No. 20-35963

United States Court of Appeals for the Ninth Circuit

ATIF AHMAD RAFAY,
Petitioner-Appellant

v.

ERIC JACKSON,
Respondent-Appellee

Appeal from United States District Court for the Western District of Washington,
Case No. 2:16-cv-01215-RAJ (Honorable Richard A. Jones)

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

I. *De Novo* Review Applies to Atif's Coercion Claim 3

A. The trial court applied the wrong legal standard 3

B. The court of appeals also applied the wrong standard 8

C. The State's contrary arguments lack merit 11

II. The State Courts' Adjudication of Atif's Coercion Claim Is Contrary to, and an Unreasonable Application of, *Fulminante*, Based on Unreasonably Determined Facts 19

III. Atif Was Denied His Right to Present a Complete Defense 28

IV. Nearly All the Forensic and Testimonial Evidence Exonerated Atif and Sebastian 31

CONCLUSION 37

TABLE OF AUTHORITIES

Cases

Arizona v. Fulminante,
499 U.S. 279 (1991) .... *passim*

Bell v. Cone,
543 U.S. 447 (2005) 14

Brown v. Horell,
644 F.3d 969 (9th Cir. 2011) 3

Burns v. Warner,
2015 WL 9165841 (W.D. Wash. July 2, 2015) 17

Collazo v. Estelle,
940 F.2d 411 (9th Cir. 1991) 4

Cordova v. Baca,
346 F.3d 924 (9th Cir. 2003) 10

Early v. Packer,
537 U.S. 3 (2002) 12

Frantz v. Hazey,
472 F.3d 1104 (9th Cir. 2007) 12

Frantz v. Hazey,
533 F.3d 724 (9th Cir. 2008) 1, 13

Hardy v. Chappell,
849 F.3d 803 (9th Cir. 2016) 8

Harrington v. Richter,
562 U.S. 86 (2011) 13

Hernandez v. Small,
282 F.3d 1132 (9th Cir. 2002) 12

Holland v. Jackson,
542 U.S. 649 (2004) 17

Holmes v. South Carolina,
547 U.S. 319 (2006) 30

Hudson v. Rushen,
686 F.2d 826 (9th Cir. 1982) 16

Jones v. Harrington,
829 F.3d 1128 (9th Cir. 2016) 16

Kipp v. Davis,
971 F.3d 939 (9th Cir. 2020) 8, 16

Lam v. Kelchner,
304 F.3d 256 (3d Cir. 2002).. 25, 27, 29

Lego v. Twomey,
404 U.S. 477 (1972).. 4

Malloy v. Hogan,
378 U.S. 1 (1964)... 7

Miller v. Fenton,
474 U.S. 104 (1985).. 15

Miller v. Fenton,
796 F.2d 598 (3d Cir. 1986).. 10, 11

Murray v. Schriro,
745 F.3d 984 (9th Cir. 2014) 20, 24

Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty.,
391 U.S. 563 (1968).. 18

Rogers v. Richmond,
365 U.S. 534 (1961)...*passim*

Schneckloth v. Bustamonte,
412 U.S. 218 (1973).. 9

State v. Broadaway,
133 Wash. 2d 118 (1997) 18

State v. Unga,
165 Wash. 2d 95 (2008) ....*passim*

Taylor v. Maddox,
366 F.3d 992 (9th Cir. 2004) 16

Tobias v. Arteaga,
996 F.3d 571 (9th Cir. 2021) 4, 24

United States v. Dreyer,
804 F.3d 1266 (9th Cir. 2015) 19

United States v. Gamboa-Cardenas,
508 F.3d 491 (9th Cir. 2007) 19

United States v. Harrison,
34 F.3d 886 (9th Cir. 1994) 11, 24, 25

United States v. Pickering,
794 F.3d 802 (7th Cir. 2015) 15

Williams v. Taylor,
529 U.S. 362 (2000).. 10

Wilson v. Sellers,
138 S. Ct. 1188 (2018) 12, 13

Constitutional Provisions

U.S. Const. amend. IV... 4, 7

U.S. Const. amend. V 3, 5, 6, 7

U.S. Const. amend. VI... 28

Statutes

28 U.S.C. § 2254(d)(1) 13

28 U.S.C. § 2254(d)(2) 20, 27

28 U.S.C. § 2254(e)(1)... 20

Other Authorities

The Confession Tapes (Netflix 2017) 31

INTRODUCTION

Atif's opening brief explained how the state courts denied his coerced-confession claim by applying the wrong legal standards, such that this Court reviews the claim *de novo*. Br.37-49. In any event, he also explained how the state courts adjudicated the claim unreasonably and contrary to Supreme Court precedent. Br.49-62. While that is sufficient to reverse, since there is no doubt the error was harmful, Atif explained why he is also entitled to relief because he was deprived of his constitutional right to present a complete defense. Br.62-70.

The response seemingly agrees that the state courts' analysis of Atif's coercion claim is suspect, so it urges the Court to ignore their reasoning and find a way to affirm the result. Resp.28. This Court expressly considered and rejected that standard of review in *Frantz v. Hazey*, 533 F.3d 724, 734 (9th Cir. 2008) (en banc). On the merits, the State waives any argument that it should win under *de novo* review of the coercion claim. And the state courts' adjudication of either claim cannot even survive AEDPA's deferential standards.

Remarkably, the State has nothing to say about the voluminous evidence that "Mr. Big" convinced the teens their arrest was imminent,

and the only way to assure him they were not a threat was to cooperate, by confessing, with his plan to prevent their arrest. Br.13-23, 51-54. Officer Haslett told Sebastian "they're fuckin' coming to lock your ass up. Yours and your friend['s]." 10-ER-2338-39. He said he believed he would be the "first person" Sebastian would "give up" after Sebastian was arrested. 8-ER-2001-02. "I will not be set up by anybody," Haslett warned. 9-ER-2213. "[D]on't fuckin' sell me short, and don't ever let your fuckin' friends try to sell me short." 9-ER-2257.

Sebastian had already been told that Haslett killed "the person that could finger" his accomplice in a previous murder trial. 8-ER-1955. He knew if he "were to fuck [Mr. Big] around," he "would wake up one day with a bullet in [his] head." 9-ER-2199; 10-ER-2382 (same). Haslett agreed, testifying that "Sebastian thought that if he did anything to displease [Mr. Big], he risked death." 2-ER-264. Atif knew he would also be killed if Mr. Big ever felt "fuck[ed] around." 10-ER-2382-83; *see* 2-ER-276-77; 9-ER-2212-13. The State has zero response.

Nor does the State mention—much less dispute—Atif's detailed showing that essentially all the testimonial, blood, hair, and other-

suspect evidence demonstrated that neither he nor Sebastian could have committed the murders. Br.4-13.

This Court should grant the petition.

ARGUMENT

I. *De Novo* Review Applies to Atif's Coercion Claim.

The trial court applied an incorrect legal standard urged by the prosecutors themselves, who failed to brief the merits of the coercion claim under the correct Fifth Amendment framework because they believed the issue was already resolved by Canada's courts applying foreign law. 3-ER-457.

The court of appeals also applied a standard the State essentially admits is "inconsisten[t]" with *Arizona v. Fulminante*, 499 U.S. 279 (1991). *See* Resp.31. *De novo* review applies to this claim.

A. The trial court applied the wrong legal standard.

1. A confession is voluntary when the totality of the circumstances prove it was "the product of a rational intellect and a free will." *Brown v. Horell*, 644 F.3d 969, 983 (9th Cir. 2011) (citation omitted). The term "voluntary" in this context "applies *either* to the conduct of the police, *or* to [the suspect's] reaction to police overreaching."

Collazo v. Estelle, 940 F.2d 411, 426 (9th Cir. 1991) (en banc) (emphasis added). Put differently, "[v]oluntariness is not merely a fact-bound question whether this particular suspect's confession is the product of coercion, but also a legal question about whether the techniques the police used were tolerable." *Tobias v. Arteaga*, 996 F.3d 571, 582 n.8 (9th Cir. 2021) (quoting *Collazo*, 940 F.2d at 426 (Kozinski, J., concurring)). If "the technique used here risks overcoming the will of the run-of-the-mill suspect," it is unconstitutionally coercive, "even if it did not overcome the will of this particular suspect." *Collazo*, 940 F.2d at 426 (Kozinski, J., concurring); *see Tobias*, 996 F.3d at 582 n.8 (same).

Thus, a confession is involuntary when given in response to a promise of protection against "a credible threat of physical violence," *Fulminante*, 499 U.S. at 287, even if the suspect never feared harm nor sought safeguarding, *contra id.* at 304 (Rehnquist, C.J., dissenting).

2. The State had the burden of proving, by a preponderance, that Atif and Sebastian voluntarily confessed. *Lego v. Twomey*, 404 U.S. 477, 485, 489 (1972). Instead, the trial court spent most of its analysis on a completely irrelevant matter. Prosecutors insisted that under the *Fourth* Amendment, so long as Bellevue police had not been in a "joint venture"

with the RCMP, the teens' statements were admissible unless the RCMP's conduct "shocked the conscience." The trial court agreed, and found "no violation of Canadian law," "nothing in the methodology … that shocks the judicial conscience," and "no joint venture/agency." 1-ER-25. Based on those findings, the judge held that the statements, "obtained" by "foreign police, consistent with the laws of that foreign country, c[ould] be handed over to the U.S. police" on a "'silver platter.'" 1-ER-26.

In response to Atif's *Fifth* Amendment coercion claim, prosecutors argued that "the Court of Appeals in Canada in its committal proceeding did entertain that very notion, which is why we didn't spend any time briefing it here." 3-ER-457. They quoted the Canadian court's findings that "'the undercover officers' conduct'" was not "'shocking or outrageous, although they were deceitful, persistent, and aggressive.'" *Ibid.* Prosecutors pressed the trial court to make the same finding that "'the officers['] conduct, viewed objectively, would not … shock the sensibilities of an informed community considering the brutality of the crime then under investigation and would not bring the administration of justice

into disrepute.'" 3-ER-457-58.[1] Again the trial court agreed, and thus did not apply the Fifth Amendment standard nor engage in a totality-of-the-circumstances inquiry. Instead, the court either adopted the finding of, Br.41, 43-44, or made "the same finding" as, the Canadian court "in reviewing the self[-]same issue under Canadian charter rights," 1-ER-62 (quoting 1-ER-36).

The court quoted the wrong standard that prosecutors had advanced: "The Canadian court, in reviewing the self[-]same issue under Canadian charter rights, found no duress, found nothing under Canadian police standards that would bring the administration of justice into disrepute." 1-ER-36. The "Canadian court reviewed and found no evidence of coercion" under Canada's standard, and the trial "court ma[de] the same finding," *ibid.*, then "entered minimal written findings and conclusions" to the same effect, 1-ER-65. "The statements of defendants were given," according to the trial court, "in a noncustodial setting. The defendants

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[1] The State doesn't dispute that Canada's coercion standard is vastly different from ours, so Atif doesn't repeat the details. *See* Br.41-43.

were free to speak or not. The defendants were free to leave or not." 1-ER-35-36.

The response brief mistakes the trial court's Fourth Amendment ruling that "nothing" in the RCMP's conduct "can be said to shock the judicial conscience," *compare* 1-ER-18-35, *with* 1-ER-35-36, for a finding related "to the voluntariness of the statements" under the Fifth Amendment, Resp.7, 25-26. Regardless, "the constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was free and voluntary," as Atif previously explained. Br.43 (quoting *Malloy v. Hogan*, 378 U.S. 1, 7 (1964)) (quotation marks omitted). The State did not respond.[2]

Whether characterized as "referring to, and even adopting, the Canadian court's findings of fact," Resp.30, or independently making the "self[-]same" findings, 1-ER-62 (quoting 1-ER-36), it is "apparent on the surface" of the decision that the trial court "applied an incorrect

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[2] To be sure, the RCMP's conduct *was* conscience shocking. Bellevue's own officers testified they could never conduct a Mr. Big-style operation in the United States. *See* 3-ER-443-44.

standard," *Hardy v. Chappell*, 849 F.3d 803, 819 (9th Cir. 2016). Having pressed for that erroneous standard, the State cannot now argue that the trial court applied a different, correct one. *De novo* review applies, and the trial court's findings are *per se* unreasonable. *Id.* at 819-20; *see Kipp v. Davis*, 971 F.3d 939, 953 (9th Cir. 2020).

B. The court of appeals also applied the wrong standard.

It is apparent from the face of the court of appeals' decision that it also misstated the legal standard and erred in its analysis. The State does not defend the court's claim that whether a statement is coerced—the legal conclusion—is merely a factor to consider under the totality of circumstances. *See* Br.32. It focuses instead on the other erroneous consideration Atif highlighted in the opening brief. *Ibid.*

The court reasoned that Atif and Sebastian "made a deliberate" and constitutionally voluntary "choice after weighing competing options," based on its belief that "[a] confession is voluntary 'so long as that decision is a product of the suspect's own balancing of competing considerations.'" 1-ER-65 (quoting *State v. Unga*, 165 Wash. 2d 95, 102 (2008)). The court's reasoning was based on an incomplete quotation from the Washington Supreme Court's decision in *Unga*. But when

incriminating statements are elicited by "a credible threat of physical violence," they are coerced, period. *Fulminante*, 499 U.S. at 287-88. No amount of "balancing of competing considerations" can overcome that. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 224 (1973) ("all incriminating statements" are "'voluntary' in the sense of representing a choice of alternatives," "even those made under brutal treatment").

Recognizing the "inconsistency" between the quoted portion of *Unga* and the Supreme Court's decision in *Fulminante*, the State argues that Atif "conjectures" that the court of appeals "gave [*Unga*'s] statement more meaning or consideration than [*Fulminante*'s], or, presumes the court neither noticed the alleged inconsistency nor resolved the language of each." Resp.31. The State suggests that "[t]here is no proof" the court of appeals "necessarily relied on the state[-]law standard [in *Unga*] and rejected *Fulminante*'s language." *Ibid.*

Atif never argued that *Unga* describes a "state law" balancing standard inconsistent with *Fulminante*—and if it did, that would obviously be contrary to clearly established Supreme Court precedent. Rather, Atif argues that the court of appeals misunderstood *Unga*'s description of *federal* law. As to needing "proof" that the state court relied

on a standard contrary to *Fulminante*, the dissenters in *Williams v. Taylor* made a similar argument, *see* 529 U.S. 362, 417-18 (2000) (Rehnquist, C.J., concurring in part and dissenting in part), which six Justices rejected, *id.* at 406 (majority); *id.* at 414 (O'Connor, J., concurring in part and in the judgment). "Whether a state court's interpretation of federal law is *contrary* to Supreme Court authority" is "a question of federal law as to which we owe no deference to the state courts." *Cordova v. Baca*, 346 F.3d 924, 929-30 (9th Cir. 2003) (citing *Williams*, 529 U.S. at 406).

In *Unga*, the suspect had been "given *Miranda* warnings and knew what his rights were" during a custodial interrogation. 165 Wash. 2d at 108 (footnote omitted). In that context, according to *Unga*,

> A police officer's psychological ploys such as playing on the suspect's sympathies, saying that honesty is the best policy for a person hoping for leniency, or telling the suspect that he could help himself by cooperating may play a part in a suspect's decision to confess, "but so long as that decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary."

Id. at 102 (quoting *Miller v. Fenton*, 796 F.2d 598, 605 (3d Cir. 1986)). It makes perfect sense that a Mirandized suspect's "own balancing of competing considerations" comes into play during a custodial

interrogation, where the alleged police coercion is "playing on the suspect's sympathies, saying that honesty is the best policy," or "telling the suspect that he could help himself by cooperating." *Ibid.* (quotation marks omitted); *see Miller*, 796 F.2d at 605 (same). Competing considerations have no place, though, when even an implicit threat of credible violence from third parties is used to elicit incriminating statements. *Fulminante*, 499 U.S. at 287-88.

At the same time, the court of appeals found that Sebastian "exhibited a remarkable resilience to continued pressure" and was "not intimidated" by the undercover officers. 1-ER-64. Even if true, *but see infra* pp.24-26, that would only be half the inquiry. A confession is involuntary when "the technique used … risks overcoming the will of the run-of-the-mill suspect," regardless of whether the particular suspect is "unusually resistant to psychological coercion." *United States v. Harrison*, 34 F.3d 886, 892 (9th Cir. 1994) (quotation marks omitted).

C. The State's contrary arguments lack merit.

First, the State accuses Atif of unfairly "parsing through the texts" of the "state[-]court decisions" and "delv[ing] into the intricacies of the state court's analysis." Resp.28. But AEDPA requires federal courts to

faithfully adhere to what a state court actually said because it "respect[s] what the state court actually did." *Wilson v. Sellers*, 138 S. Ct. 1188, 1197 (2018).

The State counters that it "is the state court's decision, as opposed to its reasoning," that matters. Resp.28 (quotation marks omitted).[3] And it relies on cases this Court has expressly overruled, quoting, for example, *Hernandez v. Small* for the proposition that "the intricacies of the state court's analysis need not concern us; what matters is whether the *decision* the court reached was contrary to controlling federal law," 282 F.3d 1132, 1140 (9th Cir. 2002). Resp.28.

In *Frantz v. Hazey*, this Court specifically asked the parties for briefing on AEDPA's standard, citing *Hernandez* and quoting the very language on which the State relies. 472 F.3d 1104, 1105 (9th Cir. 2007) (quoting 282 F.3d at 1140). Then, in a unanimous en banc opinion, the Court expressly overruled *Hernandez* and cases like it: "It is now firmly

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[3] Elsewhere, the State agrees that "neither the reasoning nor the result of the state-court decision" may contradict Supreme Court precedent. Resp.33 (quoting *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam)).

established … that a decision by a state court is contrary to the clearly established law of the Supreme Court if it *applies a rule* that contradicts the governing law set forth in Supreme Court cases." *Frantz v. Hazey*, 533 F.3d 724, 733 n.12, 734 (9th Cir. 2008) (en banc) (cleaned up).

Federal courts only hypothesize "arguments or theories" that "could have supported" a state court's adjudication of a federal claim when those courts give no reasoning at all. *Harrington v. Richter*, 562 U.S. 86, 101-02 (2011). And there must be "no lower court opinion" with reasoning either. *Wilson*, 138 S. Ct. at 1195 ("*Richter* did not directly concern … whether to 'look through' the silent state higher court opinion to the reasoned opinion of a lower court …."). Atif explained that when, as here, a state court has given reasons for rejecting a federal claim, federal courts must "confine [their] § 2254(d)(1) analysis to the state court's *actual* decisions and analysis." *Frantz*, 533 F.3d at 737; *see* Br.60-61. The State has no response.

Second, the State hints that Atif waived reliance on *Rogers v. Richmond*, 365 U.S. 534 (1961), by allegedly citing it for the first time

here, and downplays *Rogers*'s importance. Resp.28-30.[4] This is not surprising; *Rogers* is devastating to the State's position. Not only did the Supreme Court hold that it "would be manifestly unfair … to sustain a state conviction in which the trial judge … passes upon that claim under an erroneous standard of constitutional law"—there, the veracity of the coerced statement—it held that any "facts 'found' in the perspective framed by an erroneous legal standard cannot plausibly be expected to furnish the basis for correct conclusions if and merely because a correct standard is later applied to them." 365 U.S. at 546-47. Thus, even if the state court of appeals had applied the correct legal standard, it relied on the trial court's unreasonable factfinding contrary to *Rogers*. *E.g.*, 1-ER-64 ("As the trial court stressed, the defendants were free to break off their contact with the undercover officers at any time."); 1-ER-65 ("The trial

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[4] Atif never similarly argued that the state courts' mere failure to cite *Rogers* constituted error. *Contra* Resp.28-29 (citing *Bell v. Cone*, 543 U.S. 447, 455 (2005) (per curiam)).

court was therefore able to view the defendants' demeanor and body language during their entire confessions ….").[5]

Contrary to the State's apparently unresearched allegation that *Rogers* was "not mentioned by Burn[s] or Rafay in any of their state or earlier federal proceedings," Resp.28, Atif cited *Rogers* before the court of appeals, *e.g.*, Reply Brief of Appellant, 2009 WL 10631318, at *16 (Wash. Ct. App.). Atif explained that "the trial court did not apply the voluntariness test but instead 'paralleled' Canadian law and 'silver platter' doctrine" contrary to "*Rogers v. Richmond*." FER-51. The Washington Supreme Court also cited *Rogers* when it denied review of Atif's state habeas application. SER-15.

More importantly, the State admits that Atif "resurrects" his "argument that the state courts applied foreign law" and "that the

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[5] "[A]ssessments of credibility and demeanor," even during live testimony that only the trial judge witnesses, "are not crucial to the proper resolution of the ultimate issues of 'voluntariness.'" *Miller v. Fenton*, 474 U.S. 104, 116-17 (1985); *see United States v. Pickering*, 794 F.3d 802, 805 (7th Cir. 2015) (collecting authorities explaining "demeanor evidence … can be an unreliable clue to truthfulness or untruthfulness"). Atif explained this, Br.59, and the State did not respond, *see* Resp.26-27.

Washington Court of Appeals failed to apply, misapplied, or unreasonably applied the clearly established federal law of the Supreme Court." Resp.27; *see* 2-ER-117. Everyone agrees that he has consistently made the claim. He was not required to assert "the claim under the particular authorities advanced in the federal habeas court." *Hudson v. Rushen*, 686 F.2d 826, 830 (9th Cir. 1982).

The State also argues *Rogers* does not apply because it came before Congress enacted AEDPA. Resp.32-33. But *Rogers*'s dictates are clearly established. Under AEDPA, "where the state court makes factual findings 'under a misapprehension as to the correct legal standard,' 'the resulting factual determination will be unreasonable and no presumption of correctness can attach to it.'" *Jones v. Harrington*, 829 F.3d 1128, 1136 (9th Cir. 2016) (quoting *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004)); *Kipp*, 971 F.3d at 953 (same). Atif explained this too, Br.36-38, 43, and again the State remained silent.

Third, the State suggests this Court already resolved "Burns's identical claim." Resp.10, 29-30. But Burns did not argue that *de novo* review applies. Br.28. Moreover, the State cannot assert that Atif's and Sebastian's claims are "identical," yet also fundamentally different

because Atif "had only a single interaction with the undercover officers." Resp.21-22; *see infra* p.27. And the State conveniently ignores that the district court in Burns's federal proceedings found that "'the implicit threat of physical violence was credible,' 'Haslett was relaying to [Sebastian] that [he] had to be kept out of jail for Haslett's protection,' Sebastian's 'arrest would be a betrayal'" because "'it would ultimately result in Haslett's arrest,' and Sebastian 'believed Haslett would kill him if he betrayed Haslett.'" Br.28 (quoting *Burns v. Warner*, 2015 WL 9165841, at *13-14 (W.D. Wash. July 2, 2015)) (brackets in original).

Fourth, the State relies on *Holland v. Jackson*, 542 U.S. 649 (2004) (per curiam), *see* Resp.16, 31-32, which is nothing like this case. In *Holland*, unlike here, the state court cited the correct standard of review, then correctly applied it. 542 U.S. at 654. Even though "it [was] possible to read" some of the state-court opinion's isolated phrases as in tension with the legal standard, the Supreme Court rejected that conclusion because "such a reading would needlessly create internal inconsistency in the opinion," which showed that the reasoning was correct. *Ibid.* Here, the state court *neither* recited the correct standard *nor* correctly applied it.

Fifth, the State believes Atif "misconstrues" the Washington Supreme Court's "holding in *Broad[a]way*." Resp.33-34. Not so. The opening brief correctly set forth that Washington law does "not allow 'independent appellate review of the record in a confession case' on direct review." Br.44 n.3 (quoting 1-ER-62). That is precisely what *State v. Broadaway* holds: "the rule … in confession cases is that findings of fact" are "verities on appeal if unchallenged, and, if challenged, they are verities if supported by substantial evidence in the record." 133 Wash. 2d 118, 131 (1997).

Reviewing findings for support by "substantial evidence" is "no[t] independent review." *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty.*, 391 U.S. 563, 569 n.2, 579 n.2 (1968). Indeed, *Broadaway* expressly contrasts Washington's courts with the Supreme Court, which "has adhered to its rule that it will … make an independent review of the record." 133 Wash. 2d at 131 n.3 (collecting Supreme Court cases). Even if the state court of appeals had applied the correct coercion standard, it still reviewed the trial court's unreasonable determinations under Washington's "substantial evidence" standard, contrary to clearly established law requiring *de novo* review of facts that are procedurally

unreasonable because they were found under the wrong legal standard. *Rogers*, 365 U.S. at 547.

II. The State Courts' Adjudication of Atif's Coercion Claim Is Contrary to, and an Unreasonable Application of, *Fulminante*, Based on Unreasonably Determined Facts.

The State does not attempt to defend the voluntariness ruling under *de novo* review. It therefore waives the argument. *United States v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015) (en banc) ("Generally, an appellee waives any argument it fails to raise in its answering brief."); *United States v. Gamboa-Cardenas*, 508 F.3d 491, 502 (9th Cir. 2007) (appellees who fail to raise argument in answering brief "have waived it"). No surprise. For the reasons given by Atif and in the supporting briefs of *amici* Washington Innocence Project, Dkt. 36, and Criminal Lawyers' Association of Ontario, Dkt. 29-2, it is possible even the State thinks it should lose on *de novo* review. *Cf.* Resp.34 (arguing "amici's briefs do not provide a basis of relief" solely based on AEDPA).

Instead, the State entirely relies on AEDPA's deferential standards to argue that (1) the court of appeals' "resolution of the claim was neither contrary to, nor an unreasonable application of," *Fulminante*, Resp.18-21, (2) Atif fails to rebut by "clear and convincing evidence" the state

courts' determinations that "Rafay made his statements under circumstances not even remotely resembling custodial interrogation, and that the RCMP officers never threatened or coerced Rafay," Resp.21-24, and (3) the trial court "did not simply rely on the ruling of the Canadian courts," but rather "had reviewed the record and reached the same finding," Resp.24-27.[6]

Atif already addressed how the trial court unquestionably failed to perform the voluntariness inquiry. *Supra* pp.4-8. Regardless, the trial court's decision does not even survive AEDPA's deferential standards. The court did not attempt to weigh the totality of the relevant circumstances. Instead, the trial judge found that the teens voluntarily made incriminating statements because they were "in a noncustodial

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[6] Atif need not overcome the state courts' factual determinations by "clear and convincing evidence" under 28 U.S.C. § 2254(e)(1). *Contra* Resp.10-11, 21. Atif need only show that the determinations are "unreasonable" under § 2254(d)(2), because his factual challenges are based on the state-court record. *Murray v. Schriro*, 745 F.3d 984, 999 (9th Cir. 2014); *id.* at 1001 (contrary rule would have to be imposed by this Court "en banc, or by the Supreme Court").

setting," "were free to speak or not," and "were free to leave or not." 1-ER-35-36.

Whether the teens felt free not to speak is the legal conclusion. That leaves just the trial court's reasoning that Atif and Sebastian gave their statements, "unlike Mr. Fulminante and unlike Galileo, in a noncustodial setting," and that they were "free to leave or not leave" (the same "custodial" question). That is contrary to and an unreasonable application of *Fulminante*, because Fulminante was also questioned in a "noncustodial" setting and just as "free to leave" rather than confess to his fellow inmate.

Fulminante and his friend Sarivola, an incarcerated FBI informant, were "walk[ing] together around the prison track" when Sarivola "said that he knew Fulminante was 'starting to get some tough treatment and whatnot' from other inmates because of the rumor" that "Fulminante was suspected of killing a child in Arizona." 499 U.S. at 283. "Sarivola offered to protect Fulminante from his fellow inmates, but told him, 'You have to tell me about it,' you know. I mean, in other words, 'For me to give you any help.'" *Ibid.* Fulminante confessed, and the Supreme Court held that

the confession was involuntary. Fulminante was not in Sarivola's custody. He could have walked away.

In any event, the trial court's reasoning doesn't even make logical sense. No one in police custody fears that he and his friends will be shot in the head if they fail to assure their interrogator they won't squeal. Nor do those in custody reasonably believe they would be completely exonerated by the police if they confess. The noncustodial circumstances of Atif and Sebastian's encounter cuts the other way.

Moreover, in *Unga*, the Washington Supreme Court reasoned that the custodial nature of an interrogation *weighed in favor* of finding the Mirandized suspect's confession voluntary. 165 Wash. 2d at 110-11 (finding "no indication that Detective Mikulcik exploited the friendly nature of the relationship to overcome Unga's will" because "Unga was well aware that the encounter was not a friendly chat" based on fact he was in custody, "had been given *Miranda* warnings," and "was being questioned about serious criminal activity"). If *Unga* is correct, then the fact that Mr. Big's questioning was noncustodial cannot also weigh in favor of finding the statements voluntary. *Contra* 1-ER-71. This "heads we win, tails you lose" maneuver by Washington's courts is unreasonable.

The court of appeals' opinion also fails under AEDPA's deferential standards. As to the threats themselves, the State argues that the court of appeals "reasonably held" that "'the record does not indicate that [Haslett and Shinkaruk] ever threatened the defendants with physical harm or placed them in a position suggesting they were subject to imminent physical harm.'" Resp.18 (quoting 1-ER-64) (alteration in original). That is an unreasonable determination of fact and contrary to *Fulminante*.

The State has no response to the numerous instances identified in the opening brief where the undercover officers conveyed that Mr. Big had killed and would kill anyone he thought might testify against him or his accomplices; that he believed he was the "first person" the teens would "give up" if they were arrested; where Sebastian himself expressed that he knew he would be killed if he were perceived to betray Mr. Big; or where Sebastian relayed that Atif was also aware he would be murdered for betraying Mr. Big. *See* Br.16-22, 51-54. Mr. Big convinced the teens that the reach of his power extended into the Bellevue police department itself, having seemingly obtained an *internal* memorandum from officers

in a foreign country, belying any notion that the teens felt "free to break off their contact with the undercover officers at any time." 1-ER-64.

Indeed, the court's finding is not even internally consistent with its other finding that "Burns … exhibited a remarkable resilience to continued pressure" and "was not intimidated" by Haslett. *See* Resp.19 (quoting 1-ER-64). If "the record does not indicate" that undercover officers "ever threatened" the teens, it is hard to understand to what "intimidat[ion]" Sebastian supposedly exhibited "remarkable resilience." An "appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the … record" supports the court of appeals' finding that the undercover officers never even implied the teens could be subject to physical harm. *See Schriro*, 745 F.3d at 999 (quotation marks omitted) (AEDPA standard for determining that state court findings are "unreasonable" based on state-court record).

More fundamentally, the Constitution forbids coercive methods that would require "remarkable resilience" to resist. Certain "threats always render a suspect's subsequent statements involuntary," regardless of whether the particular suspect is "unusually resistant to psychological coercion." *Tobias*, 996 F.3d at 582 n.8 (explaining holding in *Harrison*

that "'*[e]ven if Harrison were unusually resistant to psychological coercion*,' the technique used was unacceptable because it would be coercive for the run-of-the-mill suspect" (quoting 34 F.3d at 892)).

Of course, the teens obviously felt threatened, so this is an *a fortiori* case. *See, e.g.*, *Lam v. Kelchner*, 304 F.3d 256, 266 (3d Cir. 2002) (AEDPA case where suspect "Lam presented uncontradicted testimony that she was actually afraid of the agents' threats of violence," so the "totality of circumstances present[ed] a situation far more coercive to Lam than the one found unconstitutional in *Fulminante*"). Officer Haslett himself agreed, under oath, "It's obvious that Sebastian thought that if he did anything to displease [Haslett], he risked death." 2-ER-264. Haslett testified that he intended to send the message: "Don't underestimate me." 2-ER-277.

It wasn't just that the teens felt threatened in some general sense. The reason the RCMP's ploy eventually worked is because they convinced Atif and Sebastian that Mr. Big thought they would be arrested imminently, and, once in custody, would betray him. Sebastian adamantly refused to falsely confess to the point where, in the State's words, the undercover officers concocted "a fake 'police memorandum'

that indicated the police would soon file charges" and arrest Sebastian and Atif. Resp.5 (quoting 1-ER-60). Mr. Big conveyed that he believed "they're fuckin' coming to lock your ass up. Yours and your friend['s]." 10-ER-2338-39. Sebastian had already been told that Haslett had killed "the person that could finger" Shinkaruk in a previous murder trial. 8-ER-1955. And Mr. Big conveyed his belief that he would be the "first person" Sebastian would "give up" if Sebastian were arrested. 8-ER-2001-02. "I will not be set up by anybody," Haslett warned. 9-ER-2213. "[D]on't play games with me," *ibid.*, "sell me short," or "ever let your fuckin' friends try to sell me short," he said, or it "is gonna hurt," 9-ER-2257.

Thus, the court of appeals could not reasonably conclude that Atif and Sebastian were never "placed … in a position suggesting they were subject to imminent physical harm." Resp.18 (quoting 1-ER-64). The imminency of their arrest, and thus the imminency that Mr. Big would feel the need to dispose of them to protect himself, was the only thing that worked to convince the teens to make incriminating statements.

In any event, *imminent* physical harm is not the standard. The State agrees that *Fulminante* and progeny turned on "defendants in those cases confess[ing] in response to '*credible* threats of physical harm.'"

Resp.18 (quoting 1-ER-64) (emphasis added). And Fulminante's confession was deemed involuntary because Sarivola "made an *indirect* threat of violence by saying that he would not protect Fulminante from other prisoners unless he confessed." *Lam*, 304 F.3d at 265 (citing *Fulminante*, 499 U.S. at 288).

The State pivots to repeat the mistake of the federal district court, arguing that Atif "relies on statements the police made to Burns over many months," but does not present "evidence of any threat communicated or directed to [Atif] by the RCMP officers." Resp.21-22. Like the district court, the State seems to doubt the state court's reasoning. But again, hypothesizing alternative grounds under AEDPA is only permitted when no state court gives reasons for denying a federal claim. Br.60-61; *supra* p.13. The court of appeals necessarily treated both teens as having understood the undercover officers' threats on equal footing, because it adjudicated their separate coercion claims as one. Moreover, the court found that Sebastian "managed the relationship with Haslett and Shinkaruk on behalf of" himself *and* Atif. 1-ER-64. If the State wishes to dispute this finding, it must prove that the finding was unreasonable under 28 U.S.C. § 2254(d)(2). It hasn't, and it couldn't.

III. Atif Was Denied His Right to Present a Complete Defense.

The State's use of Sebastian's and Atif's involuntary statements is a sufficient basis for reversal, because the State makes no claim that the error was harmless, nor could it. *Fulminante*, 499 U.S. at 296 (State has "burden of demonstrating that the admission of the confession[s] … did not contribute to [the] conviction"); *see ibid.* ("a full confession … may tempt the jury to rely upon that evidence alone in reaching its decision," even when "coerced" and "unreliable").

In addition, Atif was denied his Sixth Amendment right to present a complete defense. By allowing the teens' unreliable statements to be admitted to the jury, and then preventing them from effectively rebutting the reliability of their false statements, the trial court unconstitutionally deprived Atif of his ability to defend himself.[7] The claim also supports the inference that the teens' incriminating statements were fabricated in

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[7] The State misunderstands this to be a new "cumulative error" claim. Resp.57. It is not. Being prevented from effectively rebutting the prosecution's case—whether by a single fatal error or a thousand small cuts—is a claim that Atif was prevented from presenting a complete defense.

response to coercion, because the rejected evidence also casts serious doubt on the reliability of the confessions. Br.39-40; *e.g.*, *Lam*, 304 F.3d at 266 (under "totality of circumstances," suspect's "fear of the threats undermines the reliability of the incriminating responses she made").

The State attempts to cast doubt on the exceedingly probative tip from Douglas Mohammed, a reliable FBI informant (mislabeled "a police informant" by the State), suggesting he "identified 'dozens of people' and provided contact information of 'all sorts of people who might be involved in killing' Rafay's father." Resp.40 (quoting 1-ER-75-76). And because Mohammed supposedly heard that the family had been "bludgeoned to death," the State suggests he was "speculating that there might be a connection between the bat and the murders." *Ibid.*

But that obfuscates the exceptionally probative value of Mohammed's tip: He identified a particular individual belonging to a particular violent group with an expressed motive to kill Atif's father as nervously asking whether Mohammed had seen the particular murder weapon in a group member's car, just days after the Rafays were killed. Br.12-13, 63-64. Mohammed may have "connected the dots," Resp.40, but he undeniably did so with alarming precision before the police did, 1-ER-76. The fact

that he also identified other individuals he knew to be members of the same violent group only substantiates his tip.

The State admits that Mohammed's testimony was suppressed under a Washington rule of evidence requiring "an eyewitness or similar evidence directly connecting the other suspect to the crime." Resp.40. "[E]vidence of a motive in another party … coupled with threats of such other person" is not enough; "there must be such proof of connection or circumstances as tend clearly to point out someone besides the one charged as the guilty party." Resp.39 (quotation marks and alteration omitted). Washington requires "proposed [other-suspect] testimony [to] show a 'step taken'" by the suspect "'that indicates an intention to act' on the motive or opportunity." 1-ER-76 (citation omitted).

Washington's rule is contrary to clearly established precedent that probative other-suspect evidence suppressed under state procedures that are "arbitrary or disproportionate to the purposes they are designed to serve" violates a defendant's right to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (cleaned up). Also excluding evidence from the Seattle Police Department that a Muslim extremist group may have committed the crime, as well as Atif's proposed expert

testimony, unconstitutionally prevented Atif from being able to rebut the reliability of his and Sebastian's statements. Br.65-70.

IV. Nearly All the Forensic and Testimonial Evidence Exonerated Atif and Sebastian.

Atif and Sebastian were not the murderers, as the record overwhelmingly shows, and as meticulously explored in the premiere episodes of an acclaimed documentary series devoted to investigating false confessions. *The Confession Tapes* (Netflix 2017) (season 1, episode 1, *True East Part 1*, episode 2, *True East Part 2*).

1. The opening brief explained that the Rafay family had faced hostility from Muslim extremists for years, and just days before the Rafays were murdered, the RCMP received a tip that an extremist group had put out a $20,000 murder contract for an East Indian Family originally from Vancouver and now living in Bellevue, Washington—a perfect description of the Rafays. Br.4-5 (citing 5-ER-960-62; 5-ER-997-1000).

Then, just a few days after the RCMP received that tip, the Rafays were murdered between 9:40 PM and 9:50 PM, according to neighbors on either side of the Rafay household. Br.7-8 (citing 4-ER-739-40; 4-ER-754-55; 4-ER-791-92; 4-ER-814; 6-ER-1203-04). This was at precisely the

same time that Atif and Sebastian were identified by multiple witnesses purchasing tickets and concessions at a movie theater fifteen minutes away, shortly before the 9:50 PM showing of *The Lion King*; multiple witnesses again identified the teens after the movie started, when Sebastian reported a curtain malfunction to theater employees at 10:00 PM. Br.6-7 (citing 4-ER-716-17; 5-ER-1093; 5-ER-1145; 6-ER-1156-57; 6-ER-1164-70; 6-ER-1172-73; 6-ER-1177-78; 6-ER-1179-80; 6-ER-1188-89). Several witnesses also identified them at a restaurant across the street from the theater, from around 8:45 PM until at least 9:25 PM, when they left to make their movie time. Br.6-7 (citing 4-ER-716-17; 5-ER-1093; 5-ER-1145-50).

Despite an inordinate amount of blood at the scene, only trace amounts could be identified on the cuff of Atif's pants, which thus necessarily could have gotten there only after the teens returned home. Br.10-11 (citing 4-ER-616-17; 7-ER-1492-95; 7-ER-1520-21; 11-ER-2624-27). In fact, the police identified an "unknown male's" blood mixed with blood splatter from Atif's father that did not match either Atif's or Sebastian's DNA, as well as hair from an "unknown male" on the bedsheet, next to Tariq's body—which the police insisted could only have

come from the killer until testing revealed that it did not belong to Atif, Sebastian, or any of the victims. Br.11 (citing 11-ER-2641-42; 11-ER-2653). The only evidence of Sebastian's hair was found in the drain of the shower he had been using for several days while staying with the Rafays. *Ibid.* (citing 11-ER-2636).

The State's only response relies—as it must—on the teens' unreliable statements. Resp.1-2. Even there, the opening brief highlighted multiple inconsistencies between (and within) their false confessions, which were further inconsistent with the State's forensic evidence. Sebastian claimed he and Atif had thrown their clothes and a VCR in the dumpster of the diner they were at before the movie (and before the crime had been committed), while Atif claimed he had thrown his clothes out of the window; the police found no clothes nor a VCR in any of those locations. Br.24 (citing 10-ER-2349; 10-ER-2440). Sebastian said he and Atif found the murder weapon at Atif's house; Atif claimed they bought it together in Bellingham, WA. *Ibid.* (citing 10-ER-2361; 10-ER-2450-51).

Their statements also contradicted testimony from the State's forensic expert that, based on the blood splatter, at least two individuals violently attacked and killed Atif's father. Br.24-25 (citing 3-ER-554-55).

In its response, the State suggests Atif "confirmed" Sebastian's account "that he had not witnessed Burns's killing of his father and sister." Resp.23. That cannot be squared with the State's own expert testimony.

Rather than attempt to rationalize these devastating inconsistencies, the State asks this Court to look past them because "most of the details" of the teens' statements are aligned. Resp.23.

2. The State inaccurately paraphrases the record to unfairly cast Atif and Sebastian as cold-blooded killers.

The State suggests that Sebastian told the undercover officers he "would not have 'any dilemma' about killing someone for the organization and that 'anything goes.'" Resp.4 (quoting 1-ER-59). Read in context, it is obvious Sebastian was blustering while trying to dissuade Shinkaruk from asking him to murder anyone. *E.g.*, 8-ER-1975 (Sebastian telling Shinkaruk "there'd be [too] many sort of technical reasons why I wouldn't necessarily want to do that"). Mr. Big later asked Sebastian whether he could "kill" if "the circumstances were right," and Sebastian responded, "I doubt it." 9-ER-2266. When Mr. Big asked "Why?," Sebastian said: "I just think that would be very unpleasant. I don't know." *Ibid.* Mr. Big continued to press: "What if I needed it done, and the circumstances were

right?" *Ibid.* Again, Sebastian responded "I, I … doubt it, man." *Ibid.* (ellipses in original). *Yet again*, Mr. Big asked "Why?," forcing Sebastian to respond: "'Cause I think that [would] be fucking brutal. It's fucking making me an old man. And my hair falls out, and my face is aged." 9-ER-2266. Sebastian provided further excuses for why he couldn't do it. *E.g.*, 9-ER-2267 ("I'm not … very reliable because my knee is the shits ….").

The State also insinuates that Atif and Sebastian acted culpably because they "traveled to Canada" in the middle of the investigation "without informing the police." Resp.2. But the Canadian consular officer who arranged their travel informed the Bellevue police beforehand that Sebastian and Atif were returning to Canada. 3-ER-512. And while Atif "did not attend the funeral for his parents and sister," Resp.2, the State knows that was not by choice, 3-ER-382, 513-14, 584. The State perversely attempts to cast Atif as callous based on the unfortunate fact that his family was interred when he did not know and thus could not be there to say goodbye.

* * *

The tragedy of this case is that, rather than investigate the other-suspect leads that might have led to the real killers, police focused on Atif and Sebastian. Despite forensic and testimonial evidence plainly exonerating them, the State used the teens' coerced, implausible statements to wrongly convict them. The State does not argue that those confessions were, in fact, voluntary. It only defends the state courts' judgment as debatable. As a result, two innocent men have been in prison since they were teenagers, and, unless this Court grants Atif's petition, both will likely remain imprisoned for the rest of their lives. All the while, the real killers remain free from justice for the Rafay family murders—very likely the "unknown male[s]" whose blood and hair were collected at the crime scene but never identified by the Bellevue police.

CONCLUSION

For the reasons here and in the opening brief, the Court should grant the petition.

Respectfully submitted,

s/Thomas C. Goldstein

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