# IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS CRIMINAL DIVISION

People of the State of Illinois, Plaintiff,

v.

Hyungseok Koh,

Defendant.

)

)

)

) No. 09 CR 9151

)

) Hon. Garritt Howard

)

)

)

)

# MR. KOH’S MOTION TO RECONSIDER PRIOR RULING ON MOTION TO QUASH ARREST AND SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO SUPPRESS

The pending motion to suppress hearing has focused on two legal questions: (1) whether Hyungseok Koh’s allegedly inculpatory statements were involuntary; and (2) whether they should be excluded under Illinois Rule of Evidence 403. In his motion, Mr. Koh did not ask the Court to revisit its earlier ruling that Mr. Koh was not in custody until after the interrogation ended. Newly-decided case law and new facts elicited during the pending hearing, however, now impel Mr. Koh to do just that.

In Part I of this brief, Mr. Koh explains why the Court should reconsider its prior decision and hold that he was in custody throughout the interrogation, or, alternatively, at least from the point in the interrogation when Sergeant Graf first accused Mr. Koh of killing his son. In Part II, Mr. Koh shows that the Court should suppress his statements for three reasons in addition to those that Mr. Koh asserted in his initial motion to suppress: (1) as this Court has already found, throughout the interrogation the police did not have probable cause to detain Mr. Koh, meaning all statements he made are the fruits of an unlawful seizure under the Fourth Amendment; (2) Mr. Koh was not given proper *Miranda* warnings prior to his custodial interrogation, and did not knowingly and intelligently waive his *Miranda* rights; and (3) Mr. Koh was denied his right to counsel under *People v. McCauley*, 163 Ill. 2d 414 (1994).

# ARGUMENT

1. **The Court Should Reconsider Its Earlier Ruling That Mr. Koh Was Not In Custody Throughout The Interrogation Because Both New Law And New Facts Have Undermined The Basis For That Decision.**

As this Court has acknowledged, the test to determine if someone is in police custody is “whether, under the circumstances, a reasonable innocent person would have concluded that he was not free to leave.” *People v. Hopkins*, 363 Ill. App. 3d 971, 982-83 (1st Dist. 2005); *see also* Ex. A, Compiled Hearing Transcripts, at 15. In resolving the motion to quash in July of 2010, the Court held that until Mr. Koh was placed under arrest after the interrogation, “the defendant was at the police station voluntarily, as a cooperating witness and a parent of the deceased,” and so was not in custody. (Ex. A at 16.) Both new law and new facts have undermined that decision, warranting reconsideration.

* 1. **The Court should reconsider its decision in light of the Supreme Court’s recent decision in *J.D.B v. North Carolina.***

Earlier this year, the United States Supreme Court clarified how courts should apply the objective totality of the circumstances test to determine if an individual is in custody. *See J.D.B*

*v. North Carolina*, 131 S. Ct. 2394 (2011). The issue in *J.D.B.* was whether the lower courts should have considered the defendant’s young age (thirteen years old) when deciding if a reasonable person in his position would have believed he was free to terminate his interrogation and leave. *Id.* at 2406.

The Supreme Court held that courts *must* consider individualized factors like age when deciding if a suspect was in custody. *Id.* at 2406. Addressing the particular characteristic at issue in that case, the Supreme Court noted that “childhood yields objective conclusions” and “in no way involves a determination of how youth subjectively affects the mindset of any particular child.” *Id*. at 2404-05 (internal quotations omitted). The Court held that as long as a child’s age

is “known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of th[e] test.” *Id*. at 2406.

*J.D.B.* is not limited to a suspect’s age. Rather, its reasoning applies broadly to *any* objective characteristic of an interviewee that was either “known to” or that “would have been objectively apparent to a reasonable officer.” *Id.* Indeed, the Supreme Court applied logic equally applicable to objective factors present here: Mr. Koh’s language problems and cultural characteristics. *Id*. The State in *J.D.B.* argued that age should not be considered because “it goes to how a suspect may internalize and perceive the circumstances of an interrogation.” *Id.* The Supreme Court rejected that argument, explaining that “the same can be said of every objective circumstance that the State agrees is relevant to the custody analysis: Each circumstance goes to how a reasonable person would ‘internalize and perceive’” that person’s situation when undergoing police questioning. *Id.* at 2406-07. The Supreme Court held that the cost of ignoring those characteristics is too great, because it “will often make the inquiry more artificial” and because the police remain capable of evaluating the effect of those objective characteristics. *Id.* at 2407. And, most relevant to this case, the majority’s rationale would apply to a “*suspect’s cultural background*,” especially where the suspect grew up in “a country in

which dire consequences often befall any person who dares to attempt to cut short any meeting with the police.” *Id*. at 2414 (Alito, J., dissenting) (emphasis added); *see also* Ex. A at 62 (testimony by Dr. Galatzer-Levy that due to his cultural background, “Mr. Koh would be more likely than the average native-born American to attempt to be polite, deferential, cooperative,

even in the context of an interrogation, and less likely, for example, to assert his legal rights in that context.”)*.*1

As we now know from *J.D.B.*, this Court should have considered Mr. Koh’s obvious difficulties with English and his Korean cultural background when determining if Mr. Koh was in custody at any point during the interrogation. Like the suspect’s age in *J.D.B.*, those factors either were known to the interrogating officers or should have been apparent to a reasonable officer. Indeed, the officers obviously knew that Mr. Koh had poor English language skills, as they arranged for a Korean-speaking officer, Sung Phil Kim, to serve as an interpreter. Moreover, Officer Kim knew of the unique cultural factors involved in questioning a Korean immigrant, as demonstrated by his testimony regarding how he tried to address Mr. Koh in a way consistent with Mr. Koh’s cultural background. (Ex. A at 37-38.)

*J.D.B.* requires the Court to consider those readily-apparent, objective factors in determining whether a reasonable person in Mr. Koh’s position would have understood that he was free to leave at the time he made statements to the police. *J.D.B.*, 131 S. Ct. at 2406. As Dr. Robert Galatzer-Levy explained, being interrogated in a non-native language in which one is not fluent is inherently stressful, because it decreases the likelihood both that the suspect will

1. Prior to *J.D.B.*, some Illinois state cases held that the court must consider at least some of the suspect’s individualized characteristics when applying the totality of the circumstances test. *See People v. Braggs*, 209 Ill. 2d 492, 507 (2003) (collecting cases and considering woman’s mild mental retardation when holding that she was in custody). *Braggs* stated that courts should “consider the age, intelligence, and mental makeup of the accused” when evaluating whether a suspect was in custody. *Id.* However, those cases also held that the courts should not consider “the frailties and idiosyncrasies of every person” who is questioned, *id.* at 513, which implies that the universe of characteristics Illinois courts were allowed to consider pre-*J.D.B.* did not extend much beyond the three characteristics expressly mentioned in *Braggs*: age, intelligence, and mental capacity. *J.D.B.*, however, makes clear that courts should consider *all* objective characteristics that are known to the interrogating officers or should be known to a reasonable one. *J.D.B.*, 131 S. Ct. at 2406. Further, some of the Justices in *J.D.B.* expressly acknowledged that the

*J.D.B.* test would apply to characteristics that, to our knowledge, no Illinois court has considered when deciding if a suspect was in custody and which are directly applicable to this case: cultural predisposition and language ability. *Id.* at 2414 (Alito, J., joined by Roberts, C.J., and Scalia and Thomas, JJ., dissenting). *J.D.B.*, therefore, did change—or at least clarified—the law this Court applied in its earlier custody ruling.

understand what is asked and that the officers will understand what the suspect is trying to convey. (Ex. A at 58-61.) That stress is apparent from the interrogation video, which shows multiple instances of confusion between the English-speaking officer, Sergeant Graf, and Mr. Koh. (*See, e.g.*, Mem. Supp. Mot. Suppress. (“Mem.”) 11 n.4 (filed Jan. 14, 2011) (discussing some of the confusing exchanges).) Indeed, Sergeant Graf himself testified that some of the interactions he had with Mr. Koh were confusing due to the language barrier. (Ex. A at 25.) And the lion’s share of the interrogation was not translated into Korean. (*See generally* Mem., Ex. L (DVD of interrogation videos).) A reasonable person sitting in an interrogation room, who has difficulty understanding English and is undergoing an accusatory interrogation at the hands of English-speaking police officers, would be very unlikely to come to the conclusion that he was free to stop the interrogation and leave.

Similarly, Mr. Koh’s cultural background also made it markedly more likely that a person like Mr. Koh would not have believed he was free to leave. When Mr. Koh lived in South Korea, it was under an “authoritarian regime” that routinely used abusive police practices— including coercive interrogations—against Korean citizens. *See* K. Cho, *The Unfinished “Criminal Procedure Revolution” of Post-Democratization South Korean*, 30 DENV. J. INT’L L. & POL’Y 377, 378-79 (2002). As an expert in Korean law described it, at the time Mr. Koh lived in Korea, “[i]llegal police practices including torture, illegal arrest and detention were widespread in the criminal process.” *Id.* at 378. That was true even though technically South Koreans enjoyed a plethora of legal rights, including the right to remain silent. *See id.* at 377.2

Thus, someone who grew up in Korea would be schooled to believe that interrogation by police officers is inherently coercive—which suggests that those like Mr. Koh would not

1. Although the South Korean government’s respect for civil liberties has improved markedly since democratization began in 1987, see Cho, *supra*, at 379, Mr. Koh never experienced those changes because he left South Korea in 1983.

understand that, unlike what would have been the case in Korea, in the United States a person has the right to end police questioning at will. *See J.D.B.*, 131 S. Ct. at 2414 (Alito, J., dissenting). What’s more, the fact that Mr. Koh received *Miranda* warnings—even if he understood them, which as we demonstrate below was not the case—would not dispel the inherently coercive nature of police interrogation to a Korean immigrant. When Mr. Koh grew up in South Korea, its citizens had the right to remain silent—but the Korean police habitually coerced statements in violation of those rights. Cho, *supra*, at 377.

# New evidence elicited at the pending motion to suppress hearing undermines the basis for the Court’s earlier ruling, warranting reconsideration.

In addition to *J.D.B.*, new factual evidence elicited at the hearing on the motion to suppress undermines the basis for the Court’s earlier holding, and requires reconsideration.

# The new evidence.

In general, this new evidence concerns two issues: (1) testimony from Commander Dunham that it is Northbrook Police Department policy to issue *Miranda* warnings when there is “any doubt” as to whether a person is in custody; and (2) restrictions that the police imposed on Mr. Koh’s ability to speak with certain people during the interrogation—especially the restrictions on Mr. Koh’s ability to speak to his attorney, Michael Shim. Specifically, that new evidence is:

***Miranda* warnings**

* + Commander Dunham testified that the Northbrook Police Department “typically give[s] Miranda warnings if we were going to embark upon custodial interrogations. And I’ve always instructed my guys to err on the side of caution and provide Miranda if there’s any doubt.” (Ex. A at 42.)

# Restrictions on Mr. Koh’s access to his attorney

* + Mr. Shim, Mr. Koh’s lawyer, arrived at the Northbrook Police Station on April 16, 2009, at approximately 12:30 or 12:40 p.m., prior to the conclusion of Mr. Koh’s

interrogation. (Ex. A at 66 (Shim).) Mr. Shim properly identified himself as an attorney to a Northbrook police officer in the reception area of the station and requested to see his client, Mr. Koh. (Ex. A at 65-66, 70 (Shim).)

* + Sometime around 12:50 p.m., Commander Dunham learned that a person identifying himself as an attorney for Mr. Koh had arrived at the station and was asking to speak to Mr. Koh. (Ex. A at 46 (Dunham).) Sometime after learning of Mr. Shim’s presence, Dunham walked to the lobby of the station to meet Mr. Shim, where Mr. Shim again identified himself as Mr. Koh’s attorney. (Ex. A at 68 (Shim), 46-49 (Dunham).) About *twenty to twenty-five minutes* had elapsed since Mr. Shim arrived by the time Dunham first greeted Mr. Shim. (Ex. A at 68 (Shim).)
  + Commander Dunham did not immediately permit Mr. Shim to see Mr. Koh. (Ex. A at 67-68 (Shim), 50-51 (Dunham).) Instead, Dunham returned to the interrogation room. (Ex. A at 50-51 (Dunham).) Dunham knocked on the door and advised Sergeant Graf, outside of the presence of Mr. Koh, that Mr. Shim, an attorney, had arrived to see Mr. Koh. (Ex. A at 26-27 (Graf), 52-54, (Dunham).) Dunham did not direct Graf to stop the interrogation. (Ex. A at 55 (Dunham).)
  + Sergeant Graf testified that he understood at that time that Mr. Shim was Mr. Koh’s attorney. (Ex. A at 26-27.) That contradicts Graf’s testimony from the motion to quash arrest hearing, where Graf testified that although he knew Mr. Shim was an attorney, he did not know that Mr. Shim was *Mr. Koh*’s attorney. (Ex. A at 10-12.)
  + Sergeant Graf also testified that he continued the interrogation after learning that Mr. Koh’s attorney was at the police station because he knew that the attorney was likely to end the interrogation when the attorney entered the interrogation room. (Ex. A at 28.) That, of course, is evident from the videotape, where one observes Graf, after being told that Mr. Koh’s attorney had arrived at the police station, telling Mr. Koh to “come on,” “hurry up, fast,” and confess.
  + No officer, including Sergeant Graf, advised Mr. Koh that his lawyer was present and asking to see him. (Ex. A at 27 (Graf).) Instead, Graf continued the videotaped interrogation of Mr. Koh while Dunham returned to the lobby a second time. (*Id.*; Ex. A at 56 (Dunham).).
  + *Five to ten minutes* more elapsed between the time Commander Dunham first spoke to Mr. Shim and when Dunham met Mr. Shim in the lobby the second time. (Ex. A at

68 (Shim).) Some minutes later, the police permitted Mr. Shim to enter the interrogation room and speak with his client, Mr. Koh. (Ex. A at 68-69 (Shim); Mem., Ex. G, at 154-157).)

# That new evidence shows that a reasonable person in Mr. Koh’s position would not have believed he was free to leave.

That new evidence is inconsistent with the notion that a reasonable person in Mr. Koh’s position would have understood he was free to terminate the interrogation and leave.

*First*, the testimony about why the officers gave Mr. Koh *Miranda* warnings undermines the Court’s earlier ruling that Mr. Koh was not in custody. Commander Dunham testified that Northbrook police officers give *Miranda* warnings if they have “any doubt” that a person is in custody. (Ex. A at 42.) Thus, if Sergeant Graf was following Northbrook Police Department policy—and there is no evidence he was not—then he himself felt that an individual in Mr. Koh’s position may have reasonably believed he was in custody. If Sergeant Graf thought it was a close-call, surely a civilian like Mr. Koh—indeed, any reasonable person—would not have believed he was free to leave.

*Second,* the restrictions on Mr. Koh’s access to certain individuals show that he was in custody. The new testimony of Sergeant Graf and Commander Dunham shows that the police did not allow Mr. Koh’s attorney prompt access to his client; instead, the police left Mr. Shim in the lobby for at least *twenty-five minutes* while the interrogation was ongoing, and intentionally increased the intensity of the questioning. The manner in which the police limited Mr. Shim’s access to Mr. Koh is inconsistent with the notion that Mr. Koh was free—free people do not need police acquiescence to speak to their lawyer. That is powerful evidence that no person in Mr. Koh’s position could have reasonably believed he was free to leave, especially when considered in conjunction with the evidence on that point already elicited at the hearing on the motion to quash arrest and reiterated at the motion to suppress hearing.

After the police first arrived at the Koh’s house and during the interrogation, Mr. Koh asked the police if he could see no less than three people:

* + - His son, Paul: Mr. Koh asked the police to take him to the hospital where he believed medical personnel were taking Paul, so he could see his son. (Ex. A at 2, 3 (Hyungseok Koh));
    - His daughter, Helen, during the interrogation, (Ex. A at 41 (Kim)); and
    - His pastor, during the interrogation, (Ex. A at 20 (Graf)).

The police, however, allowed Mr. Koh to see *none* of those people. For instance, during the interrogation the police explicitly told Mr. Koh that “you can’t have your pastor in here.” (Ex. A at 22, 38, 41.) A reasonable person would have understood the officers’ statements to mean he was not free to speak to his pastor. *See People v. Wheeler*, 281 Ill. App. 3d 447, 460 (2d Dist. 1996). Similarly, though Mr. Koh asked if he could speak to his daughter—and Officer Kim promised Mr. Koh he would ask his superiors if that was allowed—Mr. Koh was never allowed to call his daughter. (Ex. A at 41.) And Mr. Koh was brought to the police station despite his request that he be allowed to accompany his son to the hospital—where Mr. Koh believed his son was being taken. (Ex. A at 2, 3.)

Again, a reasonable person who has asked the police if he could see or speak to three individuals, but who is not allowed to do so, would not simultaneously conclude he could get up and walk out of the station at will. *See Commonwealth of The Northern Mariana Islands v. Mendiola*, 976 F.2d 475, 485 (9th Cir. 1993) (“a prolonged interrogation of an accused who is ignorant of his rights and who has been cut off from the moral support of friends and relatives is not infrequently an effective technique of terror”) (quoting *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960)), *overruled on other grounds*, 119 F.3d 1393 (9th Cir. 1997).

# At the very least, Mr. Koh was in custody when he was first accused of killing his son.

In ruling on the motion to quash arrest, this Court found that “[t]here is no one point in the interview where [Mr. Koh] is a clear suspect.” (Ex. A at 16.) Mr. Koh respectfully submits

that the Court should clarify that ruling and hold that Mr. Koh was a suspect, and therefore was in custody, no later than the first time Sergeant Graf accused him of killing his son. No reasonable person would believe he was free to leave after a police officer accused him of such a serious crime. The first explicit accusation by Sergeant Graf begins at the 12:15 minute mark of the third videotape, when Graf told Mr. Koh “I know you did it.”3 (*See* Mem., Ex. L.) Mr. Koh was in custody at that time.

The Illinois Appellate Court has held that it is reversible error to find that a suspect was not in custody even after the suspect was accused of a serious crime during questioning at a police station. In *People v. Alfaro*, the suspect was questioned at a police station regarding a murder for three hours. 386 Ill. App. 3d 271, 295 (2d Dist. 2008). The first hour of the interrogation was not confrontational. *Id.* But, just as in this case, the second hour of the interrogation turned confrontational. The interrogating officer began the second hour by asking the suspect if he committed the murder, and then, taking over, another detective “unrelentingly pushed [the suspect] to tell him what happened, alternating between scare tactics . . . and pleas for help.” *Id.* The Appellate Court found that the officers’ “accusation[s] of liability . . . were clear statements by the police that defendant was a suspect and that this was an investigation not into what the defendant witnessed, but into defendant’s criminal liability for the shooting death of the victim.” *Id.* at 295-96. Finding the “accusatory aspects of the questioning” the “most important” factor in the custody analysis, the Appellate Court held that “a reasonable person, faced with the knowledge that the police believed him to be criminally liable for the murder of

1. Of course, that followed nearly an hour of implicit statements that the police thought Mr. Koh did it. (*See* p. 12 nn.4-5, *infra*.) Throughout the entire second interrogation, Sergeant Graf repeatedly accused Mr. Koh of lying and stated that he “knew” that Mr. Koh was omitting details about his son’s death. The defense submits that, even if Mr. Koh was not in custody at the beginning of the first interrogation, he was by the time the police first accused Mr. Koh of lying—which occurred at the outset of the second interrogation.

the victim, and confronted with the express disbelief of his explanations of his and the victim’s activities during [the time in question], would not have believed that he could terminate the interview and leave the station.” *Id.* at 296, 298-99. On that basis, the court reversed the defendant’s conviction because his custodial statements were improperly admitted. *Id.* at 301- 02.

*Alfaro* is not an outlier. Rather, it is the latest in a long line of cases holding that once the police accuse a suspect of having committed a crime during an interrogation, the suspect is in custody. *See Wheeler*, 281 Ill. App. 3d at 457 (affirming suppression where the police questioning had become “more adversarial and confrontational at 5:30 p.m.; and, by 5:30 p.m., the law enforcement officials had disclosed to defendant that she was the focus of their investigation”); *People v. Savory*, 105 Ill. App. 3d 1023, 1029 (2d Dist. 1982) (holding that because the police questioning “became accusatory as [the police] began doubting defendant’s account,” and “suggested they had reliable information discounting his version of the events,” the suspect “was in custody”); *cf. People v. Carroll*, 318 Ill. App. 3d 135, 138-39 (3d Dist. 2001) (suspect in custody during questioning where “the investigation had become focused exclusively upon defendant at the time his taped confession was made” and the defendant “knew that the officers suspected him of murder”).

Applying that principle here, Mr. Koh was in custody no later than when Sergeant Graf first accused Mr. Koh of killing his son. During the second interrogation session, Sergeant Graf’s questions turned from investigatory to purely accusatory—to the point where Sergeant Graf told Mr. Koh, “I know you did it.” (Mem., Ex. G at 145.) Prior to that direct accusation,

moreover, Sergeant Graf repeatedly accused Mr. Koh of not being truthful,4 and told Mr. Koh that he should confess “for Paul” and “for God.”5 Just as in *Alfaro*, those “accusations of liability . . . were clear statements by the police that [Mr. Koh] was a suspect and that this was an investigation not into what [Mr. Koh] witnessed, but into [his] criminal liability” for Paul Koh’s death. *Alfaro*, 386 Ill. App. 3d at 295-96. By at least that point, a reasonable man in Mr. Koh’s position, accused of killing his son, would not have felt free to leave. *Id.* at 298-99.

# Mr. Koh’s Statements Must Be Suppressed For Three Independent Reasons In Addition To Those Raised In His Initial Motion to Suppress.

Mr. Koh’s statements must be suppressed for three independent reasons. *First*, the statements were the result of an unlawful seizure, because the police did not have probable cause to detain him. *Second*, Mr. Koh did not receive clear *Miranda* warnings, and did not knowingly and intelligently waive his rights. *Third*, the police denied Mr. Koh prompt access to his attorney, who was at the police station, and did not tell Mr. Koh his attorney was at the station and wished to speak to him, in violation of the rule laid down in *McCauley*.

# The statements must be suppressed because they resulted from a violation of the Fourth Amendment and Article I, Section 6 of the State Constitution.

If the police secure a statement from a defendant while the defendant is seized in violation of the Fourth Amendment or Article I, Section 6 of the Illinois Constitution, the statement is generally inadmissible as a fruit of the unlawful seizure. *See People v. Jackson*, 374

1. *See* Mem.*,* Ex. G, at 108 (“are you lying to us”), at 115 (“Come on”), at 117 (“I know stuff already that you are leaving out and not telling me the truth on”), at 118 (“Come on. Look at me. I know this. Let’s just be honest”; “Listen to me, listen to me, listen, listen, listen, listen . . . I want you to be honest, okay. Because you are wasting a lot of time here, okay. And this is your son we’re talking about, okay. You would remember this stuff”), at 123 (“You’re telling me stories [y]ou’re telling me stuff that’s not

true”).

1. *See* Mem., Ex. G, at 131 (“Come on, now. Come on, come on we’re wasting time”; “We’re wasting time. And this isn’t right for Paul. This isn’t fair for Paul. God wouldn’t want this for Paul. Would [God] want this for Paul?”; “Would God want Paul to be — have his father sitting here and telling us a story that’s not true?”), at 133 (“Do this for God. Do this. Tell the truth and do this for Paul”).

Ill. App. 3d. 93, 101-02 (1st Dist. 2007). As relevant here, Mr. Koh’s detention was lawful only if the police had probable cause to believe he committed a crime. *See People v. Lee*, 214 Ill. 2d 476, 484 (2005). This Court has already held that the police did not have probable cause until Mr. Koh “admit[ted] to getting a knife from the kitchen and actually demonstrate[d] on the video how he cut Paul with the knife,” which occurred at the very end of the second interrogation. (Ex. A at 16.)6 As discussed above, Mr. Koh was in custody well before that point and throughout his interrogation, or at the very latest when he was first accused by Sergeant Graf of killing his son. *See* Part I, *supra*. Therefore, he was in custody without probable cause at the time he made his statements, in violation of the Fourth Amendment. Any statements he made during that custodial interrogation are inadmissible. *See, e.g*., *Jackson*, 374 Ill. App. 3d at 108.7

# The statements are inadmissible because (1) Mr. Koh was not clearly informed of his *Miranda* rights; and (2) Mr. Koh did not knowingly and intelligently waive those rights.

Under *Miranda v. Arizona*, 384 U.S. 436, 471 (1966), the State has the burden to establish two propositions in order to admit custodial statements into evidence. *First*, the State must show that the police “clearly informed” the suspect “in clear and unequivocal terms” of his rights prior to any questioning. *Miranda*, 384 U.S. at 467-68, 471. In determining if the warnings given were sufficiently clear, courts apply an objective test; the suspect’s *subjective* understanding of his rights is therefore irrelevant. *See Doody v. Ryan*, 649 F.3d 986, 1028 (9th Cir. 2011) (en banc) (Kozinski, C.J., concurring). *Second*, the State must establish that, prior to

1. In quoting the Court’s prior holding, we do not mean to imply that we agree with the Court’s characterization of Mr. Koh’s statements and actions during the interrogation.
2. The Court must suppress even those statements that Mr. Koh gave after the police had probable cause. The police only gained probable cause through an unlawful custodial interrogation, which means that even those statements made after the police had probable cause were still the product of an unlawful seizure under the Fourth Amendment. And there was insufficient time—only seconds or minutes— between the unlawful detention and Mr. Koh’s statements to remove the taint of the illegal arrest. *See Taylor v. Alabama*, 457 U.S. 687, 691 (1982) (confessions given *six hours* after an illegal arrest were still inadmissible).

giving any statement, the suspect knowingly and intelligently waived his rights. *See People v. Winsett*, 153 Ill. 2d 335, 350 (1992). The second prong of the *Miranda* inquiry focuses on whether the suspect in fact understood his rights prior to waiving them, and so incorporates the suspect’s subjective understanding into the test. *See Braggs*, 209 Ill. 2d at 515; *People v. Mahaffey*, 165 Ill. 2d 445, 462 (1995). Here, the *Miranda* warnings given to Mr. Koh were objectively unclear, and Mr. Koh in fact did not understand his rights. Thus, the State cannot establish either prong of the *Miranda* inquiry.

# The *Miranda* warnings given to Mr. Koh did not “clearly inform” him of his rights.

To “clearly inform” a suspect of his *Miranda* rights, the warnings given must “reasonably convey to a suspect his rights as required by *Miranda*.” *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) (quotations omitted). *Miranda* requires “four now-familiar warnings: ‘[A suspect] must be warned prior to any questioning [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.’” *Florida v. Powell*, 130 S. Ct. 1195, 1203 (2010) (brackets in original) (quoting *Miranda*, 384 U.S. at 479).

Here, Mr. Koh stated to the officers after receiving his *Miranda* rights in English that he needed them translated. (Ex. B at 1; Mem., Ex. L, 1st Int. Video, 1:38-44.) Yet Officer Kim’s translation completely omitted at least two of those rights, and did not “clearly inform” Mr. Koh of the other rights that Officer Kim attempted to translate. No reasonable person in Mr. Koh’s position could have resolved the inherent contradictions in the warnings that Officer Kim gave.

In a recent decision, the Ninth Circuit held that a defendant’s custodial statements were inadmissible because the interrogating officers “expressly misinformed” the suspect about his

*Miranda* rights. *Doody,* 649 F.3d at 1003. In *Doody*, instead of providing proper *Miranda* warnings, the officer “downplayed the warnings’ significance, deviated from an accurate reading of the *Miranda* waiver form, and expressly misinformed Doody regarding his right to counsel.” *Id.* Regarding the latter point, the officer implied that Doody would only need a lawyer if he were guilty, which suggested that “the invocation of one’s right to counsel would be tantamount to admitting one’s involvement in a crime.” *Id*.

Similar to *Doody*, here Officer Kim’s partial Korean translation mangled the meaning of the *Miranda* warnings. *Miranda* requires that the police clearly inform an individual that he has an absolute, inviolable *legal* right to remain silent and to consult an attorney before and during an interrogation. *See, e.g.*, *People v. Karr*, 68 Ill. App. 3d 1040, 1044 (2d Dist. 1979) (noting that *Miranda* “is phrased in the absolute” and puts the rights “in absolute terms”); *People v. Shorter*, 59 Ill. App. 3d 468, 475 (1st Dist. 1978) (“a defendant has an absolute right to the presence of counsel during a custodial interrogation”).

Officer Kim’s translation implied that Mr. Koh had something less than that absolute right. Officer Kim told Mr. Koh only that he had a “human right[]” that he did not “have to talk,” and that he had “human rights . . . with the lawyer.” (Ex. B at 2;8 *see also* Ex. A at 31.) The use of the phrase “human right” mis-conveyed the substance of both of those rights.9 A

1. This Court admitted the translation of the Korean portions of the interrogation (Exhibit B to this brief) into evidence at the motion to quash hearing as DX 12, and the parties have agreed the Court may consider that evidence in resolving the pending motion to suppress. (*See* Ex. A at 5-6, 18-19.)
2. Officer Kim testified that he used the term “human” to describe the right at issue because there is no way to translate the name “Miranda” into Korean. (Ex. A at 30.) His reason does not explain why he failed to properly translate key words and meanings beyond the word “Miranda,” and is irrelevant under settled law. All that matters is the lack of clarity of the warnings. *See Wheeler*, 281 Ill. App. 3d at 460. In any case, his rationale is unpersuasive. *Miranda* itself does not require that the police use the word “Miranda” when describing the rights. Thus, Officer Kim had no reason to substitute a word for “Miranda” when he was under no obligation, even in English, to use that word. And even if he was, surely “legal” would have clearly conveyed the binding nature of the rights at issue far more clearly than “human.”

“human” right is not necessarily a “legal” right—by referring only to “human” rights, Officer Kim implied that Mr. Koh’s rights were something less than absolute legal rights. Indeed, Officer Kim testified that Mr. Koh told him “he didn’t know what human rights were,” yet Officer Kim never explained that what he really meant was that Mr. Koh enjoyed legally- enforceable rights. (Ex. A at 30.) The very fact that “human right” is subject to conflicting interpretations renders the warning insufficiently clear: “[W]arnings that ‘could’ be construed in such a manner can’t possibly be ‘clear,’ ‘understandable’ or ‘appropriate.’” *Doody*, 649 F.3d at 1026 (Kozinski, C.J., concurring).

What’s more, Officer Kim did not translate the *Miranda* warnings in a sufficient manner to clearly inform Mr. Koh of *all* his rights. Among other things, *Miranda* requires that the police inform a suspect that he has the right “to consult with a lawyer and to have the lawyer with him during interrogation.” *Miranda*, 384 U.S. at 471. But Officer Kim translated the right to counsel as simply being “human rights . . . with the lawyer.” (Ex. B at 2.)10 The best that can be said of Officer Kim’s translation is that it conveyed to Mr. Koh only that he had *some kind* of right with respect to a lawyer. But Officer Kim omitted the required details: *when* Mr. Koh had the right to counsel—both *prior to* and *during* the interrogation, not merely at some other unmentioned point; *what* that right entailed—a right not only to have the lawyer present during the interrogation, but to consult that attorney at will; or the *consequences* of invoking that right— that the interrogation would end immediately. *See People v. McCauley*, 163 Ill. 2d 414, 442 (1994) (“Concerning, in particular, the right to the presence of counsel during custodial

1. A translation prepared by a second defense translator, Yo Yo Kim, says that Officer Kim told Mr. Koh, “you have a right to be with an attorney whom you can call here” or that Mr. Koh “can bring an attorney.” (PX 16.) That translation is not in evidence. Even if the Court were to consider it, however, Mr. Kim’s translation implied to Mr. Koh only that he could have an attorney present *if* Mr. Koh “called” that attorney himself, and completely omitted that Mr. Koh had the right to appointed counsel. Thus, even under the alternative translation provided to defense counsel, Officer Kim’s translation got the *Miranda* warnings objectively wrong. *Miranda*, 384 U.S. at 471-72.

interrogation, it is not sufficient for authorities to merely advise a suspect of a *generalized* right to an attorney,” but rather the police must inform the suspect, among other things, that if the suspect invokes his right to counsel, “the interrogation must cease”).

Finally, Officer Kim did not even attempt to translate two of the four *Miranda* warnings:

(1) that anything Mr. Koh said would be used against him, or (2) that an attorney would be provided for him if he could not afford one, (Ex. A at 32-33), each of which is “an absolute prerequisite to interrogation,” *Miranda*, 384 U.S. at 471. Given Mr. Koh’s express request that Officer Kim translate the *Miranda* warnings—a clear indication that he did not understand the English version—the State cannot meet its burden to show that the *Miranda* warnings were adequately clear to someone, like Mr. Koh, with limited understanding of the English language. *See, e.g., United States v. Perez-Lopez*, 348 F.3d 839, 848 (9th Cir. 2003) (*Miranda* warnings must not only “be clear and not susceptible to equivocation, but *Miranda* also requires meaningful advice to the unlettered and unlearned in language which they can comprehend and on which they can knowingly act”) (internal quotations omitted).

Underlying all of these shortcomings was Officer Kim’s inability to speak Korean at a proficient level. Indeed, Kim apologized to both Kohs for his poor Korean, and admitted that he could not recall simple Korean words like “sink,” “strainer,” or “dish rack.” (Ex. A at 35-37, 39- 40.) Kim’s general lack of proficiency in Korean rendered his conversations with Mr. Koh confusing, including when Kim attempted to translate the *Miranda* warnings. That confusion is the antithesis of the clarity required of *Miranda*. *See Miranda*, 384 U.S. at 467-68, 471; *Doody,* 649 F.3d at 1003.

# Mr. Koh did not knowingly and intelligently waive his rights.

Under *Miranda*, Mr. Koh’s statements must be suppressed for a second, independent reason: he did not knowingly and intelligently waive his *Miranda* rights. *See Winsett*, 153 Ill.

2d at 350. “[I]n order to effect an intelligent and knowing waiver of *Miranda* rights, a defendant must have a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” *Braggs*, 209 Ill. 2d at 515 (quotations omitted). While the defendant need not understand every nuance, the suspect “must at least understand basically what those rights encompass and minimally what their waiver will entail.” *People v. Bernasco*, 138 Ill. 2d 349, 363 (1990). The evidence shows that Mr. Koh was hopelessly confused as to what he was doing when he signed the *Miranda* waiver form.

First, Mr. Koh signed the *Miranda* waiver form after receiving his *Miranda* warnings in English, but *before* he asked Officer Kim to translate the form for him. (Mem., Ex. L, 1st Int. Video, 1:38-44.) There would have been no reason to request translation if Mr. Koh had understood the rights that Sergeant Graf spoke in English or the form that Mr. Koh signed. Thus, Mr. Koh’s signature on the waiver form says nothing about whether he actually understood his rights. *See United States v. Monreal*, 602 F. Supp. 2d 719, 724 (E.D. Va. 2008) (suppressing statements where the evidence indicated that a suspect who was not proficient in English “had absolutely no idea what she ultimately signed”).

Second, when Mr. Koh was asked to sign the form, he was confused and thought he was supposed to write down the time of Paul Koh’s death, not the time at which he signed the form. (Mem., Ex. L, 1st Int. Video, 2:18-22; Ex. A at 23-24.) That, too, shows Mr. Koh did not understand what was said to him in English, or what was printed on the form in English, sufficiently to comprehend the meaning of the document he was being asked to sign. Mr. Koh’s confusion suggests that he believed he was signing a document to describe what happened earlier that morning rather than a document waiving his constitutional rights—that is the natural implication from his filling in the time that he and his wife discovered Paul Koh’s body.

Finally, when Mr. Koh was told that he had the right to consult an attorney, he asked if that meant he would be allowed to see his pastor. (Ex. B at 2.) Officer Kim responded, in Korean, “No. Lawyer only. Not pastors. Or you can . . . lawyers.” (*Id.*) The fact that Mr. Koh thought his *Miranda* rights authorized him to speak to his pastor—even after hearing those rights conveyed to him in English and translated poorly into Korean—shows that he did not understand his rights, which makes the importance of a proper Korean translation evident. As described above, Mr. Koh received only a partial and inaccurate Korean translation—which omitted entirely two of the four *Miranda* rights. Mr. Koh, therefore, did not knowingly and intelligently waive those rights. *See Braggs*, 209 Ill. 2d at 515; *see also Monreal*, 602 F. Supp. 2d at 724.

The State offered evidence from Dr. Peter Lourgos regarding Mr. Koh’s ability to understand *Miranda*, but that testimony is beside the point. Dr. Lourgos testified only as to whether Mr. Koh had a medical diagnosis of confusion that rendered him *incapable* of understanding *Miranda*, not whether Mr. Koh *in fact* understood his *Miranda* warnings. (Ex. A at 72-73.) In reaching his opinion, moreover, Dr. Lourgos did not consider factors that are crucial to understanding whether Mr. Koh understood his rights, most importantly the obvious language barrier that existed between Mr. Koh and the interrogating officers and the effect that Mr. Koh’s cultural background may have had on his ability to truly understand his legal rights. (Ex. A at 74-77.) Thus, Dr. Lourgos’s testimony says nothing at all about whether Mr. Koh knowingly and intelligently waived his *Miranda* rights, because the central question before the Court is not just Mr. Koh’s ability to understand *Miranda*, but whether he in fact did so. As described above, he did not.

# The statements were taken in violation of Mr. Koh’s right to counsel because he was not informed of or promptly allowed access to counsel present at the police station.

The police violate a suspect’s rights to due process and against self-incrimination when the police (1) do not promptly allow an attorney present at the police station to speak to his client during a custodial interrogation; or (2) fail to inform the suspect that his attorney is present at the police station and wishes to speak to him. *See McCauley*, 163 Ill. 2d at 437-39, 446; *People v. Smith*, 93 Ill. 2d 179, 189 (1982). In *McCauley*, the Illinois Supreme Court explained that Illinois “state constitutional guarantees simply do not permit police to delude custodial suspects, exposed to interrogation, into falsely believing they are without immediately available legal counsel and to also prevent that counsel from accessing and assisting their clients during the interrogation.” 163 Ill. 2d at 414.11 Any statement elicited after that right has been violated is inadmissible. *See id*; *People v. Chapman*, 194 Ill. 2d 186, 213 (2000). The police flagrantly violated the *McCauley* rule in this case.

Mr. Shim testified that he arrived at the Northbrook Police Station sometime between 12:30 and 12:40 p.m. on April 16, 2009—while the interrogation was ongoing. (Ex. A at 66 (Shim).) He identified himself to the police officer seated in the reception area as Mr. Koh’s attorney, and requested to speak to his client. (Ex. A at 65-66, 70 (Shim).) Commander Dunham testified that someone in the Northbrook Police Department alerted him of Shim’s presence around 12:50 p.m. (Ex. A at 46.) Mr. Shim testified that *twenty to twenty-five minutes* elapsed before Dunham came to the lobby of the police station. (Ex. A at 68.) Mr. Shim again identified

1. The *McCauley* court also noted that “[i]t is apparent that when police are allowed to withhold information from custodial suspects that their attorneys are present and immediately available to offer assistance, enormous pressure builds upon the police to secure statements from those suspects before they either exercise their right to an attorney or somehow learn of their attorneys’ presence.” *Id*. at 424. As described in the main text, that is precisely what happened here.

himself to Dunham as Mr. Koh’s attorney and gave Dunham his business card. (*See* Ex. A at 48- 49 (Dunham).)

Commander Dunham did not immediately take Mr. Shim to see Mr. Koh in the interview room, nor did Dunham stop the interrogation. (Ex. A at 55 (Dunham).) Instead, Dunham left Mr. Shim in the lobby, walked back to the interrogation room, and knocked on the door. (Ex. A at 50-52(Dunham).) Sergeant Graf walked out into the hallway to speak with Dunham outside the interrogation room. Dunham told Graf that Mr. Koh’s attorney was at the police station and wished to speak to Mr. Koh, but did not tell Graf to stop the interrogation. (Ex. A at 26-27 (Graf), 52-55 (Dunham).)

Sergeant Graf then returned to the interrogation room. But he did not tell Mr. Koh that his attorney was at the police station requesting to see him, and he did not stop the interrogation. (Ex. A at 27 (Graf).) To the contrary, Graf increased the pressure on Mr. Koh in an obvious effort to elicit as many statements as possible before Mr. Koh learned that his lawyer was present and wished to speak with him. (Ex. A at 28 (Graf).) Graf told Mr. Koh to “come on,” “right now,” “hurry up, fast” and confess, (Mem., Ex. G at 154):

(DETECTIVE ENTERS ROOM)

Q. Okay, so, so, Hyungseok, so, so you -- he poke -- did you poke him with the knife, did you hit him in the chest? Hyungseok, come on. Right now, let’s be done. Hurry up, fast. Okay. How did it happen? Did you, did you grab him and then when you, when you went at him like this did it cut his throat? When you swung the knife –

As Sergeant Graf increased the pressure of the interrogation, Commander Dunham went (finally) to retrieve Mr. Shim. Five to ten minutes had elapsed between the time Dunham first spoke to Mr. Shim and when Dunham returned to the lobby to bring Mr. Shim back to see Mr. Koh. (Ex. A at 68 (Shim).) The trip back to the interrogation room took at least an additional

minute. Then, the police finally allowed Mr. Shim to speak to his client. By that point, *between twenty-five and thirty-five minutes had elapsed since Mr. Shim had arrived at the police station.* (*Id.*) Using the more conservative estimate, Mr. Koh was denied access to his attorney just before the start of the third interrogation video—which is just under twenty-five minutes in length.

It is difficult to imagine a clearer violation of the *McCauley* rule. Both Commander Dunham and Sergeant Graf testified that they knew, during the interrogation, that Mr. Shim was an attorney who was there to see Mr. Koh, yet they did not (1) tell Mr. Koh of Mr. Shim’s presence, (2) immediately bring Mr. Shim back to see Mr. Koh, or (3) stop the interrogation once Mr. Shim asked to see Mr. Koh.12 Both the desk officer’s and Dunham’s decisions not to bring Mr. Shim back to see Mr. Koh immediately when Mr. Shim identified himself to each of them as Mr. Koh’s lawyer violated Mr. Koh’s rights. *McCauley*, 163 Ill. 2d at 444 (“[D]ue process is violated when police interfere with a suspect’s right to his attorney’s assistance and presence by affirmatively preventing the suspect, exposed to interrogation, from receiving the immediately available assistance of an attorney.”).

Even worse, however, was Commander Dunham and Sergeant Graf’s subsequent failure to inform Mr. Koh that his lawyer was present at the station and wished to talk to him—and, incredibly, Graf’s decision to ratchet-up the pressure of the interrogation while Dunham returned to the lobby at last to escort Mr. Shim to the interrogation room. The whole chain of events smacks of an effort by the police to maximize the additional interrogation of Mr. Koh before his

1. Sergeant Graf’s testimony on this point contradicted his testimony at the motion to quash arrest hearing, where he testified that although he knew Mr. Shim was an attorney, “[a]t that time [after Commander Dunham told Sergeant Graf Mr. Shim had arrived, Sergeant Graf] didn’t know if it was [Mr. Koh’s] attorney [or] it was his wife’s attorney. All I know is it was an attorney coming back.” (Ex. A at 11.) Of course, it was obvious from the very fact that Commander Dunham interrupted the interrogation *of Mr. Koh* to tell Graf an attorney was coming back that the attorney was *Mr. Koh*’s. And Commander Dunham testified that he expressly told Graf that Mr. Shim was Mr. Koh’s attorney. (Ex. A at 50-51, 54.)

lawyer was finally permitted to see him. That is precisely the tactic the Supreme Court sought to end in *McCauley*, where the Court held that “[t]he trial court properly suppressed defendant’s statements based on State decisional law . . . interpreting the privilege against self-incrimination under the Illinois Constitution [because the] police refused defendant’s retained attorney’s access to defendant and did not inform defendant that his attorney was present at the station, seeking to consult with him.” *McCauley*, 163 Ill. 2d at 445. This Court must do the same here.

This Court must suppress all of the statements that Mr. Koh made after Mr. Shim arrived at the police station and first informed Northbrook Police Department personnel that he was Mr. Koh’s attorney and wished to speak to his client. *Id.*; *Chapman*, 194 Ill. 2d at 213. Given that Mr. Shim was not given access to Mr. Koh until *at least* twenty-five minutes after Mr. Shim arrived at the police station, the entire third interrogation video—which is just under twenty-five minutes in length—must be excluded.

# CONCLUSION

As set forth in Mr. Koh’s Memorandum in Support of His Motion to Suppress (filed January 14, 2011), Mr. Koh respectfully requests that the Court exclude statements he made during his interrogation that the State claims to be inculpatory, for two reasons: (1) the statements were involuntary; and (2) admission of the statements would violate Illinois Rule of Evidence 403.

For the reasons stated in this motion to reconsider and supplemental brief, Mr. Koh respectfully requests that the Court reconsider its earlier decision that Mr. Koh was not in custody, and exclude Mr. Koh’s statements because: (1) they were the fruits of an unlawful seizure in violation of the Fourth Amendment; (2) they were elicited without Mr. Koh’s having received adequate *Miranda* warnings or having given a knowing and intelligent waiver of his

*Miranda* rights; and (3) they were elicited in violation of Mr. Koh’s right to counsel, under the rule laid down in *McCauley*.

Dated: January 4, 2019 Respectfully submitted, Defendant Hyungseok Koh

By: One of His Attorneys

Terri L. Mascherin Andrew W. Vail

Jenner & Block LLP (#05003) 353 N. Clark Street

Chicago, Illinois 60654-3456

(P) (312) 222-9350

(F) (312) 840-7799

**CERTIFICATE OF SERVICE**

I hereby certify that, on October 21, 2011, I caused a copy of the foregoing document, entitled Mr. Koh’s Motion to Reconsider Prior Ruling on Motion to Quash Arrest and Supplemental Brief in Support of Motion to Suppress, to be served, via hand delivery, upon counsel of record below:

Assistant State’s Attorney Michele Gemskie Office of the Cook County State's Attorney 5600 Old Orchard Road

Skokie, IL 60077

Daniel T. Fenske