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)

OPENING BRIEF

Gregory Geist
Andrew Kennedy
Assistant Federal Public Defenders
1601 Fifth Avenue, Suite 700
Seattle, Washington 98101
Phone: (206) 553-1100
Fax: (206) 553-0120

Thomas C. Goldstein
Daniel Woofter
Goldstein & Russell, P.C.
7475 Wisconsin Ave., Suite 850
Bethesda, MD 20814
Phone: (202) 362-0636
Fax: (866) 574-2033

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

INTRODUCTION

Atif Rafay and Sebastian Burns were wrongly convicted of murdering Atif's family as teenagers, and sentenced to three consecutive life terms without the possibility of parole. Their convictions were based almost entirely on false incriminating statements, whereas the physical and other evidence in the case plainly exonerated them. Because the statements were coerced, admitting them against Atif violated his Fifth and Fourteenth Amendment rights.

Using an undercover investigative technique called "Mr. Big," the Royal Canadian Mounted Police created a fake underground criminal organization with deep reach and a penchant for murdering those they believed would betray them. The entire point of the operation was to intimidate the teens into making incriminating statements. The technique has never been acceptable in the United States, and the Canadian Supreme Court has since found that any confessions elicited during a Mr. Big operation are "presumptively inadmissible." In *Arizona v. Fulminante*, 499 U.S. 279 (1991), the Supreme Court found incriminating statements involuntary and thus inadmissible under less coercive circumstances. The Court of Appeals of Washington thus

unreasonably rejected this claim. And because the state court applied the wrong legal standard, this Court reviews the claim *de novo* rather than applying the "deference" typically due under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. 28 U.S.C. § 2254; *Frantz v. Hazey*, 533 F.3d 724, 737 (9th Cir. 2008) (en banc).

The state court of appeals also unreasonably rejected Atif's claim that he was denied his Sixth and Fourteenth Amendment rights to present a complete defense. Despite three different sets of persuasive evidence that the murders were committed by religious extremists, Atif was unreasonably barred from presenting two of the most probative pieces of "other suspect" evidence under a state evidentiary rule. Atif was also barred from presenting the jury with expert testimony addressing the phenomenon of false confessions and the lack of appropriate safeguards in the Mr. Big operation. The cumulative errors—admitting the coerced confessions, excluding probative evidence that someone else committed the crime, and then prohibiting expert testimony from even contextualizing why the coerced statements might be unreliable—surely made an enormous difference to the outcome of this case. That is

particularly true given that the State had almost nothing else to prove its theory. The state court unreasonably applied Supreme Court precedent in rejecting this claim as well.

JURISDICTIONAL STATEMENT

Petitioner timely filed the operative petition on February 6, 2019 pursuant to 28 U.S.C. §§ 2241 and 2254. 3-ER-490. The district court denied the amended petition for writ of habeas corpus and denied a certificate of appealability (COA) on October 8, 2020. 1-ER-6-12. On November 5, 2020, petitioner timely filed a motion to alter or amend the judgment. ECF 76. On August 26, 2021, the district court denied the motion and request for a COA. 1-ER-2-5. Petitioner timely filed an amended notice of appeal on September 27, 2021, 11-ER-2712, and filed a motion for a COA within 35 days of the amended notice of appeal pursuant to 9th Cir. R. 22-1(d). 9th Cir. Doc. 9. This Court granted the motion for a COA and has jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253.

STATEMENT OF THE ISSUES

The Court granted a COA with respect to two questions:

1. "Whether the incriminating statements admitted at trial and obtained in the course of a months-long undercover operation

in Canada were coerced, in violation of appellant's Fifth and Fourteenth Amendment rights."

2. "Whether the exclusion of 'other suspect' evidence or defense expert evidence regarding false confessions violated appellant's Sixth and Fourteenth Amendment rights to present a complete defense at trial."

9th Cir. Doc. 20-1, at 1-2.

STATEMENT OF THE CASE

I. Factual Background

Petitioner Atif Rafay was the youngest in his family of four. He had two parents, Tariq and Sultana, and an older sister Basma. *See* 3-ER-500-01. They were practicing Sunni Muslims, and Atif's father Tariq was very active in the local Muslim community. 4-ER-838-41. For example, Tariq was a founder and president of the Pakistan-Canada Friendship Association.[1]

The Rafay family had faced hostility from more extreme members of the Muslim community for years. *Cf.* 5-ER-960-62. And in early July

[1] His successor as president, Riyasat Ali Khan, was assassinated in 2003. *See* Robert Matas, *Pakistani Community Leader Shot to Death in B.C.*, The Globe & Mail (Jan 7, 2003), https://tinyurl.com/bdfem9pa; *see also* 11-ER-2647-48.

1994, just days before the Rafays were murdered, a confidential informant working with the Royal Canadian Mounted Police (RCMP) learned that an organization known as the Dosanjh crime 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. 5-ER-997-1000. Rather than make any real effort to chase down the lead, Bellevue officers only contacted the RCMP officer who had received the tip many years later to suggest that defense lawyers might contact him in preparation for trial. 5-ER-1007-08; 6-ER-1393-94.

A. Rafay family murders and aftermath

1. In the summer of 1994, Atif was an 18-year-old Cornell University college student who had never even been in a schoolyard fight—much less accused of any crime—back home visiting his family in Bellevue. 4-ER-716; 5-ER-1052-53. His friend and high-school classmate Sebastian Burns, who also had no criminal record or *any* history of violence, was staying with the Rafay family in a spare bedroom at the time. 5-ER-1053; 5-ER-1092.

On the evening of July 12, Atif and Sebastian went out to dinner at a restaurant and then to a movie theater to watch the children's Disney movie, *The Lion King*. 5-ER-897-88; 5-ER-1111. It is undisputed that when Atif and Sebastian left home, Atif's parents and sister were alive. When Atif and Sebastian returned late that evening, they found a brutal scene: Both of Atif's parents were murdered, and his older sister was barely clinging to life. She died at the hospital.

Neighbors on both sides of the Rafay home independently reported hearing sounds from the attack during the same narrow range of time. 4-ER-747-78; 4-ER-754-55; 4-ER-791-93. And unless both witnesses were independently mistaken, neither Atif nor Sebastian could have committed the murders—they were at the movie theater during that period, as confirmed by multiple witnesses, and they could not have returned home to kill the victims within the time frame of the murders.

To elaborate, Atif and Sebastian left their home around 8:30 PM, and arrived at a restaurant about fifteen minutes later. 4-ER-716-17; 5-ER-1093. Servers testified that the two were there from around 8:45 PM until about 9:25 PM, and that they seemed relaxed and exhibited nothing unusual in their behavior. 5-ER-1146-50. They then crossed the street to

the movie theater for the 9:50 PM showing of *The Lion King*. 4-ER-716-17; 5-ER-1093; 5-ER-1145. Cinema employees testified that they specifically remembered Atif and Sebastian purchasing tickets and buying snacks at the concession stand inside, shortly before the film. 6-ER-1164-70; 6-ER-1172-73; 6-ER-1177-78; 6-ER-1188-89. What made this testimony particularly powerful was that there was an equipment malfunction after the previews (around 10:00 PM), and Sebastian was one of the patrons who informed employees that the curtain failed to go up for the movie. 6-ER-1156-57; 6-ER-1179-80.

One of the Rafays' neighbors, Julie Rackley, testified that around 9:45 PM—minutes before the start of the showing Atif and Sebastian were attending—she heard a repeated "hammering" sound of "construction-type work" happening next door that was muffled and had an odd resonance. 4-ER-739-40; 4-ER-754-55. She had carefully recreated her activities that night to confirm the time. 4-ER-735-50; 4-ER-753-54; 4-ER-756-57; 4-ER-755; 4-ER-759.

A different neighbor who was standing in his driveway, Marc Sidell, told the police that he could hear noises in the Rafay home during the same period: between 9:40 PM and 9:50 PM. 4-ER-791-92; 4-ER-814; 6-

ER-1203-04. Specifically, he heard "thuds against the wall" and "some hollow hitting type of sounds." 4-ER-778; 4-ER-786-89; 4-ER-811. He also reported hearing a blow that he thought penetrated the wall, as well as a moaning sound. 4-ER-783; 4-ER-789-90; 4-ER-812-13. Both neighbors described light at the time of the blows matching conditions at the end of civil twilight (9:43 PST on July 12, 1994): Rackley said it was too late for work outside, but her neighbor's house was still visible, 4-ER-767-69, while Sidell said it was dark, but not yet completely dark, 4-ER-776-77; 4-ER-779. Both were certain it was quiet by 10:15, 4-ER-754-55; 4-ER-794-95, shortly after Sebastian spoke with theater employees. And in a later test conducted by police, both neighbors identified the sound of a metal bat as what they had heard the night of the murders. 4-ER-752; 4-ER-763; 4-ER-785; 7-ER-1549-50.

After the movie was over around 11:30 PM, Atif and Sebastian drove to downtown Seattle to a 24-hour restaurant and popular hangout. 6-ER-1159-62; 6-ER-1191. Employees testified that they remember the teens arriving sometime after midnight. 5-ER-1124; 5-ER-1128-29; 6-ER-1193-95. The teens ordered food, and the servers testified that nothing seemed unusual about their appearance or behavior. 5-ER-1120-22. One

employee testified that she spoke to the teens multiple times—first between 12:00 AM and 12:30 AM, and last between 1:15 AM and 1:30 AM. 6-ER-1397; 6-ER-1400-01; 6-ER-1403. They then tried to go to a local club, but it was already closed, so they returned to the restaurant to use the restroom, where employees testified seeing the teens arrive around 1:40 AM, 5-ER-1125-26, and then left for Atif's home.

2. When Atif and Sebastian arrived to find the scene of the crime, they immediately called 911 (at 2:01 AM). 4-ER-615. When the police arrived, they found the teens "shaking," "on the verge of tears," and "incoherent, almost," screaming "blood" and "bodies." 6-ER-1254-63; 6-ER-1268-72. Both fully cooperated with the police, answering questions and handing over their clothing. 4-ER-696-99; 5-ER-1095.

The teens both gave an account of their evening consistent with the above. 4-ER-716-17; 5-ER-1093-95. Speaking with Atif, the officer on the scene described him as "subdued, stunned," "shocked," and "cooperative," with "a 1,000[-]yard stare." 6-ER-1407-08; 6-ER-1414-15. The teens gave their statements on the scene for several hours, where they were subjected to gunshot residue testing and eventually transported to the Belleview police station. 4-ER-702-04; 6-ER-1412-13; 7-ER-1480-82; 7-

ER-1486-87. They were interviewed again at the station and checked for evidence, including blood spatter. 7-ER-1487-90; 7-ER-1492-93; 7-ER-1520-21; 10-ER-2476-77. They were then put up in a motel. 6-ER-1304.

In the coming days, the Bellevue police went to each of the locations the teens said they'd been the night of the murder—the restaurant, the cinema, the 24-hour diner, and the club. Witnesses from each confirmed that Atif and Sebastian had been there, when they said. 6-ER-1309-39; 6-ER-1345-53; 6-ER-1355-56; 6-ER-1362-66. On July 14, police interviewed Atif and Sebastian again, this time as suspects. *See* 5-ER-875-972; 5-ER-1097-1113. Thereafter, a Canadian consular officer arranged for their return to Sebastian's home. *See* 3-ER-512; 6-ER-1376-78.

3. Despite the presence of an inordinate amount of blood at the scene and the brutality of the murders, nothing pertinent was found on either teen or the clothing they'd been wearing all night. *See* 4-ER-616-17; 7-ER-1492-95; 7-ER-1520-21. The most police were eventually able to identify was a trace amount of blood on the cuff of Atif's pants, 11-ER-2624-27, which—given the absence of any other blood on either of their

clothing—necessarily could only have gotten there when the teens arrived back home after the murders.

Indeed, police later identified evidence of a *different* "unknown male's" blood that was mixed with the blood splatter from Tariq in the downstairs shower, which did not match either Atif's or Sebastian's. 7-ER-1651-52; 7-ER-1668-77. And a coarse hair from an "unknown male" was found on the sheets of the bed where Tariq was murdered—hair that did not match the DNA of any of the victims, Atif, or Sebastian. 6-ER-1285-86; 7-ER-1658-59; 7-ER-1664-65.

Police initially believed that this hair could only have come from the killer. 11-ER-2653. The police completely reversed themselves only when their own DNA testing proved that the hair did not belong to Atif, Sebastian, or the victims. 11-ER-2641-42. Instead, the *only* hard evidence they supposedly could point to was evidence of Sebastian's hair in the drain of a shower—the very shower he had been using for several days as a guest of the Rafays. *See* 11-ER-2636.

B. The "other suspect" evidence

Despite their strong, corroborated alibi and the utter lack of physical evidence against them, the police set their sights on the teens as the

murderers. The police continued to do so despite the presence of other compelling leads.

Days after the murders, a reliable FBI informant named Douglas Mohammed contacted police and informed them of an extremist Muslim group in the local community that opposed the beliefs and teachings of Atif's father Tariq. 7-ER-1579; 7-ER-1584; 7-ER-1589; 7-ER-1591-92. According to Mohammed, this extremist faction advocated a violent interpretation of the Quran and had singled Tariq out for death. 4-ER-724; 7-ER-1580-81; 7-ER-1583; 7-ER-1593-94; 7-ER-1599-1601; 7-ER-1606-07. Mohammed also reported that just a few days after the murder, a member of the group approached him, seeming concerned and nervous, to ask whether Mohammed had seen the baseball bat that was used to kill the Rafays in a group member's car. 7-ER-1581; 7-ER-1608. When Mohammed replied that he had not, the individual told Mohammed to "forget about it." 4-ER-724-25; 7-ER-1581-82; 7-ER-1593; 7-ER-1601; 7-ER-1607-08; 7-ER-1614-15. Crucially, Mohammed gave the police this tip *before* it was public that the Rafays had been killed with a bat, and indeed, before even the police had made that determination themselves. 7-ER-1608; 7-ER-1614; *see also* 3-ER-518-20 (detailing how police

ultimately determined that a baseball bat was the murder weapon). Nevertheless, the police decided that Mohammed's detailed information was not worth investigating. 7-ER-1585-86; 7-ER-1601-02; 7-ER-1609; 7-ER-1614-15.

Shortly thereafter, police received yet a third tip, this one from a Seattle Police Department Intelligence Unit detective who had heard about the Rafay murders and *also* believed that the murders were linked to an Islamic terrorist group. *See* 1-ER-76. The Seattle police provided detailed information about a terrorist group active in the area where the murders took place that was known to be very organized and involved in "contract assassinations." *Ibid.* Bellevue police did not follow up on this lead either.

C. The "Mr. Big" operation

Bellevue detectives sought to prove their theory that Atif and Sebastian were the killers by seeking assistance from the RCMP, which agreed to conduct an elaborate two-pronged investigation they called "Project Estate." 4-ER-598-614; 7-ER-1686-90; 7-ER-1692-93. The first prong involved covert surveillance, wiretaps, and listening devices to eavesdrop on Atif and Sebastian and their housemates, Jimmy Miyoshi

and Robin Puga. 4-ER-657-58. The nearly *4,400 hours* of surveillance it yielded contained absolutely *nothing* incriminating. 7-ER-1711-15.

The second was an undercover operation called "Mr. Big." 8-ER-1746-47. As will be further explained in the forthcoming Amicus Brief of the Criminal Lawyers' Association of Ontario, Canada, Mr. Big operations induce targets to join what purports to be a powerful criminal organization, and then elicit incriminating statements by offering them escalating enticements and sometimes (as here) threats of physical harm and death. Targets are told that confessing will help advance them in the organization, earn Mr. Big's trust and respect, and bring financial reward. If that fails, Mr. Big tells targets they face imminent arrest due to damning evidence the organization can make disappear—if they confess. 7-ER-1723-28; 8-ER-1747-52. But this operation went distinctly beyond the standard Mr. Big playbook, even though Atif and Sebastian were among the youngest individuals ever targeted.

This Mr. Big operation involved twelve "scenarios," which were planned interactions between the targets (Atif and Sebastian) and undercover officers (Sergeant Al Haslett as Mr. Big himself and Corporal Gary Shinkaruk as a thug working for him). 4-ER-687-91; 7-ER-1720-22;

8-ER-1746. The elaborate scheme coerced Sebastian and later Atif into involuntarily "confessing" by convincing the teens that Mr. Big believed they were facing imminent arrest, that he believed the only way he could protect *himself* from being turned in by the teens in exchange for leniency was for the teens to confess to him immediately, and that if they refused to confess he would have them killed in order to protect himself from the teens doing so.

Eventually, Sebastian made contradictory and even internally inconsistent incriminating statements to avoid the perception that he would turn on Mr. Big. Once Sebastian had falsely implicated them both in the murders, Atif had even less of a choice. At that point, the only way for Atif to avoid the perception that he was a risk to Mr. Big was to falsely implicate himself as well.

i. The undercover officers induce Sebastian into the "Mr. Big" organization.

In the first scenario, undercover officer Shinkaruk made contact with Sebastian in a "chance" encounter, asking Sebastian for a ride after pretending that his keys were locked in his car. 8-ER-1778-87. Their conversations led to Sebastian agreeing to meet "Mr. Big" (undercover officer Haslett) at a pub, 8-ER-1788-93, where Haslett asked Sebastian if

he wanted to make money by doing "some stuff" with Shinkaruk from time to time, 8-ER-1843; 8-ER-1847. No one indicated that Sebastian would be asked to commit any crimes. *Ibid.*

In the second scenario a few days later, the undercover officers convinced Sebastian to drive a "stolen" car for them over his extreme hesitance. 8-ER-1769; 8-ER-1800-01. He was not told, ahead of time, that he was expected to participate in a theft. 8-ER-1808. And when Haslett finally told Sebastian about the plan, he was "very scared and pale white" and said he didn't want to be involved, but eventually agreed to drive the car after Shinkaruk first pretended to break into it and drove it out of the parking lot where it had been parked. 8-ER-1812-16; 8-ER-1826-27.

Over the coming scenarios, the officers then worked to entrench Sebastian into a fake underground world he believed he couldn't escape. *See, e.g.*, 3-ER-528-30 (Scenario 6 involved Sebastian and Miyoshi making cash deposits at several banks in the area, which they believed were part of a money laundering scheme).

ii. Mr. Big and Shinkaruk convince Sebastian that they kill those who might testify against them.

In the fourth scenario, which took place a few weeks after Sebastian had already been entwined in their organization, Haslett and Shinkaruk

made their first substantial display of the organization's extreme violence. While Shinkaruk and Sebastian made small talk in a room at a Four Seasons Hotel, another undercover officer showed up, pulled out two pistols to give Haslett—notable because few Canadians may legally carry handguns—and stated that one was "pretty hot like she's uh, I don't mean hot like stolen, I mean still warm." 8-ER-1771; 8-ER-1836-38; 8-ER-1897-98; 8-ER-1901-02. In other words, that it had just been used in a shooting. 8-ER-1838.

At this point, Sebastian tried to distance himself from the group, expressing fear about getting further involved. 8-ER-1950-53. In response, Shinkaruk explained that he had once "fuckin' toasted a guy," and that when it came time for his trial, Haslett had ensured that "the person that could finger me, they're not around anymore." 8-ER-1955; *see* 8-ER-1918. Then Haslett tried to push Sebastian into confessing to the Rafay murders, stating that he needed to know Sebastian was "trustworthy." 8-ER-1993. Sebastian responded that he did not want to work for the organization. 8-ER-1993-94. When that standard Mr. Big ploy failed, Haslett explained that he thought Sebastian was putting him at risk, because Haslett was the first person Sebastian would "give up"

when arrested. 8-ER-2001-02. This was right after Shinkaruk had intimated that Haslett had murdered someone who could have exposed him. 8-ER-1955.

When Sebastian disclosed that he had taken note of Shinkaruk's license plate number, 8-ER-2008, Shinkaruk responded that "it took a lot of guts right now, to fuckin' tell me that .... knowing what I've done in the past," 8-ER-2011. For his part, Haslett responded so fiercely to Sebastian's intimation that he could go to the police with the license plate number that Shinkaruk had to tell Haslett to "Take it easy," and the transcript becomes indecipherable as Shinkaruk attempted to calm the seemingly enraged Mr. Big. 8-ER-2012. Haslett explained: "I got two things to lose, a lot of money, and a chance of *me* going to jail." *Ibid.* (emphasis added). "There's two things I ain't gonna fuckin' do in my life," he repeated, "go to jail, or lose money." *Ibid.* "And you always remember that," he told Sebastian. *Ibid.* "That's the fuckin' way to live." *Ibid.*

Sebastian repeatedly insisted that police must have been fabricating evidence against him. 9-ER-2069. So Haslett told Sebastian to read every newspaper article on the murders to figure out the evidence against him.

Ibid. "[R]ead 'em and read between every line," Haslett said, "they have something there." *Ibid.*

iii. Mr. Big convinces Sebastian and Atif that the only way to reassure him they would not be a risk to him—and would not need to be killed—was to implicate themselves in the crime.

On June 28, months after establishing a relationship with Sebastian, Haslett told Sebastian that the Bellevue police had him "in a pretty big fucking way down there," and "the report I read knows you did it," citing nonexistent hair and DNA evidence tying Sebastian to the murders. 9-ER-2188. This account of the police's thinking was plausible—despite the teens' innocence—because Sebastian had in fact been living in the Rafays' home. *Supra* p.5. Haslett offered to have the evidence destroyed, but to help Sebastian, Haslett said he needed to know details about the murders and what evidence the Bellevue Police had in order to destroy it. 9-ER-2189-93. Sebastian responded that he had no idea, even after being pressed. 9-ER-2194.

When Sebastian failed to provide any details of the crime, 9-ER-2192-98, Haslett said he needed to know everything or someone "gets fuckin' bit," and "nobody that works for me is going to get bit," because "[i]f they get bit, I get bit," 9-ER-2198-99. Sebastian responded that he understood

that "if I were to fuck you around, okay, I would just assume that I would wake up one day with a bullet in my head." 9-ER-2199. Throughout, Sebastian repeated his innocence yet again, *see* 9-ER-2188-2266, and Haslett accused him of lying, telling him to "[s]top the fuckin bullshit" and "out and out fucking lying to me," 9-ER-2219. And if Sebastian "[went] down" on a murder charge, Haslett warned, he would go down too. 9-ER-2256.

When Sebastian continued to refuse to tell the story the undercover officers were seeking, they eventually went even further. Right before meeting with Sebastian on July 18, the RCMP coordinated a press release with Bellevue police to confirm Haslett's narrative, 2-ER-242-43, and *fabricated* a Bellevue Police Department memorandum detailing the purported evidence tying Sebastian to the Rafay murders, 8-ER-1774; *see* 9-ER-2188-2327. At the meeting, Haslett confirmed that Sebastian had reviewed all the newspaper and television coverage about the case, *see* 10-ER-2338, which reported the details of the coordinated press release. And just before showing Sebastian the fake memo, Haslett sprang the trap:

> they're fuckin' coming to lock your as up. Yours and your friends [*sic*]. But there's uh, things here that can be done very fucking

> quickly and very easy…. But, you're gonna want to do them, you're gonna have to tell me you want them done, and you're gonna have to play straight with me, 'cause things are fuckin' happening quick here now. But it can't be done without you fuckin' saying you want it done. And, there's too many questions that are unanswered here right now. And you and your friend, your fuckin' asses are going to jail. So you got two choices to make that are gonna effect [*sic*] me and you. Me financially, you, you stay out of jail. It's your call….

10-ER-2338-39.

Haslett then showed Sebastian the fake memo, which indicated that he would be charged with murder once the "culturing" of the DNA was completed. 9-ER-2190. *Still* Sebastian tried to explain that police must have been fabricating evidence against him, while acknowledging that Haslett would kill him if Haslett felt betrayed. 10-ER-2341. Indeed, Sebastian believed he might be killed if he did anything at all to displease Haslett. Haslett testified to this himself: "Q: It's obvious that Sebastian thought that if he did anything to displease you, he risked death, right? [Haslett]: Yes. He had that impression, sure." 2-ER-264.

The threats were made explicit multiple times. Haslett had expressed that the only "reason" he was offering help was "to protect my own ass." 9-ER-2198. Haslett made explicit that he believed if Sebastian and Atif "take a fall," then he would also "go[] down." 9-ER-2243-44. He made

clear that if Sebastian or any of his "fuckin' friends try to sell me short," Sebastian "being in the middle is gonna hurt." 9-ER-2257. He told Sebastian he had his "fuckin' future in the palm of my fuckin' hand." 9-ER-2254. And again, Sebastian told Haslett that he knew he would get a "bullet in my head" if the organization ever thought he might sell them out and could be reached even if he were in jail. 9-ER-2199.

With no way to dissuade Haslett from perceiving the teens as a threat to himself, Sebastian made the only rational, seemingly costless choice: He concocted a story that he committed the murders with Atif present. 10-ER-2345-66. Sebastian claimed to have committed the murders even though multiple witnesses testified the teens were at the theater at the time. *Supra* p.5. He also made many other statements that were later contradicted, either by himself, Atif, or the evidence. For example, Sebastian variously claimed *during this same conversation* to have tossed his clothes in dumpsters, to have committed the murders naked, to have committed them in underwear alone, and to have been wearing shoes, 10-ER-2356-59; 10-ER-2375-76, changing his story as Haslett asked pointed questions revealing parts of the story that made no sense, *e.g.*, 10-ER-2359.

After Sebastian's statements, Haslett said he would have the evidence destroyed, but first needed to hear from Atif and Miyoshi to make sure they were trustworthy too. 10-ER-2364-66. Sebastian reiterated that he, Atif, and Miyoshi all knew that if they ever "fucked [anyone] around" in the organization, they would be dead. 10-ER-2382.

The following day, Haslett had Sebastian call Atif and then had Shinkaruk drive to pick Atif up. 10-ER-2406-09. Once Sebastian confessed, Atif believed he had no choice but to do so as well, or he would be perceived as a risk that had to be disposed of. Haslett had made clear his distrust, asking Sebastian "[h]ow solid's Atif?", 10-ER-2352, and stating "I'm still worried about little ole fuckin' Atif," 10-ER-2360, and "Fuck all on Atif, right," 9-ER-2255. "I don't got no best friend," Haslett said; "People I deal with, people I work with.... I just hope they don't give you up." 9-ER-2271. "In my fuckin' world," Haslett had explained, "you always gotta be concerned about that." *Ibid.*

Haslett drove the point home to Atif himself, stressing that the reason he helped accomplices like Sebastian avoid arrest was because Haslett saw the risk he faced should an accomplice go to jail. 10-ER-2430 (telling Atif "Anybody works for me and gets in trouble, I'll get him out of

trouble. Anybody who works for me gets me in trouble, I couldn't fuckin' imagine how much trouble I'd be in"). And he said Atif was close to going to jail himself: "You read the papers the last couple weeks," he asked Atif, "You and Sebastian are in a little bit of trouble." 10-ER-2431. Haslett then had Sebastian "tell [Atif] about" the contents of the fake memo. 10-ER-2431-32.

Having heard the details of these discussions all along from Sebastian, Atif had no option. To avoid the perception that he was a risk, Atif affirmed Sebastian's tale that he was present during the murders, had pulled out the VCR to make it look like a burglary—just as the papers had reported—and that the murders were for financial gain. 10-ER-2433-35. Still the teens contradicted each other, multiple times over. For example, Sebastian had claimed that both teens threw their clothes and the VCR in a dumpster. 10-ER-2349. Atif claimed he "hucked" his clothes out of a window. 10-ER-2440. (Police did not find clothes or a VCR in any dumpster or around the house.) Sebastian denied buying the baseball bat, saying they found it at the house. 10-ER-2361. Atif claimed the teens bought it together in Bellingham. 10-ER-2450-51. And both teens'

accounts contradicted expert testimony from the prosecution that there were at least two attackers who killed Tariq. *See* 3-ER-554-55.

II. Procedural Background.

1. On July 31, 1995, Atif and Sebastian were arrested for murder and eventually extradited to Washington State for trial. 3-ER-545 & n.9. Miyoshi was arrested for conspiracy to commit murder, based on his own "confession" to Mr. Big to avoid the perception that he was a risk to the organization, *see* 3-ER-545, and prosecutors granted him complete immunity in exchange for his testimony against Sebastian and Atif—saying "it's either them or you" and even threatening that someone close to Miyoshi might be killed if he did not cooperate, 3-ER-545-46. Atif's and Sebastian's attorneys attempted to suppress their incriminating statements, arguing psychological coercion from the undercover officers' threats to kill Atif and Sebastian if they did not implicate themselves, but the trial court denied the motion. 3-ER-547-59. Sebastian testified in his own defense, explaining that he and Atif made the incriminating statements because they feared for their lives. 3-ER-549-52. They were convicted and each sentenced to three life terms without the possibility of parole. 3-ER-490; 3-ER-500.

Relevant here, the trial court allowed Sebastian and Atif's statements to be admitted, orally ruling:

> The statements of defendants were given … 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 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. 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-35-36. The court incorporated this into finding of fact 15 and conclusion of law 6. 1-ER-62.

Second, the trial court excluded the "other suspect" evidence of the tips from Mohammed and the Seattle Police under a Washington rule of evidence that requires that a defendant "first establish a sufficient foundation, including 'a train of facts or circumstances as tend clearly to point out' someone besides the defendant as the guilty party," "a clear nexus between the other person and the crime," and "a 'step taken by the third party that indicates an intention to act' on the motive or opportunity." 1-ER-76 (citation omitted).

Third, the trial court prohibited Atif from presenting expert testimony from Dr. Leo and DEA Agent Levine. Dr. Leo's testimony

would be unhelpful to the jury, according to the trial court, because lay people understand that people "tell lies, little lies and big lies," and it would invade the province of the "jury to decide, number one, if it's a confession, and, number two, was it voluntary or was it coerced?" 10-ER-2547. DEA Agent Levine's testimony was excluded for invading the province of the jury and lacking a proper foundation as to "generally accepted standards for undercover operations in '94 and '95 in the United States." 10-ER-2549.

2. The teens both appealed their convictions, which the Court of Appeals of Washington upheld. 1-ER-46-102. Relevant here, the court concluded that (1) the trial court supposedly "resolved the claim of coercion independently" of the Canadian court on whose findings the trial court relied, and its "expression of agreement with the Canadian court's conclusion does not reflect a failure to apply the proper standard," 1-ER-65; (2) the record "supports the trial court's conclusion that the confessions were voluntary and not coerced," 1-ER-61; (3) the trial court did not abuse its discretion or violate the right to present a meaningful defense by excluding the defense expert witnesses, 1-ER-71; and (4) it did not abuse its discretion in excluding the "other suspect" evidence, 1-ER-

74-78. Their motions for reconsideration were denied without further reasoning, as were their petitions for discretionary review with the Washington Supreme Court. *See* 3-ER-556.

Sebastian then filed a federal petition for writ of habeas corpus, asserting that his statements to the undercover police were involuntary and coerced. *Burns v. Warner*, 2015 WL 9165841 (W.D. Wash. July 2, 2015). The district court 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 (at least if it occurred because his friends turned him in) because it would ultimately result in Haslett's arrest," and Sebastian "believed Haslett would kill him if he betrayed Haslett." *Id.* at *13-14. Nevertheless, the court found that Sebastian's "insistence that he would not betray Haslett, even if arrested," somehow made it "not objectively unreasonable" for the state court to conclude that Sebastian did not confess out of fear. *Id.* at *14.

On appeal, Sebastian claimed that his confession was coerced, but he did not argue that *de novo* review applies, and the panel did not address it. *Compare Burns v. Warner*, 689 F. App'x 485 (9th Cir. 2017), *with infra*

pp.37-49. Sebastian also did not claim, as Atif does here, that his right to present a complete defense was violated. Rather, this Court applied AEDPA deference to Sebastian's coerced-confession claim, which he importantly accepted as appropriate, and affirmed in a brief, unpublished opinion. *Burns*, 689 F. App'x at 485.

3. Atif sought state habeas relief, which the state courts rejected. 3-ER-496-99. He then filed the federal petition at issue here. The magistrate judge recommended denial. 2-ER-144. Relying on the recommendation, the district court denied Atif's petition with little additional commentary. 1-ER-7-12.

As to the coerced-confession claim, the court believed it was mere speculation that Sebastian spoke to Atif about the violence and threats Sebastian witnessed and experienced, 2-ER-161-62, disregarding the state court factual finding that Sebastian "managed the relationship with Haslett and Shinkaruk on behalf of the defendants"—the basis of the state court's joint resolution of the teens' claims, 1-ER-64. And the court below relied on this Court's denial of Sebastian's coercion claim to reject any claim based on statements made to him. 2-ER-160-61.

As to the "other suspect" evidence and expert testimony, the district court found that the AEDPA requires challenging the constitutionality of the evidentiary rules themselves. 2-ER-169-77.

The district court denied Atif's motion to alter or amend the judgment. 1-ER-2-5. This appeal follows.

SUMMARY OF THE ARGUMENT

I. An AEDPA petitioner must show that the state court's adjudication of his claims was either based on an "unreasonable determination of facts," or "contrary to" or an "unreasonable application" of clearly established federal law. 28 U.S.C. § 2254(d)(1)-(2). This Court reviews a habeas claim *de novo* when the state court applies the wrong legal standard. *Frantz v. Hazey*, 533 F.3d 724, 737 (9th Cir. 2008) (en banc).

II. A. The state courts applied the wrong legal standard in evaluating Atif's coerced-confession claim, so the standard of review is *de novo*. *Rogers v. Richmond*, 365 U.S. 534, 547 (1961).

The federal constitutional standard looks to the totality of the circumstances to determine whether a confession is "the product of a rational intellect and free will." *Brown v. Horell*, 644 F.3d 969, 983 (9th Cir. 2011); *see Withrow v. Williams*, 507 U.S. 680, 689 (1993). But rather

than apply that standard, the state courts relied on the court's findings in Atif's Canadian committal proceedings, which applied a vastly *different* standard under Canadian law. The Canadian court held the teens' statements were admissible because they did not believe they were speaking to the authorities when they made their incriminating statements. *See Burns v. United States*, 1997 CanLII 2914 (BC CA), at ¶¶ 7-11. That runs headlong into the U.S. Supreme Court's decision in *Fulminante*, which suppressed coerced statements made to an undercover informant. And Canada's limited exclusion of "admissions" only applies to police conduct that would "shock the sensibilities of an informed community" and thus "bring the administration of justice into disrepute." *Id.* ¶¶ 11. That is not at all the "same" inquiry as the one required by the U.S. Constitution: whether the statements were voluntarily and freely given.

Nor could the state court rely on the Canadian court's finding of "no duress" under the foreign standard. *See Richmond*, 365 U.S. at 547. "'Where the state court's legal error infects the fact-finding process, the resulting factual determination will be unreasonable.'" *Kipp v. Davis*, 971 F.3d 939, 953 (9th Cir. 2020) (cleaned up; citation omitted).

The state court of appeals erred even in setting forth the *federal* standard. First, it held that "whether" a statement "was 'coerced by any express or implied promise or by the exertion of any improper influence'" is a factor in the totality of the circumstances. 1-ER-62, 1-ER-93 (n.8) (quoting *State v. Unga*, 165 Wash. 2d 95, 101 (2008)) (emphasis added). But that is the *conclusion* to be drawn from the totality of the circumstances. By folding the conclusion back in as a factor, the state court's test substantially differed from what the Constitution requires and rendered the test impossible to meet.

Worse, the state court believed that so long as the decision to confess "is a product of the suspect's *own balancing* of competing considerations, the confession is voluntary." 1-ER-62, 1-ER-93 (n.10) (quoting *Unga*, 165 Wash. 2d at 102) (emphasis added). But that, too, is contrary to the standard set forth by the U.S. Supreme Court. Indeed, it is difficult to conceive of a case where a suspect isn't balancing competing considerations when he makes incriminating statements in the face of duress. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 224 (1973).

B. Atif's statements were involuntarily coerced in light of the Supreme Court's on-point precedent in *Fulminante*.

The RCMP officers manufactured an overwhelmingly coercive environment in which it pressured *teenagers*, over the *course of months*, to confess to crimes they did not commit. Their conduct convinced the teens that the only way for them to avoid going to jail, and therefore not be a risk to Haslett who would in turn kill them, was to confess to the murders. Even under the much more exacting AEDPA standard, it was an unreasonable application of *Fulminante* and an unreasonable determination of the facts to conclude that the statements obtained under such circumstances were "free and voluntary." And the district court erred in substituting its own findings for those of the state court to reject the claim. AEDPA requires the reviewing court to focus on the state court's *own* reasoning to determine whether the decision is reasonable. *Wilson v. Sellers*, 138 S. Ct. 1188, 1197 (2018).

III. Atif's Sixth and Fourteenth Amendment right to present a complete defense was violated when the state trial court refused to allow him to present the most probative of his "other suspect" evidence and prohibited defense expert testimony that would have explained to the jury the counterintuitive point that "confessions," like these, may be false.

The state court affirmed the exclusion of the tips received from Mohammed and the Seattle police, based on a state rule of evidence that essentially requires the tip itself to establish who the real culprit is, how and why he committed the crime, and even an affirmative act taken by him before evidence of third-party guilt may be admitted. That is an unreasonable application of *Holmes v. South Carolina*, 547 U.S. 319 (2016), which prohibits evidentiary rules that are "'arbitrary or disproportionate to the purposes they are designed to serve.'" *Id.* at 324.

The state court also unreasonably excluded essential expert testimony that would have explained why individuals falsely confess even to heinous crimes in the face of psychologically coercive interrogation techniques like those employed in this case, 10-ER-2478-81, and that the lack of procedural safeguards in the Mr. Big operation specifically could lead to false confessions, *see* 3-ER-575-76. The trial court's cumulative errors in admitting the teens' coerced statements, excluding extremely probative "other suspect" evidence, and then prohibiting expert testimony that would have contextualized why statements like those here might be unreliable effectively turned the trial into one solely about the teens' coerced statements. Considering how

exceptionally weak the State's case was in light of the utter lack of evidence—and indeed blood, hair, and "other suspect" evidence pointing *away* from Atif and Sebastian—the state court unreasonably prevented Atif from presenting a meaningful defense at all, let alone a "meaningful[ly] complete" one. *Holmes*, 547 U.S. at 324.

ARGUMENT

I. Standards for Habeas Relief.

To prevail on his habeas claims under AEDPA, Atif must show that the state court's adjudication of the claims either "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

However, when the state court fails to apply the correct legal standard, "AEDPA's rule of deference does not apply." *Fernandez v. Roe*, 286 F.3d 1073, 1077 (9th Cir. 2002). Rather, this Court reviews a petitioner's claim *de novo*. *Ibid.* That is because applying the wrong legal rule or framework is "contrary to" federal law. *Frantz v. Hazey*, 533 F.3d

724, 739 (9th Cir. 2008) (en banc); *see Williams v. Taylor*, 529 U.S. 362, 405 (2000). This includes the "addition, deletion, or alteration of a factor in a test established by the Supreme Court." *Benn v. Lambert*, 283 F.3d 1040, 1051 n.5 (9th Cir. 2002).

And when this Court reviews a claim *de novo* because the state court applied the wrong standard, the historical facts found pursuant to the erroneous standard are not presumed correct, as in the normal course. *Rogers*, 365 U.S. at 546. Rather, this Court reviews both the law and the facts "infect[ed]" by application of the wrong standard *de novo*. *Kipp*, 971 F.3d at 953 (quoting *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004)). "Obviously, where the state court's legal error infects the fact-finding process, the resulting factual determination will be unreasonable and no presumption of correctness can attach to it." *Maddox*, 366 F.3d at 1001.

II. The Teens' Incriminating Statements Were Coerced, So Atif's Conviction Based On Those Statements Violated His Fifth And Fourteenth Amendment Rights.

The state court unreasonably applied the U.S. Supreme Court's jurisprudence in rejecting Atif's coerced-confession claim. (A) Because the state court applied the wrong legal standard to this claim, this Court

reviews the claim *de novo*. Critically, Sebastian did not press in his federal habeas appeal—and this Court did not address—whether *de novo* review applies. (B) Atif is entitled to habeas relief because under the framework set forth in *Fulminante*, both his and Sebastian's statements were legally involuntary. Thus, neither's statement was admissible against Atif.

A. Atif's coerced-confession claim is subject to *de novo* review.

It "would be manifestly unfair … were [this Court] to sustain a state conviction in which the trial judge … passes upon that claim under an erroneous standard of constitutional law." *Rogers*, 365 U.S. at 546. And because "findings of fact may often be (to what extent, in a particular case, cannot be known) influenced by what the finder is looking for," any "[h]istorical 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." *Ibid.*; *see, e.g.*, *Kipp*, 971 F.3d at 939 ("Where the state court's legal error infects the fact-finding process, the resulting factual determination will be unreasonable and no presumption of

correctness can attach to it." (quoting *Taylor*, 366 F.3d at 1001) (cleaned up)).

Here, the state trial court and court of appeals erroneously applied the wrong legal standard to Atif's coerced-confession claim.[2] Rather than apply the federal constitutional standard as set forth by the U.S. Supreme Court, the state courts relied on factfinding made under a vastly *different* standard for determining whether the statements were admissible—the one that applies under *Canadian* law. Compounding that error, the state court incorrectly described even the U.S. standard multiple times over. Thus, *de novo* review applies.

1. We start with the federal constitutional standard. "The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness," but also "on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods

[2] Because the state court of appeals essentially adopted the trial court's reasoning on this point, this Court considers both the state trial and court of appeals decisions. *Hedlund v. Ryan*, 854 F.3d 557, 565 (9th Cir. 2017).

used to convict those thought to be criminals as from the actual criminals themselves." *Spano v. New York*, 360 U.S. 315, 320-21 (1959). Thus, "[t]he use of coerced confessions, whether true or false, is forbidden because the method used to extract them offends constitutional principles." *Lego v. Twomey*, 404 U.S. 477, 485 (1972).

To be legally voluntary under the U.S. Constitution, a confession must be "the product of a rational intellect and a free will." *Brown*, 644 F.3d at 979 (quoting *Medeiros v. Shimoda*, 889 F.2d 819, 823 (9th Cir. 1989)). A confession is *involuntary*, and thus inadmissible, when it results from either physical or psychological "coercive police activity." *Ibid.* (quoting *Colorado v. Connelly*, 479 U.S. 157, 167 (1986)). Courts "employ the totality-of-circumstances approach when addressing a claim that the introduction of an involuntary confession has violated due process." *Withrow v. Williams*, 507 U.S. 680, 689 (1993). That approach requires courts to consider a number of factors, "includ[ing] the degree of police coercion … and the defendant's maturity, education, physical condition, mental health, and age." *Brown*, 644 F.3d at 979. And although a coerced statement cannot be admitted even when it is reliable, circumstances that cast serious doubt on the reliability of a

confession may support the inference that the statements were fabricated in response to coercion. *See, e.g.*, *Conner v. McBride*, 375 F.3d 643, 652 (7th Cir. 2004).

2. Despite their burden to prove voluntariness by a preponderance of the evidence, *Lego*, 404 U.S. at 489, Washington's prosecutors did not even respond to the teens' voluntariness challenge before the district court, claiming instead that the voluntariness of their confessions had already been "squarely decided in the court in Canada." *See* 2-ER-206 (quoting prosecutor's written "Motion to Suppress Argument" before trial court). In the prosecutor's words, "the Court of Appeals in Canada in its committal proceeding did entertain th[e] very notion" that the statements were "involuntary and coerced," which "is why" the prosecutors "didn't spend any time briefing it" before the trial court. 3-ER-457. The prosecutor then quoted from the Canadian court's opinion that the foreign tribunal did "not find the undercover officers' conduct in this case shocking or outrageous," and there was thus "no duress." *Ibid.*; *see also* 1-ER-457-48 (prosecutor quoting Canadian court's holding that undercover officers' conduct "would not in [Canada's] view 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"). The trial court then specifically cited the Canadian Court of Appeals' decision in rejecting the teens' involuntariness claim, relying on the Canadian court's findings on "the self same issue under Canadian charter rights" to "make[] the same finding." 1-ER-62 (quoting 1-ER-36).

But the relevant Canadian standard is not at all like the voluntariness standard here. Under the foreign standard, the only way to render a "confession" inadmissible was to (a) meet a threshold showing that it was made to a person the defendant knew to be "in authority," in other words, a person the defendant reasonably believes is an officer, or (b) that it was obtained using tactics so "shocking" to the conscience of an informed Canadian that its admission would "bring the administration of justice into disrepute." *Burns*, 1997 CanLII 2914, ¶¶ 7-9, 11. The state court expressly acknowledged that "Canadian courts apply a significantly different standard when determining whether a confession is voluntary." 1-ER-92, 1-ER-93 (n.21).

As to the threshold "in authority" requirement, the teens argued that the Canadian court should apply a standard much more like the one

in the United States: "In the case at bar," they urged, their statements had to be suppressed because they "believed that Haslett and Shinkaruk were underworld figures and that they had the power of life and death over the[m]." *Burns*, 1997 CanLII 2914, ¶ 7. According to the Canadian court, that belief was fatal to their claim, as it "would amount to a significant change in the common law." *Id.* ¶ 9. Canada's "confession rule" had "no application to the statements obtained by the undercover officers" *because* the teens did not believe they were speaking to the cops, so their statements could "be admitted into evidence and it would be for the jury to determine what weight should be given them." *Id.* ¶ 10.

That standard cannot be reconciled with *Fulminante*, which would have had to come out the other way under Canada's standard. Mr. Fulminante did not confess to a "person in authority" when he made incriminating statements to his FBI-informant fellow inmate. *See* 499 U.S. at 283. It is thus hard to think of a standard that is more at odds with the one that applies to voluntariness in the United States.

The Canadian court's finding of "no duress" also applied a standard at odds with the U.S. Constitution. To find that an "admission" is inadmissible due to duress, the Canadian standard requires official

conduct so "shocking or outrageous"—*i.e.*, conduct that, "when viewed objectively," would so "shock the sensibilities of an informed community"—that admitting the statements would "bring the administration of justice into disrepute." *See Burns*, 1997 CanLII 2914, ¶ 11. Even setting that standard down on paper is enough to show that it isn't the one used to evaluate voluntariness in the United States; the Supreme Court does not look to what might shock an informed Canadian to determine whether the defendant's "capacity for self-determination" was "critically impaired." *Bustamonte*, 412 U.S. at 225-26. Here, "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.'" *Malloy v. Hogan*, 378 U.S. 1, 7 (1964) (quoting *Bram v. United States*, 168 U.S. 532, 539-40 (1897)).

Because the standard is so different, the state trial court was not permitted to rely on the Canadian court's finding of "no duress" for the purposes of admissibility here. When application of the wrong standard "infects the fact-finding process, the resulting factual determination will be unreasonable and no presumption of correctness can attach to it." *Maddox*, 366 F.3d at 1001. The state trial court's explicit failure to

develop its *own* factual record and independently make its own findings on this score violated this precept, when the state court "ma[de] the *same finding*" as the Canadian court, "in reviewing the *self same issue* under [the] Canadian charter rights." *See* 1-ER-62 (quoting 1-ER-36).

Thus, the state court of appeals could not reasonably conclude that the trial court's "expression of agreement with the Canadian court's conclusion does not reflect a failure to apply the proper legal standard." 1-ER-65.[3] Rather than "independently" evaluate the coercion claim under the U.S. constitutional standard, *contra ibid.*, the trial judge gave only two reasons for rejecting the teens' coerced confession claims: that the statements were given "in a noncustodial setting," and that the Canadian courts found no coercion or duress from police conduct that would bring the administration of justice into disrepute. 1-ER-35-36. That is

[3] It is quite likely that this error resulted from the state court of appeals' deferential review. Whereas federal courts have a "duty to make an independent evaluation of the record" in non-AEDPA cases, so long as, "in the particular circumstances of the case, the confession is unlikely to have been the product of a free and rational will," *Miller v. Fenton*, 474 U.S. 104, 110 (1985), the Washington Supreme Court does not allow "independent appellate review of the record in a confession case" on direct review, 1-ER-62 (citing *State v. Broadway*, 133 Wash. 2d 118, 131 (1997)).

decidedly not an independent evaluation of the claim under the U.S. constitutional standard. So the Canadian court's "findings" cannot "be fairly looked to for the 'facts.'" *See Rogers*, 365 U.S. at 547.

Indeed, the only citation the state court of appeals gave to find that the trial court independently evaluated the facts was to the state trial court's "finding of fact 15," which "agree[d] with the Canadian courts and *finds the same*." 1-ER-62, 1-ER-65 (emphasis added). The state court of appeals noted that the trial court "addressed only briefly defendants' claim that their confessions were coerced," quoting from the trial judge's oral ruling that explicitly cites the wrong standard and "incorporated" that ruling "into finding of fact 15":

> The Canadian court reviewed and found no evidence of coercion, and this court makes the same finding. 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-61-62 (quoting 1-ER-36). Again, the "facts 'found' in the perspective framed by an erroneous legal standard"—erroneous in the sense that Canada's standard is vastly different from the federal one applied here—"cannot plausibly be expected to furnish the bases for correct conclusions

if and merely because a correct standard is later applied to them." *Rogers*, 365 U.S. at 547.

3. The state court of appeals was triply wrong, because it incorrectly described even the U.S. constitutional standard twice over.

First, the state court of appeals believed that the "voluntariness of a confession necessarily depends on the totality of the circumstances in each case, *including whether* it was 'coerced by any express or implied promise or by the exertion of any improper influence.'" 1-ER-62, 1-ER-93 n.8 (quoting *Unga*, 165 Wash. 2d at 101) (emphasis added). But whether a confession was "coerced by any express or implied promise or by the exertion of any improper influence" is not a factor to be "included" in the totality of the circumstances—it is the very thing the totality-of-the-circumstances test is set forth to determine. In selectively quoting the Washington Supreme Court's decision in *Unga*—which correctly sets forth that "[t]he totality-of-the-circumstances test specifically applies *to determine* whether a confession was coerced by any express or implied promise or by the exertion of any improper influence," 165 Wash. 2d at 101 (emphasis added)—the court of appeals circles back into the totality-

of-the-circumstances test itself in a way that is impossible for a defendant to overcome.

Second, the state court of appeals believed that "so long as [a suspect's] decision [to confess] is a product of the suspect's *own balancing* of competing considerations, the confession is voluntary." 1-ER-62, 1-ER-93 (n.10) (quoting *Unga*, 165 Wash. 2d at 102) (emphasis added). But a suspect's "own balancing" cannot overcome a showing that any express or implied promise or any improper influence was unduly coercive. Once a court determines that "a confession was coerced by any express or implied promise or by the exertion of any improper influence," that is the end of the inquiry. Such a confession does not nevertheless become legally voluntary merely because suspects do their "own balancing" of the promises and inducements that coerced them.

Indeed, it is difficult to conceive of a case where a suspect isn't balancing competing considerations of his own when he makes incriminating statements in the face of duress. "[A]ll incriminating statements—even those made under brutal treatment—are 'voluntary' in the sense of representing a choice of alternatives." *Bustamonte*, 412 U.S. at 224 (citation omitted). Surely that was the case for Mr. Fulminante,

whose confession was deemed involuntary even though he explicitly stipulated that he had not, in fact, sought the informant's protection or expressed any fear of harm. *Infra* p.54.

The state court of appeals rendered the protections of the Fifth and Fourteenth Amendments nugatory at best, effectively shifting the State's burden to prove voluntariness to a *defendant* to prove that he did not make a rational choice. But a voluntary choice "cannot be taken literally to mean a 'knowing' choice," or else statements will only be deemed involuntary "where a person is unconscious or drugged or otherwise lacks capacity for conscious choice." *Bustamonte*, 412 U.S. at 224. "It would disregard standards that we cherish as part of our faith in the strength and well-being of a rational, civilized society to hold that a confession is 'voluntary' simply because the confession is the product of a sentient choice." *Haley v. Ohio*, 332 U.S. 596, 606 (1948) (Frankfurter, J., concurring).

The state court of appeals' "addition" of these other factors as a trump card to the "test established by the Supreme Court" shows that the state court "fail[ed] to apply controlling Supreme Court law under the 'contrary

to' clause of AEDPA." *Lambert*, 283 F.3d at 1051 n.5. This Court thus reviews Atif's coerced-confession claim *de novo*.[4]

B. The State used statements the teens made out of fear they would otherwise be killed to convict Atif, violating the U.S. Constitution.

1. The similarities between this case and *Fulminante* are striking. There, the defendant's stepdaughter was killed, and the defendant was a suspect in her death. 499 U.S. at 282. While incarcerated for an unrelated charge, he was befriended by another inmate, who, as it turned out, was "a paid informant" for the FBI who "masqueraded as an organized crime figure." *Id.* at 282-83. The informant "raised the subject" of the defendant's possible connection with the murder "in several conversations, but Fulminante repeatedly

---

[4] It is clear that the state court applied the wrong standard, but, at an absolutely minimum, certainly "there is reason to *suspect* that an incorrect standard was in fact applied." *Townsend v. Sain*, 372 U.S. 293, 315 (1963) (emphasis added), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). When "it is unclear whether the state finder applied correct constitutional standards in disposing of the claim," the federal district court "cannot ascertain whether the state court found the law or the facts adversely to the petitioner's contentions." *Ibid.* Under those circumstances, "a hearing is compelled to ascertain the facts," because "the decision of the state trier of fact may rest upon an error of law rather than an adverse determination of the facts." *Ibid.*

denied any involvement." *Id.* at 283. Eventually, the informant learned that the defendant was facing harassment over the rumor of his participation in the murder and "offered to protect Fulminante from his fellow inmates." *Ibid.* But before doing so, the informant said: "'You have to tell me about it' you know. I mean, in other words, 'For me to give you any help.'" *Ibid.* (citation omitted). At that point, Fulminante confessed to the murder, and, after failing to suppress his statement to the informant, was eventually convicted. *Id.* at 283-84.

The U.S. Supreme Court held that "Fulminante's confession was coerced." 499 U.S. at 287. The "Arizona Supreme Court [had] found a credible threat of physical violence unless Fulminante confessed," which the Supreme Court held was "sufficient" to find coercion. *Id.* at 287-88. Because "it was fear of physical violence, absent protection from his friend (and Government agent) Sarivola, which motivated Fulminante to confess," the Court believed "Fulminante's will was overborne in such a way as to render his confession the product of coercion." *Id.* at 288. The Court went on hold that the State failed to meet "its burden of demonstrating that the admission of the confession to Sarivola did not contribute to Fulminante's conviction." *Id.* at 296. Despite the existence

of a second, uncoerced, and corroborated confession from the defendant, the Court still found that admitting the first, coerced confession was not harmless. *Id.* at 296-302.

If the faux crime boss/government informant's promise of protection from the vague threat of other inmates in *Fulminante* sufficed to show coercion, then Atif and Sebastian's statements were surely involuntary in the face of threats of imminent harm directly from the undercover Mr. Big officers themselves. Indeed, the threats to Atif and Sebastian were demonstrably more coercive than those in *Fulminante*.

Over a considerable period of time, the RCMP officers manufactured an overwhelmingly coercive environment in which it pressured *teenagers* to confess to a crime they did not commit. And they did so through both implied and direct threats of violence, repeatedly stressing that: (1) Haslett was not willing to go to jail; (2) if Sebastian were arrested, Haslett believed that Sebastian would turn on him and put Haslett at significant risk of going to jail; (3) the organization made those who could testify against them disappear; (4) Sebastian would end up with a bullet in his head if he were deemed a risk to Haslett; and (5) the only way for Sebastian (and later Atif) to avoid going to jail, and

therefore not betray Haslett, was to confess to the murders. Haslett made this threat direct and explicit:

> Shinkaruk: [To Mr. Big] Take it easy, man. […]
>
> Haslett: Don't ever, and I mean ever, fuck you around. I will put out, you see that $300,000 you just counted there, I'll put out fuckin' ten times that amount of money, if it will save you, get a fuckin' lawyer to get you out of jail, *or taking care of any fuckin' buddies that will ever go to fuckin' court, [who] can fuckin' finger you*. 'Cause the minute I get fuckin' name on people that are working for me, are going to fuckin' jail, you know something, I got two things to lose, a lot of money, and a chance of me going to jail. There's two things I ain't gonna fuckin' do in my life, is go to jail, or lose money. And you always remember that.
>
> Sebastian: Kay.
>
> Haslett: That's the fuckin' way to live.
>
> Shinkaruk: Al, he's just talking his mind man…

8-ER-2012 (emphasis added).

At trial, the officers tried to downplay that the teens felt threatened. *See, e.g.*, 2-ER-256 (Haslett testifying that he "could have left th[e] inference" that if Sebastian "went to jail, he might be able to sell information about you, the person he thinks is real, to help himself"). But in that same testimony Haslett agreed that "It's obvious that Sebastian thought that if he did anything to displease [Haslett], he

risked death." 2-ER-264. And there is no escaping that this is precisely what Haslett conveyed during the Mr. Big operation. In scenario four:

> [Haslett]: What happens uh when these fuckin' auh bozos from down auh in Bellevue, come fuckin' up here and grab you?… Who's the first person you're gonna give up?
>
> [Sebastian]: Huh?
>
> [Haslett]: Well, you're looking at him, that's what I want to be fuckin' sure of you knowing what I'm saying?
>
> [Sebastian]: Umm. As if, as if, umm, well whatever, I mean fuck, first of all auh, auh, I don't know shit to give up and nor would and auh.
>
> [Haslett]: Not today you don't but in three months you might.

8-ER-2001-02. "I just want to be sure," he told Sebastian, "your concerns aren't gonna cause me fuckin' problems. You know what I mean?" 8-ER-2007. In scenario 8, a month later:

> [Haslett]: And you take a fall, you know who else takes a fall after everything's done, guess, right now, guess.
>
> [Sebastian]: No one.
>
> [Haslett]: What do you mean no one?
>
> [Sebastian]: No one.
>
> [Haslett]: Huh? No one? You're fuckin' stupid right now, you know who else goes down.
>
> [Sebastian]: You're gonna say you, right?
>
> [Haslett]: Yeah.

[Sebastian]: Okay, well.

[Haslett]: And I can't afford to have me go fuckin' down.

9-ER-2243-44. He told Sebastian, "don't fuckin' sell me short, and don't ever let your fuckin' friends try to sell me short, because if they start selling me short, you being in the middle is gonna hurt." 9-ER-2257. The threat to the teens' lives was consistent and clear. Atif and Sebastian were made to believe they could only escape being perceived as a threat to Mr. Big by convincing *him* that they were not at risk of imminent arrest, and Mr. Big was adamant the only way to do that was to tell him about the murders so that he would protect them.

Recall that the Court found coercion in *Fulminante* even though the defendant in that case, *unlike* here, stipulated that he never sought the informant's protection or expressed fear of harm. *Fulminante*, 499 U.S. at 304 (dissent highlighting that Fulminante "stipulated to the fact that 'at no time did the defendant indicate he was in fear of other inmates nor did he ever seek Mr. Sarivola's 'protection'") (cleaned up; citation omitted). And here, the coercive pressure was not only a promise to destroy evidence that the teens were told implicated them in the

murders, but *also* a serious threat of physical harm from the coercive source itself.

This is even more true for Atif, because Haslett was suggesting that he would protect *Sebastian* from anyone who "can fuckin' finger" him, 8-ER-2012, and warning Sebastian not to "ever let [his] fuckin' friends try to sell me short," 9-ER-2257. What was Atif to do when he learned that Sebastian was the one to whom Mr. Big offered protection by "taking care of any fuckin' buddies that will ever go to fuckin' court," 8-ER-2012, when Atif was not the one being offered protection but clearly the most likely "buddy" who could testify against Sebastian? Atif had to confess as well.

When compared with the facts of *Fulminante*, the totality of the circumstances plainly shows that these statements were not the product of free will. And this is doubly so when considering Atif's and Sebastian's ages at the time they made the statements. They were *teenagers* being coerced by much older, seemingly violent criminals. The forthcoming amicus brief from the Washington Innocence Project will elaborate why this was especially coercive to youths like Atif and Sebastian. They made a seemingly costless choice to fabricate a story that they killed Atif's

family in order to protect themselves, against the threat that they might be killed if they continued to maintain their innocence.

Again, even AEDPA deference would require finding that the state court unreasonably applied *Fulminante*, distorting its standard to require a *direct* threat of *imminent* harm, *see* 1-ER-64 (erroneously distinguishing *Fulminante* and *United States v. McCullah*, 76 F.3d 1087 (10th Cir. 1996), on the basis that "the record does not indicate that [Shinkaruk or Haslett] ever threatened the defendants with physical harm or placed them in a position suggesting they were subject to imminent physical harm"), when a merely "credible threat," even from others, "is sufficient," *Fulminante*, 449 U.S. at 287-88.

And the state court's reliance on unreasonable determinations of fact highlights the unreasonable application of the standard. For example, the state court of appeals relied on reassurances from Haslett that came *at the end* of Sebastian's "confession" to find that the teens did not have a fear of harm. The court of appeals reasoned that Sebastian could not have feared for his life because when he told Haslett "*[n]ear the end of the confession recording*" that Haslett "can trust him because otherwise 'some guy [would come and] blast me in the head,'" Haslett "insists he is

'not a killer'" and "either one is free to walk away." *See, e.g.*, 1-ER-64 (alterations in original). Even setting aside the absurd view that a perceived murderer's soothing words would be taken as true, such after-the-fact assurances could not affect a defendant's coercion *before* those assurances. Perhaps this error occurred because the State does not allow "independent appellate review of the record in a confession case" on direct review. 1-ER-62. But "[w]ithout exception," the U.S. Supreme "Court's confession cases" applying non-AEDPA review "hold that the ultimate issue of 'voluntariness' is a legal question requiring independent federal determination" when "the confession is unlikely to have been the product of a free and rational will." *Miller*, 474 U.S. at 110.

Even the Canadian Supreme Court has acknowledged that Mr. Big schemes are coercive and has since changed its very different "person in authority" standard. As the Canadian Court has recognized, "[s]uspects confess to Mr. Big during pointed interrogations in the face of powerful inducements and sometimes veiled threats—and this raises the spectre of unreliable confessions." *R. v. Hart*, [2014] 2 S.C.R. 544, 546 (Can.), https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14301/index.do. That is precisely what happened here—these incriminating statements were

internally inconsistent, tracked the narrative in the newspapers, and were contrary to the alibis. 2-ER-121. That evidence is hardly reliable, which is itself a good indication that the statements were not voluntary. *See, e.g.*, *Conner*, 375 F.3d at 652 (inconsistencies/unreliability a factor that weighs against voluntariness). And even if the statements *had been* reliable, that would not render them admissible. *Lego*, 404 U.S. at 485. But juries are often compelled by such unreliable statements anyway, leading to wrongful convictions. *Fulminante*, 499 U.S. at 296 ("[A] full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision.").

The Canadian Court now recognizes that "Mr. Big operations also run the risk of becoming abusive" and "cultivate an aura of violence by showing that those who betray the criminal organization are met with violence." *Hart*, 2 S.C.R. at 546. The Canadian Supreme Court therefore found confessions made during Mr. Big operations "presumptively inadmissible." *Id.* at 547. Again, this case is perfectly illustrative—the RCMP ultimately got the incriminating statements only after repeated threats and demonstrations of violence.

The state appellate court relied on the trial court's "ab[ility] to view the defendants' demeanor and body language" in their *taped* "confessions" to reject the teens' "claims that the undercover operation overcame their will to resist." 1-ER-65. Of course, the state court of appeals was equally positioned to look at that evidence for itself, but was bound to defer. *Supra* p.57. But even as to the superior vantage a trial court has in viewing the demeanor and body language of a witness *testifying in court* (unlike here), the Supreme Court has held that live "assessments of credibility and demeanor are not crucial to the proper resolution of the ultimate issue of 'voluntariness.'" *Miller*, 474 U.S. at 116-17. 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." *Id.* at 116. Mr. Big operations generally, and especially as applied to *these* young suspects here, surely are not.

2. The district court was the first court to find that there was no evidence the undercover officers' threats were passed from Sebastian

to Atif. *See* 2-ER-161-62; *see also* 2-ER-109-12. In other words, the court below would have this Court believe that Atif confessed to being an accomplice in the murder of his entire family in cold blood with a baseball bat, to total strangers, out of the blue. That finding is contrary to the record. *See, e.g.*, 2-ER-109-12. It is contrary to the state court's factual finding. *See supra* p.29. And it is contrary to common sense.

The State did not argue that the court of appeals erred in finding that "[t]hroughout the entire undercover operation," Sebastian "managed the relationship with Haslett and Shinkaruk on behalf of the defendants." 1-ER-64. That particular finding was surely correct, and unlike the finding of "no duress" from the Canadian court, it was not "infect[ed]" by application of the wrong standard. *See Kipp*, 971 F.3d at 953. There would be no reason for Atif to go to meet Mr. Big for the first time, and "confess" to being involved in his family's murder, unless he were fully aware of the circumstances that led Sebastian to do so out of fear. And the State did not try to argue the state court of appeals unreasonably determined this fact.

Moreover, under AEDPA review, a federal court is not permitted to "substitute" its own "more supportive reasoning" for that found in the last

reasoned decision of the state court. *Wilson v. Sellers*, 138 S. Ct. 1188, 1197 (2018). That is why this Court "confine[s] [its] § 2254(d)(1) analysis to the state court's *actual* decisions and analysis." *Frantz*, 533 F.3d at 737. "Indeed," if this Court "were to defer to some *hypothetical* alternative rationale when the state court's *actual* reasoning evidences a § 2254(d)(1) error"—as the court did below—it "would distort the purpose of AEDPA." *Id.* at 738. The district court erred by substituting its own findings and reasoning for that of the state court of appeals, and this error is good evidence that even the district court believed the state court's reasoning was suspect.

3. This Court should hold that *both* teens' statements were made involuntarily, and thus neither's statement could be admitted against Atif. "[A] person may challenge the government's use against him or her of a coerced confession given by another person." *Clanton v. Cooper*, 129 F.3d 1147, 1157-58 (10th Cir. 1997). Atif "may contest the voluntariness" of Sebastian's "confession not based on any violation of [Sebastian's] constitutional rights, but rather as a violation of h[is] own Fourteenth Amendment right to due process." *Id.* at 1158. And a co-defendant's confession "obtained during the same coercive interrogation" cannot be

admitted against the other defendant. *See Moore v. Czerniak*, 574 F.3d 1092, 1120 (9th Cir. 2009), *rev'd and remanded on other grounds sub nom. Premo v. Moore*, 562 U.S. 115 (2011)

Again, Sebastian did not press that *de novo* review applies, so to find that his statements were coerced would not be inconsistent with this Court's holding under AEDPA deference in Sebastian's case that the state court was not unreasonable in concluding that Sebastian's statement was voluntary. On *de novo* review, Sebastian's statement was clearly involuntary. The upshot is that neither Atif's statements *nor* Sebastian's statements should have been used against Atif.

III. Atif Was Deprived of His Right to Present a Complete Defense.

1. Under the Sixth and Fourteenth Amendments to the United States Constitution, a criminal defendant has the right to "a meaningful opportunity to present a complete defense." *Holmes*, 547 U.S. at 324 (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). The "right is abridged by evidence rules that 'infringe upon a weighty interest of the accused' and are 'arbitrary or disproportionate to the purposes they are designed to serve.'" *Ibid.* (citation and alteration omitted). Thus, rules that arbitrarily or disproportionately prejudice a defendant's right to

present compelling "proof of third-party guilt" are unconstitutional. *Id.* at 331 (reversing the exclusion of a petitioner's third-party guilt evidence under a rule that a "defendant may not introduce proof of third-party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict").

Atif's right to meaningfully present a complete defense was violated when he was barred from presented extremely compelling "other suspect" evidence, and the state court of appeals' decision affirming the trial court's decision was an unreasonable application of *Holmes*.

The trial court excluded evidence that Mohammed, a reliable FBI informant, had told the police not just that he knew of a violent group opposed to Atif's father's teachings—he identified a baseball bat as the murder weapon even before the police did. *Supra* pp.12-13. Yet the state court of appeals affirmed the trial court's decision to exclude this probative evidence based on the State's evidentiary rule that "before a defendant may present evidence suggesting another person committed the charged offense, the defendant must first establish a sufficient foundation, including 'a train of facts or circumstances as tend clearly to point out' someone besides the defendant as the guilty party," "a clear

nexus between the other person and the crime," and the "proposed testimony must show a 'step taken by the third party that indicates an intention to act' on the motive or opportunity." 1-ER-76 (citation omitted). The court of appeals reasoned that a sufficient foundation could not be established to admit evidence of Mohammed's tip, because the tip *itself* "did not provide any information that placed someone near the murder scene, indicated that someone had acted on the possible motive, or that linked any other individual or group member to the murder." 1-ER-76-77.

To the extent it is necessary to challenge the state evidentiary rule, Atif does. The rule requires a tip like Mohammed's to fully establish that a particular, other person committed the crime, how they did it, and their motive for doing so. Arguably, this rule requires more of the tip itself than the State had as hard evidence against Atif and Sebastian. The rule is "'arbitrary or disproportionate to the purposes [it is] designed to serve.'" *See Holmes*, 547 U.S. at 324.

But the Court need not strike down the State's "foundation" rule in all its potential applications to find that the court of appeals unreasonably applied Supreme Court precedent. The Supreme Court in

Green v. Georgia, 442 U.S. 95 (1979) (per curiam), and *Chambers v. Mississippi*, 410 U.S. 284, 296 (1973), dealt with challenges to "the application of the rules of evidence in a given factual scenario." *Cudjo v. Ayers*, 698 F.3d 752, 767 (9th Cir. 2012). The Supreme Court expressly did "not decide" in *Chambers* "whether, *under other circumstances*," the challenged state rule "might serve some *valid* state purpose by excluding untrustworthy testimony." 410 U.S. at 300 (emphasis added). Rather, the Court held that the State's "rule may not be applied mechanistically to defeat the ends of justice." *Id.* at 302.

So too here. To the extent there may be some circumstance where the State's "sufficient foundation" rule might validly exclude evidence of third-party guilt, requiring that Mohammed's tip be excluded because it failed to name the precise person, his motive, his placement at the scene of the crime at the right time, and an affirmative step he took indicating an intent to act, violated Atif's right to present the jury with evidence of his extremely probative tip.

The same goes for the state rule's requirement that the tip from the Seattle police be excluded. The Seattle police also raised the alarm that a radical group "known to contract for the murder of those with whom it

disagreed on religious grounds" may be involved. *Supra* p.13. If that evidence had been admitted alongside the testimony that "the Vancouver 'Dosanjh group' had placed a contract on the life of a Canadian East Indian family residing in Bellevue," *supra* pp.4-5, it would have painted a very compelling picture that an extremist killed the Rafays.

Once these tips were suppressed, there was no other basis for Atif to introduce the evidence. 1-ER-77 (rejecting argument that tips "were independently admissible for purposes of impeaching the thoroughness of the Bellevue police investigation"). The state court of appeals unreasonably upheld the trial court's exclusion of the different pieces of evidence "independently without connecting [them] to the chain of circumstances, thereby missing the probative force of the whole chain." *See, e.g.*, *Lunbery v. Hornbeak*, 605 F.3d 754, 761-62 (9th Cir. 2010) (state court exclusion of other-suspect evidence was "unreasonable application of *Chambers*"). Here, as in *Lunbery*, the fact that Atif supposedly "confessed to the crime does not detract from the prejudice flowing from h[is] inability to present the defense of third party culpability, especially since []he vigorously contested the truthfulness of that confession." *Id.* at 762.

Without the teens' coerced incriminating statements, the State's case would have looked extremely weak to the jury. There was a dearth of physical evidence against them, and multiple witnesses testified that the teens were at dinner and then a movie at the time the murders occurred. *Supra* pp.6-7. And some *other* unidentified male's hair was on the bed where Tariq was found dead, and an unidentified male's blood was mixed in with Tariq's in the shower—DNA testing proved that neither belonged to any victim, to Atif, or to Sebastian. *Supra* p.11. It is highly unlikely a jury could have convicted the teens beyond a reasonable doubt had their coerced statements been suppressed and had they been permitted to present the "other suspect" evidence from Mohammed and the Seattle police.

2. The state court of appeals also unreasonably applied clearly established precedent when it affirmed the trial court's decision to exclude the expert testimony of Dr. Leo and DEA Agent Levine.

The motion for COA set forth why a habeas petitioner may bring an as-applied challenge to a state court's evidentiary decisions under AEDPA. To be sure, this Court has at times held that it is not clearly established "whether a trial court's discretionary determination to

exclude evidence violated a defendant's constitutional rights." *Moses v. Payne*, 543 F.3d 1090, 1103 (9th Cir. 2008); *see, e.g.*, *Robertson v. Pichon*, 849 F.3d 1173, 1189 (9th Cir. 2017). But the better view is the one in *Cudjo*, which expressly rejected the idea that Supreme Court precedent allows "*only* facial challenges to general rules of evidence." 698 F.3d at 767. "Clearly the government would not be able to override a defendant's important interest in presenting a defense merely because the government action was based on an arbitrary whim, and not a rule of evidence." *Ibid.*

The Supreme Court's decisions in *Chambers* and *Green*, which "did not strike down the [challenged] rule as invalid," and therefore did not only deal with the application of an "impermissible rule," *Cudjo*, 698 F.3d at 767, control this question. But if this Court does not grant Atif's petition on other grounds, it may be necessary for this Court to take the question *en banc* to resolve this tension in the circuit's case law.

The state court's errors were cumulative. By allowing the teens' coerced statements to be presented to the jury and excluding extremely probative "other suspect" evidence based on the State's "foundation" rule, *and then also* prohibiting defense experts from contextualizing *why* the

teens' coerced statements might be unreliable, the court deprived Atif of any meaningful opportunity to present a complete defense. These decisions essentially turned the trial entirely into one that was based on Sebastian's and Atif's coerced statements.

And false confessions are notoriously hard for a jury to "unhear." *See Fulminante*, 499 U.S. at 296. "A confession is like no other evidence," and "may tempt the jury to rely upon that evidence alone in reaching its decision." *Ibid.* A layperson generally does *not* believe she would go so far as to falsely confess that she committed a murder she did not commit. *Contra* 10-ER-2547. And expert testimony was especially important given the state court's heavy reliance on the purported calm "demeanor and body language" of the teens "during the entire [videotaped] confessions" to the undercover Mr. Big officers. *See* 1-ER-65.

According to the data, a cognitive-perceptual bias makes a confession appear more "voluntary" and more "true" when presented in a suspect-focused video format, when compared to transcripts and videos that focus equally on interrogators and suspects. G. D. Lassiter *et al.*, Evaluating Videotaped Confessions: *Expertise Provides No Defense Against the Camera-Perspective Bias*, Psychological Science 18(3), at 224-226 (2010).

And viewer expertise fails to mitigate the effect—even judges are affected. *Ibid.* At the very least, expert testimony was necessary to illuminate this counterintuitive point. If Atif had been allowed to present this exert testimony, the outcome likely would have been different.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

s/Thomas C. Goldstein

Gregory Geist
Andrew Kennedy
Assistant Federal Public Defenders
1601 Fifth Avenue, Suite 700
Seattle, Washington 98101
Phone: (206) 553-1100
Fax: (206) 553-0120

Thomas C. Goldstein
Daniel Woofter
Goldstein & Russell, P.C.
7475 Wisconsin Ave., Suite 850
Bethesda, MD 20814
Phone: (202) 362-0636
Fax: (866) 574-2033

May 20, 2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

Instructions for this form: http://www.ca9.uscourts.gov/forms/form17instructions.pdf

9th Cir. Case Number(s) 20-35963

The undersigned attorney or self-represented party states the following:

○ I am unaware of any related cases currently pending in this court.

○ I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

◉ I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Burns v. Warner, 689 F. App'x 485 (9th Cir. 2017).

Signature Thomas C. Goldstein **Date** May 20, 2022

*(use "*s/[typed name]*" to sign electronically-filed documents)*

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit as set out in Circuit Rule 32-1(a), because it contains 13,996 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Circuit Rule 32-1(c).

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point New Century Schoolbook font.

s/Thomas C. Goldstein

ADDENDUM

ADDENDUM TABLE OF CONTENTS

The last two sentences of section 463(a) of title 28, U.S.C., 1940 ed., were omitted. They were repeated in section 452 of title 28, U.S.C., 1940 ed. (See reviser's note under section 2241 of this title.)

Changes were made in phraseology.

1949 ACT

This section corrects a typographical error in the second paragraph of section 2253 of title 28.

AMENDMENTS

1996—Pub. L. 104–132 reenacted section catchline without change and amended text generally. Prior to amendment, text read as follows:

"In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

"There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

"An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause."

1951—Act Oct. 31, 1951, substituted "to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his" for "of removal issued pursuant to section 3042 of Title 18 or the" in second par.

1949—Act May 24, 1949, substituted "3042" for "3041" in second par.

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

(June 25, 1948, ch. 646, 62 Stat. 967; Pub. L. 89–711, § 2, Nov. 2, 1966, 80 Stat. 1105; Pub. L. 104–132, title I, § 104, Apr. 24, 1996, 110 Stat. 1218.)

HISTORICAL AND REVISION NOTES

This new section is declaratory of existing law as affirmed by the Supreme Court. (See Ex parte Hawk, 1944, 64 S. Ct. 448, 321, U.S. 114, 88L. Ed. 572.)

SENATE REVISION AMENDMENTS

Senate amendment to this section, Senate Report No. 1559, amendment No. 47, has three declared purposes, set forth as follows:

"The first is to eliminate from the prohibition of the section applications in behalf of prisoners in custody under authority of a State officer but whose custody has not been directed by the judgment of a State court. If the section were applied to applications by persons detained solely under authority of a State officer it would unduly hamper Federal courts in the protection of Federal officers prosecuted for acts committed in the course of official duty.

"The second purpose is to eliminate, as a ground of Federal jurisdiction to review by habeas corpus judgments of State courts, the proposition that the State court has denied a prisoner a 'fair adjudication of the legality of his detention under the Constitution and laws of the United States.' The Judicial Conference believes that this would be an undesirable ground for Federal jurisdiction in addition to exhaustion of State remedies or lack of adequate remedy in the State courts because it would permit proceedings in the Federal court on this ground before the petitioner had exhausted his State remedies. This ground would, of course, always be open to a petitioner to assert in the Federal court after he had exhausted his State remedies or if he had no adequate State remedy.

"The third purpose is to substitute detailed and specific language for the phrase 'no adequate remedy available.' That phrase is not sufficiently specific and precise, and its meaning should, therefore, be spelled out in more detail in the section as is done by the amendment."

REFERENCES IN TEXT

Section 408 of the Controlled Substances Act, referred to in subsec. (h), is classified to section 848 of Title 21, Food and Drugs.

AMENDMENTS

1996—Subsec. (b). Pub. L. 104–132, § 104(1), amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows: "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

Subsec. (d). Pub. L. 104–132, § 104(3), added subsec. (d). Former subsec. (d) redesignated (e).

Subsec. (e). Pub. L. 104–132, § 104(4), amended subsec. (e) generally, substituting present provisions for provisions which stated that presumption of correctness existed unless applicant were to establish or it otherwise appeared or respondent were to admit that any of several enumerated factors applied to invalidate State determination or else that factual determination by State court was clearly erroneous.

Pub. L. 104–132, § 104(2), redesignated subsec. (d) as (e). Former subsec. (e) redesignated (f).

Subsecs. (f), (g). Pub. L. 104–132, § 104(2), redesignated subsecs. (e) and (f) as (f) and (g), respectively.

Subsecs. (h), (i). Pub. L. 104–132, § 104(5), added subsecs. (h) and (i).

1966—Pub. L. 89–711 substituted "Federal courts" for "State Courts" in section catchline, added subsec. (a), designated existing paragraphs as subsecs. (b) and (c), and added subsecs. (d) to (f).

APPROVAL AND EFFECTIVE DATE OF RULES GOVERNING SECTION 2254 CASES AND SECTION 2255 PROCEEDINGS FOR UNITED STATES DISTRICT COURTS

For approval and effective date of rules governing petitions under section 2254 and motions under section 2255 of this title filed on or after Feb. 1, 1977, see section 1 of Pub. L. 94–426, set out as a note under section 2074 of this title.

POSTPONEMENT OF EFFECTIVE DATE OF PROPOSED RULES GOVERNING PROCEEDINGS UNDER SECTIONS 2254 AND 2255 OF THIS TITLE

Rules and forms governing proceedings under sections 2254 and 2255 of this title proposed by Supreme Court order of Apr. 26, 1976, effective 30 days after adjournment sine die of 94th Congress, or until and to the extent approved by Act of Congress, whichever is earlier, see section 2 of Pub. L. 94–349, set out as a note under section 2074 of this title.

RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS

(*Effective Feb. 1, 1977, as amended to Jan. 14, 2019*)

EFFECTIVE DATE OF RULES; EFFECTIVE DATE OF 1975 AMENDMENT

Rules governing Section 2254 cases, and the amendments thereto by Pub. L. 94–426, Sept. 28, 1976, 90 Stat. 1334, effective with respect to petitions under section 2254 of this title and motions under section 2255 of this title filed on or after Feb. 1, 1977, see section 1 of Pub. L. 94–426, set out as a note under section 2074 of this title.

Rule 1. Scope

(a) CASES INVOLVING A PETITION UNDER 28 U.S.C. § 2254. These rules govern a petition for a writ of habeas corpus filed in a United States district court under 28 U.S.C. § 2254 by:

(1) a person in custody under a state-court judgment who seeks a determination that the custody violates the Constitution, laws, or treaties of the United States; and

(2) a person in custody under a state-court or federal-court judgment who seeks a determination that future custody under a state-court judgment would violate the Constitution, laws, or treaties of the United States.

(b) OTHER CASES. The district court may apply any or all of these rules to a habeas corpus petition not covered by Rule 1(a).

peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT [II.]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT [III.]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT [VII.]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT [VIII.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT [IX.]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT [X.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

AMENDMENT XIII.[5]

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV.[6]

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the

[5] The Thirteenth Amendment was proposed by Congress on January 31, 1865, when it passed the House, Cong. Globe (38th Cong., 2d Sess.) 531, having previously passed the Senate on April 8, 1964. Id. (38th cong., 1st Sess.), 1940. It appears officially in 13 Stat. 567 under the date of February 1, 1865. Ratification was completed on December 6, 1865, when the legislature of the twenty-seventh State (Georgia) approved the amendment, there being then 36 States in the Union. On December 18, 1865, Secretary of State Seward certified that the Thirteenth Amendment had become a part of the Constitution, 13 Stat. 774.

The several state legislatures ratified the Thirteenth Amendment on the following dates: Illinois, February 1, 1865; Rhode Island, February 2, 1865; Michigan, February 2, 1865; Maryland, February 3, 1865; New York, February 3, 1865; West Virginia, February 3, 1865; Missouri, February 6, 1865; Maine, February 7, 1865; Kansas, February 7, 1865; Massachusetts, February 7, 1865; Pennsylvania, February 8, 1865; Virginia, February 9, 1865; Ohio, February 10, 1865; Louisiana, February 15 or 16, 1865; Indiana, February 16, 1865; Nevada, February 16, 1865; Minnesota, February 23, 1865; Wisconsin, February 24, 1865; Vermont, March 9, 1865 (date on which it was "approved" by Governor); Tennessee, April 7, 1865; Arkansas, April 14, 1865; Connecticut, May 4, 1865; New Hampshire, June 30, 1865; South Carolina, November 13, 1865; Alabama, December 2, 1865 (date on which it was "approved" by Provisional Governor); North Carolina, December 4, 1865; Georgia, December 6, 1865; Oregon, December 11, 1865; California, December 15, 1865; Florida, December 28, 1865 (Florida again ratified this amendment on June 9, 1868, upon its adoption of a new constitution); Iowa, January 17, 1866; New Jersey, January 23, 1866 (after having rejected the amendment on March 16, 1865); Texas, February 17, 1870; Delaware, February 12, 1901 (after having rejected the amendment on February 8, 1865). The amendment was rejected by Kentucky on February 24, 1865, and by Mississippi on December 2, 1865.

[6] The Fourteenth Amendment was proposed by Congress on June 13, 1866, when it passed the House, Cong. Globe (39th Cong., 1st Sess.) 3148, 3149, having previously passed the Senate on June 8. Id., 3042. It appears officially in 14 Stat. 358 under date of June 16, 1866. Ratification was probably completed on July 9, 1868, when the legislature of the twenty-eighth State

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and

---

(South Carolina or Louisiana) approved the amendment, there being then 37 States in the Union. However, Ohio and New Jersey had prior to that date "withdrawn" their earlier assent to this amendment. Accordingly, Secretary of State Seward on July 20, 1868, certified that the amendment had become a part of the Constitution if the said withdrawals were ineffective. 15 Stat. 706–707. Congress on July 21, 1868, passed a joint resolution declaring the amendment a part of the Constitution and directing the Secretary to promulgate it as such. On July 28, 1868, Secretary Seward certified without reservation that the amendment was a part of the Constitution. In the interim, two other States, Alabama on July 13 and Georgia on July 21, 1868, had added their ratifications.

The several state legislatures ratified the Fourteenth Amendment on the following dates: Connecticut, June 30, 1866; New Hampshire, July 7, 1866; Tennessee, July 19, 1866; New Jersey, September 11, 1866 (the New Jersey Legislature on February 20, 1868 "withdrew" its consent to the ratification; the Governor vetoed that bill on March 5, 1868; and it was repassed over his veto on March 24, 1868); Oregon, September 19, 1866 (Oregon "withdrew" its consent on October 15, 1868); Vermont, October 30, 1866; New York, January 10, 1867; Ohio, January 11, 1867 (Ohio "withdrew" its consent on January 15, 1868); Illinois, January 15, 1867; West Virginia, January 16, 1867; Michigan, January 16, 1867; Kansas, January 17, 1867; Minnesota, January 17, 1867; Maine, January 19, 1867; Nevada, January 22, 1867; Indiana, January 23, 1867; Missouri, January 26, 1867 (date on which it was certified by the Missouri secretary of state); Rhode Island, February 7, 1867; Pennsylvania, February 12, 1867; Wisconsin, February 13, 1867 (actually passed February 7, but not signed by legislative officers until February 13); Massachusetts, March 20, 1867; Nebraska, June 15, 1867; Iowa, March 9, 1868; Arkansas, April 6, 1868; Florida, June 9, 1868; North Carolina, July 2, 1868 (after having rejected the amendment on December 13, 1866); Louisiana, July 9, 1868 (after having rejected the amendment on February 6, 1867); South Carolina, July 8, 1868 (after having rejected the amendment on December 20, 1866); Alabama, July 13, 1868 (date on which it was "approved" by the Governor); Georgia, July 21, 1868 (after having rejected the amendment on November 9, 1866—Georgia ratified again on February 2, 1870); Virginia, October 8, 1869 (after having rejected the amendment on January 9, 1867); Mississippi, January 17, 1870; Texas, February 18, 1870 (after having rejected the amendment on October 27, 1866); Delaware, February 12, 1901 (after having rejected the amendment on February 7, 1867). The amendment was rejected (and not subsequently ratified) by Kentucky on January 8, 1867. Maryland and California ratified this amendment in 1959.

Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV.[7]

SECTION. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION. 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XVI.[8]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment

[7] The Fifteenth Amendment was proposed by Congress on February 26, 1869, when it passed the Senate, Cong. Globe (40th Cong., 3rd Sess.) 1641, having previously passed the House on February 25. Id., 1563, 1564. It appears officially in 15 Stat. 346 under the date of February 27, 1869. Ratification was probably completed on February 3, 1870, when the legislature of the twenty-eighth State (Iowa) approved the amendment, there being then 37 States in the Union. However, New York had prior to that date "withdrawn" its earlier assent to this amendment. Even if this withdrawal were effective, Nebraska's ratification on February 17, 1870, authorized Secretary of State Fish's certification of March 30, 1870, that the Fifteenth Amendment had become a part of the Constitution. 16 Stat. 1131.

The several state legislatures ratified the Fifteenth Amendment on the following dates: Nevada, March 1, 1869; West Virginia, March 3, 1869; North Carolina, March 5, 1869; Louisiana, March 5, 1869 (date on which it was "approved" by the Governor); Illinois, March 5, 1869; Michigan, March 5, 1869; Wisconsin, March 5, 1869; Maine, March 11, 1869; Massachusetts, March 12, 1869; South Carolina, March 15, 1869; Arkansas, March 15, 1869; Pennsylvania, March 25, 1869; New York, April 14, 1869 (New York "withdrew" its consent to the ratification on January 5, 1870); Indiana, May 14, 1869; Connecticut, May 19, 1869; Florida, June 14, 1869; New Hampshire, July 1, 1869; Virginia, October 8, 1869; Vermont, October 20, 1869; Alabama, November 16, 1869; Missouri, January 7, 1870 (Missouri had ratified the first section of the 15th Amendment on March 1, 1869; it failed to include in its ratification the second section of the amendment); Minnesota, January 13, 1870; Mississippi, January 17, 1870; Rhode Island, January 18, 1870; Kansas, January 19, 1870 (Kansas had by a defectively worded resolution previously ratified this amendment on February 27, 1869); Ohio, January 27, 1870 (after having rejected the amendment on May 4, 1869); Georgia, February 2, 1870; Iowa, February 3, 1870; Nebraska, February 17, 1870; Texas, February 18, 1870; New Jersey, February 15, 1871 (after having rejected the amendment on February 7, 1870); Delaware, February 12, 1901 (date on which approved by Governor; Delaware had previously rejected the amendment on March 18, 1869). The amendment was rejected (and not subsequently ratified) by Kentucky, Maryland, and Tennessee. California ratified this amendment in 1962 and Oregon in 1959.

[8] The Sixteenth Amendment was proposed by Congress on July 12, 1909, when it passed the House, 44 Cong. Rec. (61st Cong., 1st Sess.) 4390, 4440, 4441, having previously passed the Senate on July 5. Id., 4121. It appears officially in 36 Stat. 184. Ratification was completed on February 3, 1913, when the legislature of the thirty-sixth State (Delaware, Wyoming, or New Mexico) approved the amendment, there being then 48 States in the Union. On February