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No. 130110

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS Respondent-Appellee, v. OCHEIL KEYS, Petitioner-Appellant.	))))))))))))	On Appeal from the Illinois Appellate Court, Fourth Judicial District, Case No. 4-21-0630, 4-22-0017 & 4-22-0018 (Consolidated) There heard on Appeal from Circuit Court of Vermilion County, Illinois, No. 17-CF-725 Hon. Nancy S. Fahey Judge Presiding.

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER-APPELLANT

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POINTS AND AUTHORITIES

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INTEREST OF AMICUS CURIAE

The Exoneration Project ("the EP"), an Illinois not-for-profit legal services organization, is one of the largest and most successful innocence organizations in the country. The EP is comprised of a dedicated team of attorneys, paralegals, investigators, and law students who strive to free and vindicate those who were wrongfully convicted for crimes they did not commit. To date, the EP has exonerated over 200 clients, liberating them to live their lives and enjoy their freedom. Beyond assisting clients with their innocence claims in court, the EP also seeks to shed light on the problems in the criminal justice system that allow innocent people to be convicted of crimes they did not commit.

ARGUMENT

This Court Should Find That Before Admitting the Accusatory Statements of Police Officers from a Recorded Interrogation Video, Courts Must Conduct a Robust Inquiry as to Admissibility, and, For Admissible Videos, Instruct the Jury About the Purposes for Which it Can be Considered

Parallelling the Federal Rules, Illinois courts conduct a balancing test when considering the admissibility of any evidence: "when deciding whether to exclude certain evidence, the proper consideration is whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." *People v. Walker*, 211 Ill.2d 317, 337-38 (2004); IL. R. EV. 403. Now that police interrogation videos are routinely videotaped as a matter of law, the issue of admitting the recorded accusatory statements by police officers in this context brings this rule to the forefront. The Exoneration Project, acting as *amicus curiae*, urges this Court to rule that a thorough admissibility examination is required for the admission of any accusatory statements by police officers and that any portion of any such videos deemed admissible necessitates a limiting jury instruction.

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A. A Thorough Case-by-Case Consideration of the Admissibility of All Portions of Any Proffered Custodial Police Interrogation Video is Always Warranted

Whenever courts are faced with the question of whether evidence is admissible, they adjudicate the issue on a case-by-case basis, applying the Illinois Rules of Evidence. *People v. Valdez*, 2022 IL App (1st) 181463, ¶ 138. Accordingly, Illinois' appellate courts have recognized the need for an individualized admissibility assessment before allowing the admission of videotaped custodial police interrogations. *See, e.g.*, *People v. Davila*, 2022 IL App (1st) 190882, ¶ 53 ("Each case involving a videotaped interrogation must be decided on its own facts while viewing the statements of both the police and the defendant in the context of the entire video and against the evidence offered at trial.") (collecting cases).

In particular, statements made by police during an interrogation are "subject to relevancy requirements as well as the familiar test weighing probative value versus prejudicial effect." *People v. Hardimon*, 2017 IL App (3d) 120772, ¶ 35. When an interrogation video contains both admissible and inadmissible portions, redaction is warranted to remove the inadmissible portions from the eyes of the jury, to avoid allowing the jury to hear prejudicial, accusatory questioning that is not relevant and that would lead a jury to conclude that police believe the defendant is guilty. *See, e.g.*, *Hardimon*, 2017 IL App (3d) 120772, at ¶ 39 (finding that "defense counsel was ineffective in failing to move to redact or otherwise exclude the final two-thirds of the video").

Indeed, courts around the country have recognized the importance of this particularized admissibility adjudication, with redaction of inadmissible accusatory portions, because these types of interrogation video often include statements by law enforcement officers that would be otherwise inadmissible if presented as trial testimony. *See, e.g., State v. Cordova*, 137 Idaho 635, 641, 51 P.3d 449, 455 (Ct. App. 2002) ("Although we agree … that the tactics employed in Cordova's interrogation are acceptable interrogation tactics, we do not agree that certain

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comments, which may be permissible for purposes of interrogating a defendant, are also admissible in court for consideration by the jury."); *Commonwealth v. Kitchen*, 1999 PA Super 100, 730 A.2d 513, 515 (1999) (requiring the Commonwealth to redact video interrogation to omit portions that would be inadmissible); *State v. Willis*, 165 N.H. 206, 219, 75 A.3d 1068, 1077 (2013) (acknowledging that "certain tactics, which may be permissible for purposes of interrogating a defendant, are not necessarily also admissible at trial for consideration by the jury"); *Sweet v. State*, 2010 WY 87, ¶ 28, 234 P.3d 1193, 1204-05 (Wyo. 2010) (deputy's statements in interrogation video "violated in a clear and obvious way this Court's long-standing rules prohibiting a witness to express opinions about the accused's mendacity and guilt and about the alleged victim's truthfulness and credibility; such statements invade the exclusive province of the jury to determine the credibility of the witnesses and the evidence.").

The Kansas Supreme Court surveyed cases around the country and articulated how just because statements constitute permissible interrogation tactics, that does not mean they are admissible or appropriate for the jury to hear:

> A synthesis of the referenced case law leads us to conclude that it was error for Detective Hazim's comments disputing Elnicki's credibility to be presented to the jury. The jury heard a law enforcement figure repeatedly tell Elnicki that he was a liar; that Elnicki was "bullshitting" him and "weaving a web of lies." The jury also heard the same law enforcement figure suggesting he could tell Elnicki was lying because Elnicki's eyes shifted. A jury is clearly prohibited from hearing such statements from the witness stand in Kansas and likewise should be prohibited from hearing them in a videotape, even if the statements are recommended and effective police interrogation tactics.

State v. Elnicki, 279 Kan. 47, 57, 105 P.3d 1222, 1229 (2005).

Because this case presents an issue of first impression for this Court, it would be beneficial for the Court to similarly articulate the importance of conducting a case-by-case assessment of the admissibility of custodial police interrogation videos and to instruct the lower courts to redact any inadmissible portions from the videos, to avoid trial errors. "Requiring the

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State to offer some legally valid foundation prior to admitting inherently unreliable and prejudicial evidence seems but a small intrusion on judicial expediency[.]" *People v. Jackson*, 202 Ill.2d 361, 372 (2002). As argued below, the alternative—allowing the jury to hear inadmissible interrogation tactics that convey the police's belief about a defendant's guilt—will contribute to wrongful convictions.

This Court's teachings on the admissibility of polygraph evidence provides a useful, analogous parallel for assessing admissibility. As with interrogation videos, polygraph evidence similarly contains inadmissible evidence that carries a serious risk of overinfluencing the jury. *People v. Jefferson*, 184 Ill.2d 486, 493 (1998) (the risk of polygraph evidence is that it "may lead a trier of fact to give the evidence undue weight, notwithstanding its lack of reliability."). And, like polygraph evidence, the State often seeks to admit video interrogation evidence "for the limited purpose" of showing context for a defendant's subsequent admissions. *Compare, e.g., People v. Whitfield*, 2018 IL App (4th) 150948, ¶ 49; *Jackson*, 202 Ill.2d at 369-70. This Court is clear in the polygraph context: "If the State wishes to admit polygraph testimony to flesh out the circumstances surrounding a confession, it may attempt to do so only in the limited circumstances outlined in *Jefferson*": *i.e.*, to "rebut the defendant's claim of coercion[.]" *Jackson*, 202 Ill.2d at 372; *Jefferson*, 184 Ill.2d at 495. Similar guidance on the limited purposes for which police accusations during interrogation videos may be used is needed. And, as discussed below, instructions clarifying those limited purposes are likewise needed.

B. Accusatory Statements by Police in an Interrogation Are Uniquely Prejudicial

Courts recognize that lay people typically give special credence to things said by law enforcement officers. *See, e.g., People v. Munoz*, 398 Ill. App. 3d 455, 489 (1st Dist. 2010) ("Detective Rutherford is a police officer, and therefore a 'figure of authority,' whose testimony

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the jury likely would have credited with more weight."); *People v. Crump*, 319 Ill. App. 3d 538, 542 (3d Dist. 2001) ("A police officer is a figure of authority whose testimony may be prejudicial if the officer informs the jurors that they should believe a portion of the prosecution's case."); *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983) (agreeing that "the policeman in uniform carries special credibility in the eyes of jurors."); *United States v. Gutierrez*, 995 F.2d 169, 172 (9th Cir. 1993) (law enforcement officer testimony "often carries an aura of special reliability and trustworthiness.").

This extra weight that juries tend to afford to law enforcement often derives from an assumption that the officers must know more about the case than the jury is being told. *See, e.g., United States v. Jett*, 908 F.3d 252, 267 (7th Cir. 2018) (jurors may "unduly credit the opinion testimony" from law enforcement officers as experts "due to a perception that the expert was privy to facts about the defendant not presented at trial" or be unduly influenced by an "aura of special reliability.") (cleaned up).

C. As Other Jurisdictions Have Found, Trial Courts Should Redact All Inadmissible Accusatory Statements of Police Officers and Issue a Limiting Instruction for the Use of Any Admissible Portions of Police Interrogation Videos

Given the realty of the weight juries give to the opinions of law enforcement, the need for a limiting jury instruction for statements made by law enforcement is widely recognized by courts because "without a proper jury instruction, a juror may feel inclined to either take a police officer's testimony as *per se* truth, or even give such testimony added weight due simply to the professional status of the person giving the testimony." Ikedi O. Onyemaobim, *The Michael Brown Legacy: Police Brutality and Minority Prosecution*, 26 Geo. Mason U. Civ. Rts. L.J. 157, 166 (2016). *See, e.g., People v. Freier*, 228 A.D.2d 520, 644 N.Y.S.2d 306, 307 (1996) ("the court's failure to instruct the jury that the testimony of a police officer is entitled to no greater

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weight than the testimony of an ordinary citizen [along with another error] warrants reversal"); *United States v. Williams*, 212 F.3d 1305, 1311 (D.C. Cir. 2000) ("The absence of an instruction limiting the jury's use of the [officer's] challenged testimony may have reinforced it."); *People v. Hill*, 17 Cal. 4th 800, 842-43, 952 P.2d 673, 696 (1998) ("the court should have instructed the jury sua sponte not to give Pena's testimony any artificial weight merely because he was a bailiff."); *Datsko v. City of Philadelphia*, CIV.A. 93-4746, 1995 WL 574364, at *2 (E.D. Pa. Sept. 26, 1995) (trial error could be cured with "the usual instruction to the jury that testimony should not be accorded enhanced credibility simply because the witness was a police officer."); *United States v. Alston*, 375 F.3d 408, 412 (6th Cir. 2004) ("concern that the officers' testimony would be given greater deference because of their status" was adequately addressed by jury instructions); *United States v. Victoria-Peguero*, 920 F.2d 77, 85 (1st Cir. 1990) (court's repeated jury instruction about law enforcement testimony not being entitled to greater weight than that of other witnesses cured trial errors).

This need for a limiting instruction, recognized by courts around the country, becomes even more pronounced in the context of officer statements in interrogation videos than it is in the context of officer testimony for a variety of reasons. In videotaped custodial interrogations, officers are usually in uniform, exerting their authority, and implying an insider's knowledge of facts suggestive of guilt. *See, e.g.,* § 12:9. *Controversies faced when addressing this subject matter in court*, 2 Litig Hnbk Forensic Med Psy § 12:9 ("lying about evidence is common in police interrogations, interrogation trainers suggest techniques misrepresenting evidence can elicit confessions") (footnote omitted); *People v. Burgund*, 2022 IL App (5th) 180378-U, ¶¶ 84-85 (recounting testimony from Dr. Richard Leo, professor of law and psychology at the University of San Francisco, about how one cause of false confessions is police interrogators'

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"false evidence ploys"). Jurors seeing such displays are likely even more susceptible to the officers' "aura of reliability" than they would be during officer testimony.

Additionally, as discussed above, interrogation videos often contain statements made by officers that would not ordinarily be admissible as testimony. For this reason, when considering the admissibility of interrogation videos, "Most of the other courts that have addressed this issue have endorsed limiting admonitions either by approving the trial court's use of such an admonition or by proposing the use of such an admonition." *Lanham v. Commonwealth*, 171 S.W.3d 14, 28 (Ky. 2005) (footnote collecting cases omitted) (holding, "We think the better remedy to any possible adverse inference by the jury is a limiting admonition given by the court before the playing of the recording."). *See also State v. Demery*, 144 Wash.2d 753, 30 P.3d 1278, 1283 (2001) ("We note, however, that when the trial court admits third party statements to provide context to a defendant's responses, the trial court should give a limiting instruction to the jury, explaining that only the defendant's responses, and not the third party's statements, should be considered as evidence."); *Dubria v. Smith*, 224 F.3d 995, 1002 (9th Cir. 2000) (approving the trial court's use of a limiting instruction); *People v. Musser*, 494 Mich. 337, 358, 835 N.W.2d 319, 332 (2013) (finding reversible error where untimely limiting instruction was insufficient to protect against the prejudice from officer's aura of knowledge conveyed in interrogation video).

The need for limiting instructions pertaining to interrogation videos is exacerbated by the added wrinkle that the video necessarily includes not just the officers' statements, but also a visual evisceration of the presumption of innocence. In the courtroom, a cornerstone to justice is that an accused is entitled to the presumption of innocence. *People v. Peeples*, 205 Ill.2d 480, 527-28 (2002) (the presumption of innocence, "is a basic component of a fair trial under our system of criminal justice."). But that presumption is severely undermined by an interrogation

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video where the accused is not free to go, and the officers use the interrogation tactic of asserting that they "know" the accused is guilty. *See, e.g., People v. Hughes*, 2013 IL App (1st) 110237, ¶ 73, *aff'd in part, rev'd in part on alternate grounds*, 2015 IL 117242 (observing that the "detectives' claims of having nonexistent evidence is a common police strategy" during interrogations). For example, in this case, the police told the accused over a dozen times, in varying forms, that their investigation had already proven he was the murderer and that his innocent explanations of what occurred were lies. *See* Exh. 21 53:49-55:25, 58:18-59:35, 2:33:12-2:34:10, 2:42:20-2:45:05, 2:46:22-2:47:54, 2:49:01-2:53:00.

There are other issues. In some contexts, police are permitted to confront suspects with false evidence during an interrogation. *Frazier v. Cupp*, 394 U.S. 731 (1969). In those instances, the jury might learn about "evidence" inculpating a suspect that does not actually exist.

To counter such concerns, at bare minimum, a cautionary instruction is needed advising the jury not to credit such claims for the truth of the officers' assertions. Otherwise, the jury is undoubtedly going to credit the persuasive display of authority from law enforcement, indicating confidence in the accused's guilt, without understanding that this is just an interrogation tactic, not reliable evidence of guilt. *See, e.g., People v. Boling*, 2014 IL App (4th) 120634, ¶ 135 ("Although the State purports to have offered the testimony for the limited purpose of explaining the course of [] conduct, the jury was never instructed to limit its consideration of the evidence accordingly. We see no reason why the average juror would *not* consider the testimony as evidence of defendant's guilt[.]"); *People v. Trotter*, 254 Ill. App. 3d 514, 527-28 (1993) ("If such testimony is presented, however, the trial court must instruct the jury that the testimony was introduced for the limited purpose of explaining what caused the police to act and that they were

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not to accept the statement as true. [Citation.] No such instruction was given in this trial. Thus, it cannot be presumed that the jury's use of the evidence was limited to non-hearsay purposes.").

Consider that the officers' display of authority is often compelling enough to make an innocent person themself—someone who knows they did not commit the crime—lose confidence in their own innocence and falsely confess. *See, e.g.,* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denv. U.L. Rev. 979, 983 (1997) ("confessions by the innocent still occur regularly, and will likely continue until police and other criminal justice officials develop a better understanding of the dangers of contemporary interrogation practices and establish safeguards to prevent their misuse.") (footnote omitted); Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 Studs. in Law, Politics, & Soc'y 189, 191-92 (1997) (explaining why interrogation techniques can cause innocent persons to confess to crimes they did not commit). A display powerful enough to induce a false confession is likely powerful enough to unduly sway the jury as well. It should not be presented without an admonishment about its limited purpose.

D. Wrongful Convictions Are More Likely When the Jury Is Not Properly Admonished

Courts generally assume that when the jury is properly instructed, it follows the law and does not consider evidence for impermissible purposes. *See, e.g., People v. Simms*, 192 Ill.2d 348, 373 (2000) ("We must presume, absent a showing to the contrary, that the jury followed the trial judge's instructions in reaching a verdict."); *People v. Wilmington*, 2013 IL 112938, ¶ 49 ("Absent some indication to the contrary, we must presume that jurors follow the law as set forth in the instructions given them."); *Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (discussing cases applying the "assumption of the law that jurors follow their instructions"). The corollary to

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that assumption is that the failure to properly instruct a jury leads to unjust results. *E.g., People v. Williams*, 2017 IL App (1st) 142733, ¶ 50 (failure to ensure that the jury is "properly instructed on the elements of the crime charged, on the presumption of innocence and on the question of burden of proof" deprives a defendant "of a fair and impartial trial").

Of course, many have also doubted the efficacy of jury instructions, and they are not a panacea nor a substitute for the courts meaningful weighing whether the probative value outweighs the prejudicial effect of the evidence. *See, e.g., Bruton v. United States*, 391 U.S. 123, 129 (1968) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury … all practicing lawyers know to be unmitigated fiction.") (quoting *Krulewitch v. United States*, 336 U.S. 440, 453 (1949), Jackson, J., concurring; footnote omitted). This is why a default to the redaction of police accusatory statements is the better practice.

But a well-instructed jury is certainly better than the alternative of no instructions, and there is research supporting the idea that instructions can be useful in helping to prevent wrongful convictions. *See, e.g.,* Fiona Leverick, *Jury Instructions on Eyewitness Identification Evidence: A Re-Evaluation*, 49 Creighton L. Rev. 555 (2016) (challenging the suggestion that jury instructions are an ineffective safeguard against wrongful conviction caused by mistaken eyewitness identification); James R. Acker & Sishi Wu, *"I Did It, but ... I Didn't": When Rejected Affirmative Defenses Produce Wrongful Convictions*, 98 Neb. L. Rev. 578, 625 (2020) (deficient jury instructions "often contribute to wrongful convictions when self defense is at issue").

At the end of the day, wrongful convictions are more likely to occur when jurors hear police officers insisting that the accused is guilty and that they have the evidence to prove it, especially without an explicit instruction admonishing the jury that such statements are merely interrogation tactics, not evidence. When such statements survive the more-probative-than-

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prejudicial test and are presented to the jury, an instruction is needed, or else juries will impermissibly and erroneously perceive the officers' insistence in the accused's guilt as powerful, reliable evidence.

Indeed, the case at hand illustrates the risks. The jury heard the detectives tell Mr. Keys that they knew he committed the crime. *See, e.g.,* Exh. 21 53:49-54:22 ("We've concluded our investigation up to this point and it's very clear that you caused the disappearance of Barbara, okay?"); Exh. 21 2:44:09-2:45:05 ("[W]e're past the point of that you didn't do it. We're ...not there anymore. Okay."); Exh. 21 2:46:54-2:47:54 ([Y]ou are sitting there telling us that you had nothing to do with this... . It paints you as a cold-hearted person. That you killed a mother in cold blood. And you sat here and you lied. You had no remorse for it. They're gonna play this in front of the jury and you're gonna sit here and tell us that you had nothing to do with this when everything up to this point and continuing past this is gonna prove otherwise. And you, you sat here and had no remorse. None. None. You did it out of cold blood.").

The jury also heard the detectives say that—regardless of what evidence was admitted and presented to them at trial—the detectives possessed conclusive evidence disproving Mr. Keys' defense and proving his guilt. *See, e.g.,* Exh. 21 2:52:02-2:53:00 ("I think you understand that ... the stuff we're presenting to ya, and I'm not giving you everything. I'm giving you enough, because I want you to be honest with me, I'm just giving you enough to lead you along, okay. I'm just giving you the stuff so that maybe you will find it in your heart to say, okay, since these guys are being straight with me, they're telling me these things, they know what's up, maybe I'll help them out with this other stuff."); Exh. 21 2:33:12-2:34:10 ("That's already been debunked, okay. I know that you told us that, but that has already been proved to be false."); Exh 21 2:49:01-2:50:07 ("You know that it's not because I need you to tell me so that I can prove my

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case that you did it. That's already been taken care of."). If a jury is going to hear such inflammatory statements, at bare minimum, the court needs to at least advise it that these are merely interrogation tactics and cannot be relied upon as truth and proof of guilt.

CONCLUSION

Wrongful convictions are grave tragedies that hurt us all: the wrongfully accused who serve terms of unwarranted incarceration, their families and communities, the crime victims whose true perpetrators remain free, the communities in which the true perpetrator remains free to commit more crimes, and the Illinois taxpayers who pay the price. Nevertheless, "Chicago is the wrongful conviction capital of the nation, and a disproportionate number of wrongful convictions were elicited… by police who were allowed to lie … during questioning[.]" Lucy Litt, *Underage and Unprotected: Federal Grand Juries, Child Development, and the Systemic Failure to Protect Minors Subpoenaed As Witnesses*, 92 U. Cin. L. Rev. 89, 117 (2023) (quoting Illinois Senator Robert Peters). Instead of leading the nation in wrongful convictions, this Court should provide the clarity needed and lead the way on thoughtful approaches to the admission of custodial interrogation videos. Limits on the admissibility and use of such evidence, particularly police's accusatory statements, along with clear jury instructions when the evidence is admitted are important steps in this leadership.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b), and 345(b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to appended to the brief under Rule 342(a), is 3,886 words.

/s/ Debra Loevy
Debra Loevy