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 U.S. Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

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The State does not dispute that Atif was sentenced to life in prison based almost entirely on a "confession" extracted through an undercover technique that American law enforcement acknowledges is so beyond the pale it could not be employed "here in the United States." *See* C.A.E.R.443; Brief of Law Enforcement Training & Interrogation Experts as *Amici Curiae* in Support of Petitioner. Indeed, the State has nothing to say about the voluminous evidence of Mr. Big's repeated threats, let alone Officer "Mr. Big" Haslett's own testimony that the teens thought if they did anything to displease him, he would have them killed. *See* Pet.10-20. Nor does the State mention—much less dispute—Atif's detailed showing that nearly all the testimonial, blood, hair, and other-suspect evidence show that neither he nor Sebastian could have committed the murders. *See* Pet.4-9.

The State also does not dispute that Atif argued below that the technique is so inherently coercive that it constitutes a per se due process violation. And it admits the Ninth Circuit failed to address that claim. Instead, the State opposes Atif's modest request for a remand to address the overlooked argument on the ground that the Ninth Circuit *could have* rejected the claim if the panel had considered it. The State says, for example, that the claim was not sufficiently preserved and that the right to be free from inherently coercive interrogation techniques is not clearly established. *See* BIO2, 14-17, 25. Those assertions are meritless, but ultimately beside the point.

The State does not claim that the Ninth Circuit found the claim forfeited; the panel, in fact, said nothing about the claim at all. That the State has

something to say in response to an overlooked argument provides no reason to deny Atif's reasonable request that the Ninth Circuit be required to address this claim before consigning him to spend the rest of his life in prison. *See, e.g.*, *Youngblood v. W. Virginia*, 547 U.S. 867, 870 (2006) (per curiam) (GVR'ing State Supreme Court judgment because majority opinion did not address "a federal constitutional *Brady* claim" the petitioner "clearly presented").

ARGUMENT

I. Every Argument The State Raises Must Be Addressed By The Ninth Circuit.

A. The Ninth Circuit must consider whether the claim is preserved (it is).

From the start, Atif has argued that the Mr. Big technique is inherently coercive. That is why, on top of finding that the teens were not subjectively intimidated, Pet.App.29a (because they "were free to leave or not leave," "free to speak or not speak," and "free to consult their Canadian counsel or not as they chose" from Mr. Big's hotel room), the trial court ruled that "the undercover technique used by the RCMP … did not violate the defendants' rights under Canada's Charter of Rights and Freedoms, nor did it offend the sensibilities of the Canadian citizenry," Pet.App.28a-29a. The State suggests this "ruling does not show any awareness" of Atif's "inherently coercive argument," BIO24, but the State does not explain why, then, the trial judge distinguished these holdings.

Instead, the State insists that Atif "never asked" the state courts "to apply the rule he now advocates." *See* BIO23-26. Again, the Ninth Circuit is the correct

forum to make that argument, which the State raises for the first time here. In all events, the State is wrong.

Atif's trial counsel argued that "[w]hatever the Supreme Court of Canada decided … doesn't matter, because we're in the U.S.," and "there's no doubt that this type of operation could as likely have obtained the incriminating statements from the guilty as well as the innocent." C.A.E.R.444-45. "There are no safeguards or protections in place to try to eliminate innocent people from making these statements." C.A.E.R.445. "And the best witnesses to this" were the lead investigators in Washington, "who basically said that's crazy, we can't do that kind of stuff" "here in the United States." C.A.E.R.443.

The State admits that Atif made the argument in his "pro se submission to the Washington Court of Appeals." *See* BIO24-25. Atif argued:

> The right against self-incrimination … is intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt.
>
> It is to be hoped that this Court will never adjudicate a more inquisitorial operation than the one in this case .... This is hardly a technique "compatible with a system that presumes innocence and assures that conviction will not be secured by inquisitorial means." *Miller v. Fenton*, [474 U.S. 104, 109 (1985)]. It is, rather a technique premised on leaving the suspect no rational reason to maintain innocence.

C.A.F.E.R.64 (cleaned up). The *Miller* quotation describes the clearly established right to be free from inherently coercive interrogation techniques. *Infra* pp.7-8. Atif's appellate counsel reinforced his pro se argument in the reply brief, arguing that "the Fifth and Fourteenth Amendments to the United States Constitution prohibit the use of evidence gathered in the inherently coercive world of Mr. Big." Reply Brief of Appellant, *Washington v. Rafay*, 2009 WL 10631318, at *29 (Wash. Ct. App. Feb. 20, 2009).

The State also suggests that Atif did not make the argument before the federal district court or in his opening brief before the Ninth Circuit. BIO25. That is incorrect twice over. Atif argued to the district court that "Mr. Big" is "a practice that was never lawful in the United States and has subsequently been called into question by the Canadian judiciary." C.A.E.R.560-61. In his opening brief on appeal, Atif argued that the "'admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne.'" C.A.Doc.27, at 59 (quoting *Miller*, 474 U.S. at 116). "Mr. Big operations generally, and especially as applied to *these* young suspects here, surely are not." *Ibid.*

Indeed, at oral argument the State did not respond to this claim or suggest it was forfeited. In finding of fact 15, undersigned explained, the trial judge "was referring … to the objective argument that we have been making since the outset that these tactics are inherently coercive, and he says, under the

self-same issue, I find that the Canadian police tactics would not bring the administration of justice into disrepute." Oral Arg. 5:54–6:11 (Feb. 15, 2023), *available at* https://tinyurl.com/eu6eyvd3. But:

> You can scour the [state] court of appeals' opinion and you will not see a single instance where it is addressing my client's claim that he has made from the outset that these tactics are inherently coercive such that these statements were unlawful no matter the circumstances, and you know it is clearly established since *Miller v. Fenton*—actually long before *Miller v. Fenton*—this objective inquiry, and the court of appeals doesn't say that at all. And the reason that you know the court of appeals doesn't address that is because the court of appeals [held] ... that Sebastian was extremely resilient and was not intimidated. But we know under the objective standard that once you say that you know that it is inherently coercive because anything that would require an iron will to resist renders the statements involuntary.
>
> The Supreme Court has set forth a number of circumstances that are unlawful objectively. The most obvious one is violence. When there's violence, we don't look to the circumstances, we don't look to how hearty the defendant is, those statements are out. They've said 36 hours of continued detention and interrogation, that is inherently unlawful.

Oral Arg. 7:53–9:02.

The State had no response. *Compare* Oral Arg. 15:00–27:33. It only repeated the argument raised in its response brief—that under AEDPA, "it is the state court's decision, as opposed to its reasoning, that is judged under the 'unreasonable application' standard," and "the intricacies of the state court's analysis need not concern" federal courts reviewing the decision. *See* C.A.Doc.46, at 28 (cleaned up)). *But see Harrington v. Richter*, 562 U.S. 86, 101-02 (2011) (under AEDPA, federal court may only hypothesize "arguments or theories" that "could have supported" state court's conclusion when state court does not provide reasoning).

In rebuttal, undersigned reiterated:

> Remember, there are two inquiries here. There's the subjective inquiry and there's the objective inquiry. With regard to the subjective inquiry, I think that's where the trial court is bringing in those factors and saying their individual wills were not overborn. With regard to the objective inquiry, it then says the Canadian police tactics would not ... bring the Canadian administration of justice into disrepute. … [T]here is no way to have that comport with our constitutional objective standard, which is whether it would overbear the will of a run-of-the-mill suspect.

Oral Arg. 31:05–31:37.

The Ninth Circuit was not free to ignore the claim.

B. The Ninth Circuit must consider whether the right is clearly established (it is).

As the petition explained: "This Court has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment." *Miller*, 474 U.S. at 109. When "the police conduct was 'inherently coercive,'" any incriminating statements obtained therefrom must be suppressed. *Id.* at 110 (quoting *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944)).

It is hard to think of a federal right more clearly established than one identified by this Court, nearly 40 years ago, as a right the Court "has long" recognized. *Miller*, 474 U.S. at 109 (citing *Brown v. Mississippi*, 297 U.S. 278 (1936), as "the wellspring of this notion, now deeply embedded in our criminal law"); Pet.29-30. Yet the State protests that "[n]o precedent from this Court clearly establishes" that inherently coercive interrogation techniques offend Due Process. *See* BIO14. But the Ninth Circuit did not accept that position, and the State cannot reasonably ask this Court to address its defense in the first instance in reviewing the petition.

Regardless, the Ninth Circuit, sitting en banc, has correctly held that 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). As then-Judge Kozinski explained, "the Supreme Court

has told us that voluntariness 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." *Id.* at 426 (Kozinski, J., concurring). "As the Court noted in *Miller v. Fenton*, 474 U.S. 104, 116 (1985), 'the admissibility of a confession turns as much on whether the techniques for extracting the statement, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne.'" *Ibid.* "The question before us, then, is whether the technique used here risks overcoming the will of the run-of-the-mill suspect, even if it did not overcome the will of this particular suspect." *Ibid.*

II. The State Does Not Dispute That Admitting The False "Confessions" Was Consequential.

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

1. The petition explained that just days before the Rafays were murdered, the RCMP received a tip that Islamic extremists had put out a $20,000 murder contract for an East Indian Family originally from Vancouver living in Bellevue, Washington—a perfect description of the Rafays. Pet.4.

Just a few days later, the Rafays were murdered between 9:40 PM and 9:50 PM, according to neighbors on either side of the Rafay household. Pet.5-6. This

was precisely when Atif and Sebastian were seen purchasing tickets and concessions at a movie theater fifteen minutes away, shortly before the 9:50 PM showing of *The Lion King*. *Ibid.* And multiple witnesses testified that Sebastian reported a curtain malfunction at 10:00 PM. *Ibid.* The teens were also seen at a restaurant across the street from the theater, from around 8:45 PM until at least 9:25 PM, when they left for the screening. *Ibid.*

Despite so much blood at the scene, the State admits that only "traces" could be identified on Atif's pants, BIO8, which thus could have gotten there only after the teens returned home, *see* Pet.7-8. The only other forensic evidence the State acknowledges is Sebastian's hair, which was found in the drain of the shower he had been using for several days while staying with the Rafays, and his fingerprint on a cardboard box that was in his guestroom. *See* BIO8. The State has nothing to say about the "unknown male's" blood investigators found mixed with blood splatter from Atif's father, nor the hair from an "unknown male" next to Tariq's body. Pet.8.

It is no surprise the State has never argued that, even if admitting the teens' "confessions" were erroneous, it was harmless. On the contrary, the State largely relies—as it must—on the teens' unreliable statements. BIO4-5. Even then, the petition highlighted multiple inconsistencies between (and within) their false confessions. *See* Pet.20. The State's *only* response is to suggest that Sebastian's statements aligned with testimony from the "state's expert," who "opined that blood patterns surrounding Rafay's father indicated an attack by two assailants." BIO8. The State omits that the prosecution argued "its

own expert ... was likely wrong because his conclusion was inconsistent with the story Sebastian and Atif provided to Haslett." *See* C.A.E.R.555; *see also* BIO3 (arguing Atif "did not personally swing the bat").

The State also relies on Miyoshi's testimony, BIO6-7, without acknowledging that he had also incriminated himself to "Mr. Big" out of fear and agreed to testify against Sebastian and Atif in exchange for his freedom, Pet.21; *see* C.A.E.R.545-47 (in a videotaped recording, from Japan, "Miyoshi testified in accordance with the deal he had made with prosecutors, implicated Atif and Sebastian," and "testified that Sebastian, Atif, and Miyoshi feared Haslett and Shinkaruk").

2. The State suggests that Sebastian told undercover officers he "would not have 'any dilemma' about killing someone for the organization.'" BIO4 (quoting Pet.App.20a-21a). In context, it is obvious Sebastian was blustering while trying to dissuade Shinkaruk from asking him to murder anyone. In the same conversation, Sebastian tells Shinkaruk "it's sort of [a] moot point because … there'd be [too] many sort of technical reasons why I wouldn't necessarily want to do that." C.A.E.R.1975.

Indeed, Mr. Big later asked Sebastian whether he could "kill" if the "circumstances were right," and Sebastian responded, "I doubt it." C.A.E.R.2266. When Mr. Big asked "Why?," Sebastian said: "I just think that would be very unpleasant." *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 very fucking brutal. It's fucking making me an old man. And my hair falls out, and my face is aged." *Ibid.*; *see also* C.A.E.R.2267 ("I'm not … very reliable because my knee is the shits ….").

The State also insinuates that Atif and Sebastian "fled to Canada without informing the police." BIO3-4. But they knew the Canadian consular officer who arranged their travel informed the Bellevue police beforehand. C.A.E.R.512; *see* Pet.7. And while Atif "did not attend the funeral for his parents and sister," BIO4, the State knows that was because police prevented Atif from having contact with his surviving family, so he never found out "when that funeral was going to occur," *see* C.A.E.R.382, 514-15, 584.

III. The Court Should GVR As It Has In Similar Circumstances.

The petition explains that no court has ever seriously considered Atif's per se coercion claim. Pet.31-34. The State goes further, arguing that not even the trial court was aware of the claim. BIO24. *But see* Pet.App.28a-29a (rejecting claim because "the undercover technique ... did not violate the defendants' rights under Canada's Charter of Rights and Freedoms, nor did it offend the sensibilities of the Canadian citizenry").

In *Youngblood v. West Virginia*, this Court GVR'ed for consideration of a federal claim that the State Supreme Court majority opinion failed to address. 547 U.S. 867, 868-70 (2006) (per curiam). The petitioner argued to the trial court "that an investigator working on his case had uncovered new and exculpatory evidence," and "the suppression of this evidence

violated the State's federal constitutional obligation to disclose evidence favorable to the defense." *Id.* at 868-69. "The trial court did not discuss *Brady* or its scope," and a "bare majority of the Supreme Court of Appeals of West Virginia affirmed ... without examining the specific constitutional claims associated with the alleged suppression of favorable evidence." *Id.* at 869. The dissent, though, described the petitioner's claim as alleging "a *Brady* violation." *Ibid.* Since this Court did not "have the benefit of the views of the full Supreme Court of Appeals of West Virginia on the *Brady* issue," the Court GVR'ed "for further proceedings." *Id.* at 870.

The Court also held that the *Youngblood* petitioner "clearly presented a federal constitutional *Brady* claim … to the trial court," based on the petitioner's trial court brief, which "referred to cases citing and applying *Brady*." *See* 547 U.S. at 868-70. Atif did much more, at every stage of the case. *See supra* pp.2-6.

The relief this Court granted in *Youngblood* is warranted here.

CONCLUSION

The Ninth Circuit's judgment should be vacated and the case remanded for further consideration, or the Court should grant the petition for plenary review.

Respectfully submitted,

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