that the undercover officers made no direct threats against Rafay.

Because the state court reasonably applied federal law in rejecting Rafay's coercion claim, the habeas statute bars relief absent a showing that no fairminded jurist could agree with that conclusion. Rafay makes no such showing. Even on *de novo* review, the record does not establish that the officers' tactics in this case contained intimidation so inherently coercive as to override Rafay's ability to make unconstrained choices. Unlike the credible

threats of physical harm in cases like *Fulminante*, Rafay fails to prove either subjective coercion from fear of violence or intolerable government overreach.

3. Rafay cannot show that Washington courts unreasonably applied the law to his inherent coercion claim because he never clearly raised that argument

Rafay's claim of clear error fails on yet another front. As detailed above, he cannot show that the Ninth Circuit ruling conflicts with any clearly established law. But he also cannot show that Washington courts unreasonably applied the law, because he never asked them to apply the rule he now advocates.

Rafay asserts that his inherently coercive claim was made to the Washington trial court, citing comments by Rafay's counsel during oral argument that the Canadian operation could not have been done in the United States. Pet. at 21 (citing CA9.ER.443). Nowhere in that oral argument does Rafay's counsel argue for an inherently coercive standard. *See generally* CA9.ER.436-43. Rather, Rafay's counsel explicitly argued: "It's clear that his will has been overborne, and that's the standard for voluntariness. Did he voluntarily make the statements or were they the product of coercion or threats?" CA9.ER.442. The only legal precedent cited during the oral argument was *Fulminante,* which involved the totality-of-circumstances test and did not mention nor require an additional inherently coercive standard. CA9.ER.437-39; *Fulminante,* 499 U.S. 279.

Rafay claims that the trial court rejected this inherently coercive argument, but the trial court's ruling does not show any awareness that such an argument had been made. Instead, the trial court reasoned:

> The statements of defendants were given, unlike Mr. Fulminante and unlike Galileo, in a noncustodial setting. The defendants were free to speak or not. The defendants were free to leave or not. The defendants were free to consult with their Canadian counsel or not, as they chose.
>
> The Canadian court reviewed and found no evidence of coercion, and this court makes the same finding.

Pet. App. at 163a. The Canadian court's discussion of whether police standards would bring the administration of justice into disrepute was part of the Canadian court's decision, but the trial court did not "make[] the same finding" with respect to that statement, but rather to the finding of "no evidence of coercion." Pet. App. at 163a. Moreover, Rafay's assertion that the trial court simply relied on the Canadian court's decision on voluntariness, Pet. at 22, was rejected by the Washington Court of Appeals and is contrary to the record. Pet. App. at 41a.

Rafay then claims that he raised the "inherently coercive" standard in his pro se submission to the Washington Court of Appeals. Pet. at 24 (citing CA9.FER.64). Again, the argument did not call for a separate inherently coercive test, and the portion of the record cited by Rafay—a single page in a sixty-two-page brief—relates to an

argument that there is no distinction between threats and inducements in assessing voluntariness of confessions. CA9.FER.62. Elsewhere in the brief, Rafay argued that "[a] court determines voluntariness under the totality of the circumstances. The court considers any promises or misrepresentations made by the interrogating officers. And it considers the relationship between those promises and the confessions to determine whether the defendant's will was overborne." CA9.FER.45 (citations omitted). Further indicating that Rafay did not clearly raise an inherently coercive argument is that Rafay's counsel, in his state-court brief, never addressed it. CA9.ER.933-68.

Tellingly, Rafay does not even cite any part of his federal habeas petition or Ninth Circuit briefing, other than his petition for rehearing, that argued for an inherently coercive standard. Pet. at 26-27. The habeas petition and opening brief do not identify this issue, and instead primarily argue that the Washington Court of Appeals unreasonably applied *Fulminante*. W.D. Wash., Dkt. No. 34; CA9.DktEntry.27, at 49-61. In his reply, Rafay continued to argue an unreasonable application of *Fulminante*, and in that context he argued that voluntariness could be determined based solely on whether the police techniques were tolerable rather than whether the suspect's will was overcome. CA9.DktEntry.58, at 3. This was, charitably, the first time Rafay had suggested that an additional per se test must be applied in these circumstances.

In sum, Rafay failed to argue his new inherently coercive standard in state court. Thus, he cannot argue that the state courts unreasonably applied or failed to address it.

C. Even if Rafay Could Overcome the Restrictions of 28 U.S.C. § 2254(d), Federal Courts May Not Announce and Apply a New Rule on Collateral Review

In *Teague v. Lane*, 489 U.S. 288, 314 (1989), this Court held that federal courts generally may not announce or apply new constitutional rules of criminal procedure on collateral review. Rather, habeas corpus serves to ensure state convictions abide by constitutional rules already clearly established at the time a conviction became final. Rafay's petition runs afoul of *Teague* by seeking a novel expansion of due process protections against coercive police tactics. Because no precedent addresses the undercover techniques employed here, applying the standard advocated by Rafay would announce a new rule in violation of *Teague*.

Rafay contends the undercover operation employed psychological techniques so inherently coercive that it overrides case-specific voluntariness analysis, automatically mandating exclusion of his confession. No holding cited by Rafay addresses, much less prohibits, the police methodology utilized here. On the contrary, the Court has approved the limited use of police deception and undercover operations appealing to a suspect's self-interest. *See Perkins*, 496 U.S. 292. In sum, the most that Rafay can establish is that the specific psychological tactics employed in the undercover operation fall into an area of unsettled

federal law. Granting habeas relief would therefore announce a new constitutional rule in contravention of *Teague*. As a federal court exceeds its habeas powers when it "imposes a new obligation on the States[,]" *Teague*, 489 U.S. at 301, the Court should deny Rafay's petition.

CONCLUSION

For the reasons stated above, the Court should deny the petition for a writ of certiorari.

RESPECTFULLY SUBMITTED.

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February 21, 2024