No. 125722

In The Supreme Court Of Illinois

PEOPLE FOR THE STATE OF ILLINOIS, Respondent-Appellee, v. ANDREW SALAMON, Defendant-Appellant.	On Appeal from the Illinois Appellate Court, First Judicial District, Case No. 1-16-0986. There on Appeal from the Circuit Court of Cook County, Illinois, No. 12 CR 2706. Hon. Erica L. Reddick Judge Presiding

BRIEF OF THE CENTER FOR WRONGFUL CONVICTIONS AND THE INNOCENCE PROJECT
***AMICUS CURIAE* IN SUPPORT OF APPELLANT**

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INTEREST OF AMICI

The Center on Wrongful Convictions, housed at Northwestern University School of Law's Bluhm Legal Clinic, and the Innocence Project, are not-for-profit organizations that provide *pro bono* legal services and other resources to indigent prisoners seeking to establish their innocence. Both organizations are committed to preventing future wrongful convictions by researching the causes of wrongful convictions, including coercive police practices that contribute to false confessions. Approximately *one quarter* of all wrongful convictions later overturned by DNA evidence are attributable to false confessions. Accordingly, amici's interest in eliminating the use of coercive interrogation tactics, like those at issue in this case, is manifest.

The facts of this case are not unique. History demonstrates that the right to counsel during custodial interrogation is often illusory in Chicago. Here, despite repeated and unequivocal invocation of his right to counsel, police refused to honor Appellant Andrew Salamon's requests. They likewise violated his right, pursuant to Illinois law, to make a phone call within a "reasonable time" of being taken into custody. *See* 725 ILCS 5/103-3(a). Instead, police handcuffed him to a wall in an interrogation room, and held him alone, incommunicado, for 24 hours until he finally agreed to waive his rights and give a statement.

Amici are concerned that letting such a ruling stand will give Chicago police officers carte blanche to continue to do an end-run around *Miranda* and the protections afforded defendants by statute. This brief is offered to highlight for the Court how the illegal interrogation tactics used in this case are inherently coercive, and dramatically increase the risk of wrongful convictions rooted in involuntary and false confessions.

SUMMARY OF ARGUMENT

Extensive research and decades of jurisprudence make plain that incommunicado interrogations are inherently coercive, increase the risk of false confessions, and ultimately lead to wrongful convictions. These concerns are particularly acute in Chicago, which is known as the "false confession capital" of the United States owing to its well-documented history of secret detentions and other unlawful interrogation tactics. *See* Chicago: The False Confession Capital, CBS News 60 Minutes (Dec. 19, 2012), www.cbsnews.com/news/chicago-the-false-confession-capital/. Indeed, in 2017, Cook County was responsible for nearly half of all exonerations involving false confessions in the United States. *See* The National Registry of Exonerations, a Project of the University of California Irvine Newkirk Center for Science and Society, the University of Michigan Law School, and Michigan State University College of Law, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited July 31, 2020).

Both the United States Supreme Court and this Court have long recognized the dangers of isolation, and have developed safeguards aimed at mitigating these risks including, among other things, the right to have counsel present during any custodial interrogation. Since 1963, the Illinois legislature has likewise sought to protect a suspect's right to counsel during this pivotal period by affording access to phones and attorneys for all suspects within a "reasonable time" of being taken into police custody. *See* 725 ILCS 5/103-3(a) (enacted in 1963 as Ill. Rev. Stat. 1991, ch. 38, ¶ 103-3). These protections, however, only work to combat the threat of coercive interrogation tactics (and the corresponding risk of false confessions), if police faithfully comply with the letter and spirit of the law. That Chicago police routinely flout these constitutional and statutory rights has been established by a robust body of empirical evidence.

Amici therefore urge this Court to condemn the police's dangerously coercive conduct here. Handcuffing a suspect to a wall in a locked room for 24 hours after invocation of the right to counsel is plainly—and appropriately—illegal. Such conduct—which is consistent with the Chicago Police Department's long-standing practice of delaying and denying access to counsel—violates the express mandate of 725 ILCS 5/103-3(a), contravenes the principles underlying this Court's decision in *People v. McCauley*, 163 Ill. 2d 414, 423-24 (1994), and renders meaningless the procedural safeguards that are guaranteed to suspects in police custody pursuant to *Miranda v. Arizona*, 384 U.S. 436, 470-72 (1966), and *Edwards v. Arizona*, 451 U.S. 477, 484-86 (1981).

ARGUMENT

I. INCOMMUNICADO INTERROGATIONS LEAVE DETAINEES VULNERABLE TO COERCION AND INCREASE THE RISK OF FALSE CONFESSIONS.

A. The case before this Court reflects a decades-long pattern of coercive interrogation tactics used by Chicago police.

After repeatedly requesting a lawyer, Chicago detectives left Appellant Andrew Salamon alone, crying, handcuffed to the wall of an interrogation room for more than 24 hours, without any means of contacting an attorney or his family. *People v. Salamon*, 2019 IL App (1st) 160986-U, ¶¶ 11, 44, 54, *appeal allowed*, 144 N.E.3d 1187 (Ill. 2020). More than 24 hours later (presumably with little or no sleep as he had remained handcuffed to a wall all night), Mr. Salamon desperately banged on the interrogation room wall, told officers he would talk, and ultimately made an inculpatory statement. *Id.* ¶ 9. Equally troubling, the evidence showed that the decision to ignore Mr. Salamon's pleas for counsel was not that of a single rogue officer, but rather reflected Area North's "general practice" of denying arrestees access to a telephone until *after* "booking." *Id.* ¶ 60. Mr. Salamon was

not booked until *after* he provided a statement, more than 24 hours after first invoking his right to counsel. *Id.*

The practice of delaying "booking" until after a suspect has agreed to waive his rights and speak to police, is neither new nor limited to Area North. Indeed, more than 60 years ago, even before such landmark decisions as *Escobedo v. Illinois*,[1] 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966), a groundbreaking report from the Illinois division of the American Civil Liberties Union ("ACLU") exposed the prevalence of secret, prolonged detention by Chicago police. *See* American Civil Liberties Union: Illinois Division, *Secret Detention by the Chicago Police* (1959). The report, which is cited by the Supreme Court's seminal *Miranda* decision, 384 U.S. at 446 n.7, uncovered the "widespread practice of the Chicago police . . . refusing to allow an arrested person to call a lawyer before he is questioned." *Secret Detention*, *supra* at 11. The ACLU further stressed that then, as now, "the term 'booking' is crucial," because "[o]rdinarily in Chicago a prisoner is held incommunicado until he is booked," meaning "[h]is family does not know where he is" and "he is not allowed to call a lawyer." *Id.* at 24. Finding that "secret detentions [were] not exceptional abuses," but rather "regular police practice in Chicago,"

[1] *Escobedo* is instructive because it shows that the pattern of the Chicago police ignoring the law by frustrating a defendant's right to counsel during custodial interrogation predates the statute at issue in this case. At the time of Mr. Escobedo's arrest in January 1960, a different Illinois statute required that "[a]ll public officers . . . having the custody of any person . . . restrained of his liberty for any alleged cause whatever, shall, except in cases of imminent danger of escape, admit any practicing attorney . . . whom such person . . . may desire to see or consult. . . ." *Escobedo*, 378 U.S. 478, 481 n.2 (citing Ill. Rev. Stat. (1959), ch. 38, § 477, repealed as of Jan. 1, 1964). Escobedo's lawyer, Warren Wolfson, arrived at the station before the police began to interrogate Escobedo. *Id.* at 479-80. Despite the fact that Escobedo was demanding to see Wolfson (who later became an Illinois appellate court judge and Dean of DePaul Law School), and Wolfson, citing the statute, was insisting on seeing Escobedo, the officers refused, telling Wolfson that they "hadn't completed questioning." *Id.* at 480.

id. at 28, the ACLU urged the promulgation of a rule "stating that all arrested persons are entitled to contact their families and attorneys upon request, and this rule should be prominently posted in all police stations where it will be seen by all prisoners," *id.* at 32.

Four years later, the Illinois legislature did just that, enacting 725 ILCS 5/103-3, the Right to Communicate with Attorney and Family Statute, which grants all suspects the right to communicate with an attorney within a "reasonable time" of being taken into custody.[2] The statute aims to enable an arrestee to access "counsel and procedural safeguards that the defendant cannot accomplish for himself while in custody." *People v. Prim*, 53 Ill. 2d 62, 69-70 (1972). Subsequent to the statute's enactment, a line of federal and state court decisions have expressly condemned the practices of incommunicado detention, *see infra*, and have prescribed "concrete constitutional guidelines for law enforcement agencies and courts to follow" for custodial interrogations, *Miranda*, 384 U.S. at 422. Despite all this guidance, the Chicago Police Department ("CPD") continues to systematically delay and deny arrestees access to counsel.

Indeed, the persistent refusal by Chicago police to honor the right to counsel has only become more pronounced. In 2009, the Illinois Legislature established the Illinois Torture Inquiry and Relief Commission in response to a Special Prosecutor investigation which concluded that, for two decades, former Chicago Police Commander Jon Burge led a crew of officers whose interrogation practices involved isolating and then torturing suspects into confessing to crimes. *See* State of Illinois Torture Inquiry and Relief

[2] The statute states: "Persons who are arrested shall have the right to communicate with an attorney of their choice and a member of their family by making a reasonable number of telephone calls or in any other reasonable manner. Such communication shall be permitted within a reasonable time after arrival at the first place of custody." 725 ILCS 5/103-3(a).

Commission, https://www2.illinois.gov/sites/tirc/Pages/default.aspx (last visited July 23, 2020). More recently, Chicago police have been accused of holding suspects in incommunicado detention at police stations and "black sites" such as Homan Square. *See* Spencer Ackerman, *The Hidden: How Chicago Police Kept Thousands Isolated at Homan Square*, THE GUARDIAN (Apr. 13, 2016), https://www.theguardian.com/us-news/2016/apr/13/homan-square-chicago-police-records-secret-interrogation-facility-new-documents-lawsuit (explaining that "records and supporting testimony portray a complicated system of documentation that helps explain how Chicago police, particularly from the bureau of organized crime, could use their headquarters for incommunicado detentions and interrogations without attracting significant public notice"). And, as recently as June 2020, a group of plaintiffs, including the Cook County Public Defender, filed a mandamus action to require the Chicago Police Department to comply with state law by providing access to counsel and phones, as guaranteed by 725 ILCS 5/103-3 and 725 ILCS 5/103-4. *See* Compl. Mandamus & Inj. Relief, *#LetUsBreathe Collective v. City of Chicago*, No. 2020CH04654 (Ill. Cir. Ct. June 23, 2020). Consistent with the facts in this case, the plaintiffs allege that "[d]enying phone access is a key CPD tactic to impede access to counsel" with "[t]he result [being] that detainees are held incommunicado, without legal guidance or protection from police coercion." *Id.* at 28

These incidents reflect a broader pattern of Chicago police systematically flouting the mandate of 725 ILCS 5/103-3, and, as a consequence, routinely denying arrestees access to counsel during custodial interrogation. This misconduct has likewise been

extensively documented. A 2016 report by the Police Accountability Task Force[3] found that the Chicago Police Department "generally provides phone access only at the end of processing, *after interrogation* and charging"—the very conduct that the ACLU warned of more than 60 years ago. Police Accountability Task Force, *Recommendations for Reform: Restoring Trust Between the Chicago Police and the Communities They Serve*, 56 (Apr. 2016), https://chicagopatf.org/wp-content/uploads/2016/04/PATF_Final_Report_4_13_16-1.pdf (emphasis added). According to the Task Force, "[i]ndividuals who have been taken into police custody frequently report being denied phone calls and access to an attorney" and that officers "do not provide contact information for legal aid to arrestees." *Id.* at 57. To that end, the Task Force reports that, despite legislative efforts to increase access to counsel, astonishingly few people actually obtain counsel while in police custody in Chicago: "in 2014, only *3 out of every 1,000 arrestees* had an attorney at any point while in police custody." *Id.* at 56 (italics in original).

Like the ACLU efforts in 1959, the Task Force urged the City to, among other things, "enact an ordinance, and CPD should promulgate general orders . . . [m]andating that arrestees be allowed to make phone calls to an attorney and/or family member(s)." *Id.* at 57. Furthermore, the Task Force recommended that "arrestees be allowed to make calls *within one hour of arrest*," reasoning that "[t]he ability for arrestees to call on counsel and

[3] Mayor Rahm Emanuel created the task force "to review the system of accountability, oversight and training that is currently in place for Chicago's police officers" and to "recommend reforms to the current system to improve independent oversight of police misconduct, ensure officers with repeated complaints are identified and evaluated appropriately, and establish best practice for release of videos of police-involved incidents." Press Release, Office of Mayor, Mayor Emanuel Announces Task Force on Police Accountability (Dec. 1, 2015), https://www.chicago.gov/city/en/depts/mayor/press_room/press_releases/2015/december/Task-Force-Police.html.

to understand their constitutional rights 'protects people at a time when they are most vulnerable, and is a key safeguard against . . . ill treatment.'" *Id.* at 58 (quoting a United Nations study on the value of early access to legal aid in the criminal justice process) (emphasis added).

In response to CPD's refusal to follow the law, Cook County Chief Judge Timothy Evans took an unprecedented step to further facilitate arrestee access to counsel. Noting that "the vast majority of arrestees do not receive legal representation until their first court appearance," Judge Evans signed an order "designat[ing] the Law Office of the Cook County Public Defender to send one of its attorneys to the police station or designate a volunteer private attorney to attend in place of an assistant public defender." Press Release, Circuit Court of Cook County, Chief Judge signs order to provide free lawyers for arrestees in CPD custody (Mar. 14, 2017), http://www.cookcountycourt.org/MEDIA/ViewPressRelease/tabid/338/ArticleId/2540/Chief-Judge-signs-order-to-provide-free-lawyers-for-arrestees-in-CPD-custody.aspx; *see also* General Administrative Order No. 2017-01, Appointment of the Public Defender or designee for persons in police custody (Mar. 14, 2017), http://www.cookcountycourt.org/Manage/DivisionOrders/ViewDivisionOrder/tabid/298/ArticleId/2541/GENERAL-ADMINISTRATIVE-ORDER-NO-2017-01-APPOINTMENT-OF-THE-PUBLIC-DEFENDER-OR-DESIGNEE-FOR-PERSONS-IN-POLICE-CUSTODY.aspx.

Despite efforts by both the Legislature and the Judiciary, Chicago police continue to routinely deny custodial suspects a phone call and, as a consequence, counsel. As highlighted by the Chicago Appleseed Fund for Justice, an advocacy organization focused on securing justice for underrepresented individuals in Cook County, "[t]he Chicago Police

Department's interpretation of the 'reasonableness' requirement [of 725 ILCS 5/103-3] effectively negates any meaningful right to have counsel present during interrogation," as police have unfettered discretion to determine when their "reasonable" window for eliciting a statement both starts and ends. Chicago Appleseed Fund for Justice, A Report on Stationhouse Representation in Cook County, 23 (2017), http://www.chicagoappleseed.org/wp-content/uploads/2019/09/A-Report-on-Station house-Representation-in-Cook-County.pdf. Unbound by precise timing requirements and unburdened by any potential punishment for violating the statute,[4] police continue to prevent—through purported procedural delays, such as a prolonged booking process—access to counsel. This is so despite Chief Judge Evans's Order appointing the Public Defender to every person who requests a lawyer while in police custody. Indeed, the number of calls to the Public Defender's Police Station Representation Unit from arrestees demonstrates "how successful the Chicago Police Department has been in preventing arrestees from contacting lawyers from inside the stationhouse": only 52 individuals, "out of tens of thousands of arrests between April and July of 2018, successfully reached an attorney from the police station." *Id.* at 22. Yet if only 52 people—which reflects less than 1% of arrestees in Chicago—successfully secured a phone call to contact the Public Defender,[5] there is a strong implication that "police are simply denying an unknown

[4] Although 725 ILCS 5/103-8 authorizes criminal prosecutions against police officers who intentionally violate the statute, amici are unaware of any such prosecutions.

[5] For reference, the Circuit Court in Cook Count reports that in 2015, 89% of all defendants in Cook County were represented by the Cook County Public Defender's Office. *See* Press Release, Circuit Court of Cook County, Chief Judge signs order to provide free lawyers for arrestees in CPD custody (Mar. 14, 2017), http://www.cookcountycourt.org/MEDIA/View PressRelease/tabid/338/ArticleId/2540/Chief-Judge-signs-order-to-provide-free-lawyers-for-arrestees-in-CPD-custody.aspx.

number of people's requests to call an attorney." *Id.* at 23. In other words, regardless of whether public defenders are available to consult arrestees in police custody, the legislative and judicial efforts to secure the right to counsel are meaningless if police continue to deny arrestees access to a phone. *See id.* at 22-24. And "t[his] pattern of denying arrestees access to counsel is particularly striking against CPD's long and tragic history of eliciting false confessions from unrepresented suspects." *Id.* at 24.

B. The City's pattern of incommunicado detentions and denied access to counsel increases the risk of false and coerced confessions.

The concerns regarding incommunicado detentions and the associated risk of false and coerced confessions are not merely hypothetical. A decade ago, the United States Supreme Court acknowledged that "there is mounting empirical evidence that the[] pressures [associated with custodial interrogation] can induce a frighteningly high percentage of people to confess to crimes they never committed." *Corley v. United States*, 556 U.S. 303, 321 (2009) (citing Steven Drizin & Richard Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N. C. L. REV. 891, 906-907 (2004)). Indeed, as early as 1987, research suggested that approximately 14% of "erroneous convictions" involved coerced or false confessions. *See* Hugo Bedau & Michael Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 57 (1987). By the mid-2000s, as recognized by the Court in *Corley*, DNA exonerations painted an even more troubling picture, and showed an even greater portion—approximately 25%—of later-identified wrongful convictions stemmed from false confessions. *See* Drizin & Leo, *supra* at 905.

Today, it is well-established that false confessions are a leading cause of wrongful convictions in the United States, accounting for approximately one quarter of all

convictions that have been overturned based on DNA evidence.[6] *See DNA Exonerations in the United States*, Innocence Project, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/?gclid=EAIaIQobChMI8o2J7ODy6gIVhIXICh29oQr-EAAYASAAEgLpzvD_BwE (last visited Aug. 2, 2020).

The available data reveals that the Chicago Police Department extracts from its suspects an alarming number of false confessions that lead to wrongful convictions. As of 2019, Illinois had the second highest number of exonerations in the country, almost 80% of which were cases from Cook County. The National Registry of Exonerations, at https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx. Of these cases, nearly a third involved false confessions. *See id.* Moreover, in 2017, Cook County was credited with almost half of all exonerations involving false confessions in the United States. *See* Janet Moore, *Reviving Escobedo*, 50 LOY. U. CHI. L.J. 1015, 1029 (2019). It is no surprise, therefore, that Chicago has earned the nickname "False Confession Capital of the United States." *See* Kevin Davis, *The Chicago Police Legacy of Extracting False Confessions is Costing the City Millions*, A.B.A. J. (July 1, 2018), https://www.abajournal.com/magazine/article/chicago_police_false_confessions.

[6] The statistics are even more troubling for persons wrongfully convicted of murder: of 137 individuals exonerated of murder charges based on DNA evidence since 1989, 83 had false confessions used as evidence in their cases. Thirty-three of the 83 falsely confessed themselves, while 20 of the cases involved codefendants who confessed, and another 30 within the group falsely confessed themselves *and* had co-defendants who confessed. Data provided by Innocence Project, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/?gclid=EAIaIQobChMI8o2J7ODy6gIVhIXICh29oQr-EAAYASAAEgLpzvD_BwE (last visited Aug. 2, 2020).

C. Research shows that prolonged isolation and incommunicado detention play a key role in inducing coerced and false confessions.

The prevalence of wrongful convictions based on false confessions is an inevitable consequence of coercive interrogation tactics, including incommunicado detention. Indeed, decades of research has demonstrated the inherent coerciveness of prolonged isolation, particularly under the circumstances presented in this case. *See* Saul Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 16 (July 15, 2009). Isolation is almost universally recognized as an effective tactic for manipulation, in large part because, as controlled experiments demonstrate, humans have a natural need for support from others in times of confusion and stress. *See id*; Roy Baumeister & Mark Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 PSYCHOL. BULL. 497, 508-11 (1996).

The experience of being held incommunicado in police custody is so stressful that even innocent suspects can act contrary to their own long-term best interests simply to bring an end to the isolation. *See* Kassin et al., *supra* at 16. Interrogators know this. Suspects are deliberately isolated—from family and counsel—to break down the suspect's ability to meaningfully exercise their Fifth and Sixth Amendment rights. *See id.* at 6, 14 ("Designed to overcome the anticipated resistance of individual suspects who are presumed guilty, police interrogation is said to be stress-inducing by design—structured to promote a sense of isolation and increase the anxiety and despair associated with denial relative to confession."); Fred Inbau, *Police Interrogation—A Practical Necessity*, 52 J. CRIMINOLOGY & POLICE SCI. 16, 17 (1961) ("Criminal offenders, except, of course, those caught in the commission of their crimes, ordinarily will not admit their guilt unless questioned under conditions of privacy, and for a period of perhaps several hours.").

The coerciveness of isolation is compounded when an individual is not only isolated, but also sleep-deprived. Sleep deprivation is often associated with isolation, especially in circumstances where the suspect is left in a room not suitable for sleep or, as in Mr. Salamon's case, handcuffed to a wall, making sleep nearly impossible. *See* Sara Appelby & Hadley McCartin, *Effective Assistance of Counsel? An Empirical Study of Defense Attorneys' Decision-Making in False Confession Cases*, 2019 CARDOZO L. REV. DE-NOVO 123, 132 (2019). (explaining that "[h]and-in-hand with lengthy interrogations comes sleep deprivation," which can "impair cognitive function and decision-making ability, making it difficult for sleep-deprived suspects to resist the social pressures inherent in a police interrogation.").

Social science studies have shown that lack of sleep can impair decision-making, allow a person to be misled by questioning, and heighten an individual's susceptibility to influence overall. *See id.*; Mark Blagrove, *Effects of length of sleep deprivation on interrogative suggestibility*, 2 J. EXPERIMENTAL PSYCHOL.: APPLIED 48, 56 (1996) (noting that "the results reported in this article show that suggestibility is increased by sleep loss [which] is important, given some of the methods that can be used in police interrogation"); Saul Kassin & Gisli Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 53 (2004) ("Controlled laboratory experiments show that fatigue and sleep deprivation, which accompany prolonged periods of isolation, can heighten susceptibility to influence and impair decision-making abilities in complex tasks").

Prolonged isolation, especially under the circumstances of this case, has long been recognized as an effective, coercive tactic used to induce suspects to confess to crimes. As

early as 1966, the Supreme Court recognized the "efficacy of th[e] tactic" of keeping a suspect alone, cut off from any lifeline to the outside world. *See Miranda*, 384 U.S. at 449-50 (citing police interrogation manuals and observing that "officers are told by the manuals that the 'principal psychological factor contributing to a successful interrogation is privacy—being alone with the person under interrogation'") (citation omitted); *see also People v. Harris*, 2012 IL App (1st) 100678, ¶ 52 (describing how "incommunicado interrogation—after a person is whisked from street to station for questioning, isolated from family and friends, and suddenly loses freedom of the outside world" tends to "trade[] on an individual's weakness and insecurity and present[] inherently coercive pressures that may compel a person to speak rather than refrain . . ."). Because the entire purpose of an interrogation is "to break the anticipated resistance of an individual who is presumed guilty" it is "stress-inducing by design . . . intentionally structured to promote isolation, anxiety, fear, powerlessness, and hopelessness." Drizin & Leo, *supra* at 911.

But while isolation may be an effective means of securing a confession, isolation-coerced confessions run a high risk of being untrue. *See* Kassin et al., *supra* at 16; s*ee also People v. Hall*, 413 Ill. 615, 624 (1953) ("A voluntary confession by a competent person of the guilt of a crime is the highest type of evidence – an involuntary confession obtained by brutality or coercion is wholly unreliable and is the most flagrant violation of the principles of freedom and justice.").

In times of desperate isolation and impaired cognitive functioning, the support of a lawyer to help an arrestee with decision-making and communications can be critical—the difference between an individual who can exercise his rights while in police custody, and one whose will is overborne. Denied the advice and guidance of counsel, an individual

subjected to prolonged incommunicado detention is at a dangerously high risk of succumbing to law enforcement's coercion and, against his own best interests, falsely confessing as a means of putting an end to the isolation. *See* Kassin et al., *supra* at 25, 30.

II. COURTS HAVE RECOGNIZED THE DANGERS OF ISOLATION AND DEVELOPED SAFEGUARDS AIMED AT MITIGATING THESE RISKS.

A. Decades of Supreme Court jurisprudence reflects the problems associated with prolonged isolation and the importance of counsel during custodial interrogation.

The Supreme Court has stressed that interrogations which involve "physical and psychological isolation" and other "inherently compelling pressures," can "heighten the risk that statements obtained [during such an interrogation] are not the product of the suspect's free choice." *J.D.B. v. North Carolina*, 564 U.S. 261, 268-69 (2011) (citations omitted). This recognition builds on decades of jurisprudence, wherein the Court has repeatedly condemned prolonged, incommunicado custody. *See, e.g.*, *Miranda*, 384 U.S. at 461 (noting that "[a]s a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts . . . where there are often impartial observers to guard against intimidation or trickery"); *see also Haynes v. Washington*, 373 U.S. 503, 514 (1963) ("We cannot blind ourselves to what experience unmistakably teaches: that even apart from the express threat, the basic techniques present here—the secret and incommunicado detention and interrogation—are devices adapted and used to extort confessions from suspects.").

Recognizing the dangers of incommunicado interrogations—and the need to combat the "inherently compelling pressures" of custodial interrogation—in *Miranda*, the Supreme Court made plain that, among other things, a suspect must be informed of his right to counsel—and "the exercise of th[at] right[] must be fully honored." *Miranda*, 384

U.S. at 467. The Court likewise explained that "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege," and "[t]he primary purpose of counsel is to act as a 'protective device to dispel the compulsion inherent in custodial surroundings'" and to "reduce[] the likelihood that the police will coerce a defendant into confessing," *People v. Winsett*, 153 Ill. 2d 335, 348–49 (1992) (quoting *Miranda*, 384 U.S. at 469-70).

So critical is the right to counsel, that the Court has stressed that, once a suspect invokes his right to counsel, police must "scrupulously honor" this request, *Miranda,* 384 U.S at 479, and may not reinitiate questioning until counsel has been made available, "unless the accused himself initiates further communication, exchanges, or conversations with the police," *Edwards,* 451 U.S. at 484-85. Thus, while suspects may waive their right to counsel at the outset of an attempted interrogation, any subsequent waiver is *presumed involuntary* "if the suspect initially requested the presence of counsel." *Maryland v. Shatzer*, 559 U.S. 98, 105 (2010). This rule, the Court has made clear, is necessary not only because of the risks associated with "police's persistence in trying to get the suspect to talk, but also from the continued pressure that begins when the individual is taken into custody as a suspect and sought to be interrogated—pressure likely to 'increase as custody is prolonged.'" *Id.* (citing *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990)). Thus, "[t]he *Edwards* presumption of involuntariness" helps "ensure[] that police will not take advantage of the mounting coercive pressures of 'prolonged police custody.'" *Id.* (citing *Arizona v. Roberson*, 486 U.S. 675, 686 (1988)).

Together, *Miranda* warnings and the *Edwards* rule are intended to deal directly with the problem of coercive, isolated interrogations by giving suspects the tools to put an

end to secret detentions through an invocation of the right to counsel.[7] But these procedural protections for the accused are, of course, only effective if they are "scrupulously honored" when invoked. *Miranda,* 384 U.S at 479. To that end, in addition to "adequately and effectively appris[ing] [an arrestee] of his rights," *Miranda* also mandates that "the exercise of those rights must be fully honored." *Id.* at 467. Put another way, *Miranda*'s protections only work to address the underlying problem of coercive interrogations (and the corresponding risk of false confessions), if police diligently comply with the law.

B. Illinois law goes beyond federal law in ensuring access to counsel before and during custodial interrogation.

In addition to federal protections, as this Court has previously recognized, "the right to the assistance of counsel has been afforded historically a certain degree of judicial solicitude and due process protection in Illinois." *People v. McCauley,* 163 Ill. 2d 414, 441 (1994). Indeed, both this Court and the Illinois legislature have sought to ensure that a suspect's rights are honored in the context of custodial interrogation, even beyond what is required under federal law.

Even before *Miranda*, the Illinois legislature recognized "the right [of the accused] to communicate with an attorney of their choice and a member of their family," and that, such communication with counsel must be permitted by the police "within a *reasonable* time after arrival at the first place of custody." 725 ILCS 5/103-3(a) (emphasis added). The Joint Committee on Administrative Rules—which serves as an oversight committee for the Illinois General Assembly—has further clarified that the phrase "within a reasonable time

[7] Police must also cease questioning if a suspect unambiguously invokes his right to remain silent. *See Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010) (discussing "the *Miranda* right to remain silent and the *Miranda* right to counsel" and explaining that "[b]oth protect the privilege against compulsory self-incrimination . . . by requiring an interrogation to cease when either right is invoked") (citations omitted).

after arrival at the first place of custody," should be interpreted as "generally within the first hour[] after arrival at the first place of custody." 20 Ill. Admin. Code, tit. 20, § 720.20(b). State law also requires that police advise persons in custody of their right to communicate with a lawyer by "post[ing] in every room, other than cells . . . in conspicuous places where it may be seen and read by persons in custody and others, a poster" that contains the relevant information. 725 ILCS 5/103-7. The purpose of these statutes is to remove obstacles to a suspect's assertion of his rights and to facilitate access to counsel. *See Prim*, 53 Ill. 2d at 69-70.

This Court has remained steadfast in its commitment to a suspect's right to access counsel. Even as federal courts have limited the scope of *Miranda*'s protections, this Court has "refus[ed] to allow this state's counterpart to the fifth amendment right to counsel to diminish the way the federal right [has]." *Relsolelo v. Fisk*, 198 Ill. 2d 142, 152 (2001) ("Rather than join the divergence regarding incommunicado interrogation undertaken by the federal judiciary in *Burbine*, this court decided in *McCauley* to stay true to the path begun in *Miranda* and *Escobedo*.").

Indeed, Illinois law goes beyond federal law, by ensuring both earlier and broader access to legal counsel. *See id.* at 151 (explaining that, in certain instances, this Court has "concluded that the right to counsel under the Illinois Constitution should be construed more broadly than its federal counterpart"). In *McCauley*, this Court held that statements made by a defendant whose attorney was present at the police station (unbeknownst to the defendant), but not allowed to consult with him, should be excluded under the Illinois Constitution. *McCauley*, 163 Ill. 2d at 419-20, 439-40 (1994) (explaining that the police conduct violated the state's constitutional "self-incrimination guarantee" and due process

provision). Despite the Supreme Court's earlier ruling in *Moran v. Burbine*, 475 U.S. 412, 425 (1986)—that suppression was not required in similar circumstances under the federal Fifth Amendment protection against self-incrimination—this Court made plain that the Illinois Constitution "afford[s] [a] defendant a greater degree of protection" than its federal counterpart. *McCauley*, 163 Ill. 2d at 423. This Court reasoned that "[t]he day is long past in Illinois . . . where attorneys must shout legal advice to their clients, held in custody, through the jailhouse door." *Id.* The *McCauley* Court further explained that, "[i]f a defendant is entitled to the benefit of an attorney's assistance and presence during custodial interrogation and this right is guarded, certainly fundamental fairness requires that immediately available assistance and presence not be denied by police authorities." *Id.* at 444.

III. ALLOWING POLICE TO SYSTEMATICALLY THWART ACCESS TO COUNSEL DURING CUSTODIAL INTERROGATION INCREASES THE RISK OF FALSE CONFESSIONS—AND THIS COURT SHOULD CONDEMN THE COERCIVE AND UNLAWFUL PRACTICES AT ISSUE IN THIS CASE.

A. The decision below renders the rights articulated in *Miranda*, *Edwards*, and *McCauley* toothless.

Allowing police to disregard a suspect's request for counsel—while simultaneously subjecting him to prolonged isolation until he finally agrees to waive this request—violates the accused's federal and state constitutional rights and constitutes a clear violation of 725 ILCS 5/103-3(a), rendering the protections of *Miranda, Edwards, McCauley,* and the Illinois statutory scheme utterly meaningless. Indeed, these decisions are rooted in an assumption—that when an individual detained by police is informed of his right to counsel, and invokes that right to counsel, the government will either cease questioning and allow

the individual to obtain representation *prior to continuing any interrogation*,[8] or, his case will continue to be processed (such as arraignment procedures, etc.) and he will have access to counsel for those subsequent steps in the process. The Chicago Police Department thwarted these procedural safeguards in this case—consistent with the department's long-standing practices, discussed *supra*.

Indeed, in this case, officers testified to a regular practice of delaying an arrestee his entitled phone call to contact counsel until after "booking." *Salamon*, 2019 IL App (1st) 160986-U, ¶ 16. Because the core purpose of 725 ILCS 5/103-3(a) is to effectuate constitutional protections, allowing police to disregard a suspect's request to contact counsel should render any statements procured after a flagrant violation of 725 ILCS 5/103-3(a) inadmissible.

The appellate court found it significant that police "informed [Mr. Salamon] of his rights on more than one occasion while he was in police custody" and he "evidenced an understanding of his rights by first invoking his right to counsel and then by waiving his rights after reinitiating contact with police." *Id.* ¶ 60. Yet this reasoning rings hollow. Whether an arrestee has an "understanding" of his rights is indeed essential under *Miranda*.

[8] The narrow exception is that if a suspect, after invoking his right to counsel, and having that invocation scrupulously honored, reinitiates communication with police and expresses "a desire . . . to open up a more generalized discussion relating directly or indirectly to the investigation," police may reengage with the accused without counsel present. *Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983). However, "[e]ven if the accused initiates a conversation that takes place after he has expressed the desire to deal with the police only through counsel, where reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver of the fifth amendment right to have counsel present during the interrogation." *People v. Olivera*, 164 Ill. 2d 382, 389 (internal citations omitted).

But an understanding of one's rights is meaningless for an arrestee who is powerless to exercise them.

An arrestee who is told he is entitled to an attorney, requests an attorney, and who then has those requests ignored and is instead placed in prolonged, incommunicado detention, will understand what is effectively being communicated by police: there is no right to counsel until after consenting to interrogation. *C.f. Wainwright v. Greenfield*, 474 U.S. 284, 292 (1986) (explaining that the *Miranda* warnings are given by the state "to protect constitutional rights," and in so doing the state "implicitly promises that any exercise of those rights will not be penalized"). This practice undermines the purpose and spirit of *Miranda* and its progeny. Indeed, while "*Miranda* requires procedures that will warn a suspect in custody of his right to remain silent," the purpose of these warnings is to "*assure the suspect that the exercise of that right will be honored.*" *Dickerson v. United States*, 530 U.S. 428, 442 (2000) (emphasis added).

The officers in this case deliberately violated Mr. Salamon's constitutional and statutory rights, and the appellate court's approval incentives this unlawful conduct. The decision below "in effect condone[s], the lawless activities of law enforcement officers." *Elkins v. United States*, 364 U.S. 206, 220 (1960) (internal quotation marks omitted); *see also McNabb v. United States*, 318 U.S. 332, 345 (1943) (explaining that a "conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law").

The Supreme Court's reasoning in *Missouri v. Seibert*, 542 U.S. 600 (2004), is instructive. In *Seibert*, the Court reviewed the police practice of eliciting a preliminary

confession or statement without providing the suspect with *Miranda* warnings and, thereafter, giving the mandated *Miranda* warnings, followed by a second interrogation that seeks to elicit the very information from the suspect that was obtained in the first interrogation. *See id*. at 606. An officer testified during trial that the approach was a "'conscious decision' to withhold the *Miranda* warnings" based on "an interrogation technique he had been taught." *Id.* at 605-06.

The delayed booking practice at issue here, seemingly an effort to avoid complying with the mandate of section 103-3, and more broadly, a suspect's right to counsel under both the United States and Illinois Constitutions, is analogous to the police practices at issue in *Seibert*. In both instances, "police strategy" seem to be impermissibly "adapted to undermine" constitutional protections. *See id.* at 616.

As detailed above, exclusion here is the only option. Just as it was 60 years ago, the delayed booking practice is still used in Chicago today—despite statutes requiring an arrestee be permitted a phone call and access to counsel in a reasonable time, 725 ILCS 5/103-3, 103-4, despite court cases explaining that arrestees must be allowed a phone call to family or counsel, *People v. Sanchez*, 2018 IL App (1st) 143899, ¶ 75, and despite a consent decree further reinforcing those rights, Case No. 17-CV-6260, Document 703-1.[9] This Court must condemn this practice of eliciting statements given under the

[9] As noted by the appellate court, *see Salamon*, 2019 IL App (1st) 160986-U, ¶ 61 n.10, in January 2019, the United States District Court for the Northern District of Illinois entered a consent decree between the City of Chicago and the State of Illinois, which, among other things, requires Chicago police officers to take additional steps to advise suspects of their right to an attorney and to provide them with access to a phone call to obtain counsel. *See* Consent Decree, Case No. 17-CV-6260, Document 703-1. Specifically, under the terms of the consent decree, the Department must "provide arrestees access to a phone and the ability to make a phone call as soon as practicable upon being taken into custody." *Id.* at 8.

circumstances at issue in this case—prolonged, isolated detention and repeated refusal to grant demands for a lawyer in direct contravention of state and federal law.

B. This Court should apply its decision in *McCauley* to ensure that police stop interfering with access to counsel.

This Court has underscored that the "constitutional and statutory policies of [this] State favor a person *having* the assistance of counsel during custodial interrogation and contemplate prohibiting interference with that assistance by governmental authorities." *McCauley*, 163 Ill. 2d at 444 (emphasis in the original). But as illustrated in Part A *supra*, despite this Court's commitment, access to an attorney during custodial interrogation remains illusory for the overwhelming majority of individuals detained by the Chicago police precisely *because of* interference by governmental authorities.

In *McCauley*, this Court held that under the Illinois Constitution, an arrestee's statements to police are considered involuntary and inadmissible if counsel is present but refused access and the arrestee is not made aware of counsel's presence. *See McCauley*, 163 Ill. 2d at 449. This Court affirmed,[10] concluding that the police conduct in preventing a suspect from speaking to his attorney, violated the defendant's rights under the Illinois Constitution—and reflected "exactly the sort of scenario previously condemned by the United States Supreme Court in *Escobedo* and *Miranda*." *Id.* at 424.

Here, as in *McCauley*, the actions of police reflect the type of "interference with the assistance [of counsel during custodial interrogation] by governmental authorities" that is prohibited by Illinois law. *See id.* at 444. Indeed, if denying a defendant access to a

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[10] *McCauley's* protections are broader than those discussed in *Escobedo* because Escobedo, unlike McCauley, knew that Wolfson was at the station; the two saw each other for a few seconds with Wolfson waving at Escobedo and Escobedo waving back. *See Escobedo,* 378 U.S. at 480.

lawyer he does not know he has is a violation of Illinois law, and renders his resulting statement involuntary, so too must actions by the police to deny the repeated and unequivocal requests of a suspect who affirmatively seeks counsel and requests a phone call to effectuate his right to counsel. Just as in *McCauley*, this Court must condemn the conduct in this case—which amounted to deliberate efforts by police to deny an individual the "*benefit* of counsel," *id.* at 441, rendering any prior (or subsequent) warnings meaningless, *see id.* at 442—by suppressing the confession and reversing the court below.

***

The interrogation tactics here ultimately resulted in a suspect giving an inculpatory statement, which is presumably the goal of any interrogation. But, as the Supreme Court noted many years ago, "[n]o system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights." *Escobedo*, 378 U.S. at 490. As this Court further reinforced, "[i]f our system is, indeed, such a system, we have no reason to fear both lawful and protected consultation." *McCauley*, 163 Ill. 2d at 446.

CONCLUSION

For the foregoing reasons, as well as those presented in the appellant's brief, the judgement of the appellate court should be reversed.

Dated: August 4, 2020

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 24 pages.

Sean M. Berkowitz

No. 125722

In The Supreme Court Of Illinois

PEOPLE FOR THE STATE OF ILLINOIS, Respondent-Appellee, v. ANDREW SALAMON, Defendant-Appellant.	)	On Appeal from the Illinois Appellate Court, First Judicial District, Case Nos. 1-16-0986. There on Appeal from the Circuit Court of Cook County, Illinois, No. 12 CR 2706. Hon. Erica L. Reddick Judge Presiding

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PLEASE TAKE NOTICE that on August 4, 2020, the Center for Wrongful Convictions and the Innocence Project electronically filed in the Supreme Court of Illinois a Brief of Amicus Curiae The Center for Wrongful Convictions and The Innocence Project in Support of Appellant, a copy of which is hereby served upon you.

Dated: August 4, 2020

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The undersigned certifies that on August 4, 2020, the BRIEF OF AMICUS CURIAE THE CENTER FOR WRONGFUL CONVICTIONS AND THE INNOCENCE PROJECT IN SUPPORT OF APPELLANT was filed with the Supreme Court of Illinois through its electronic filing system, and that copies of the above-listed Brief were served by electronic mail upon the following counsel for the parties to all primary and secondary email addresses listed below:

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Additionally, the Brief will be served via the Court's electronic filing system on all Counsel for Petitioner-Appellant and Respondent-Appellee.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

Sean M. Berkowitz