DOCKET NO. 128373
IN THE
SUPREME COURT OF ILLINOIS

DARRELL FAIR,	)	Appeal from the Appellate
	)	Court, First District,
	)	No. 1-20-2072
Petitioner-Appellant,	)	
	)	
v.	)	There on appeal from the Circuit
	)	Court of Cook County,
	)	No. 98 CR 25742-01,
PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Hon. Peggy Chiampas,
Respondent-Appellee.	)	Judge Presiding

APPELLANT'S REPLY BRIEF

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ARGUMENT

At the suppression hearing conducted below, Petitioner Darrell Fair presented abundant evidence supporting his claim that his confessions were involuntary, including: his own testimony about the violence, threats, and deprivations he suffered; corroborating testimony from other witnesses; medical records; and extensive pattern and practice evidence implicating the lead offending officer, Michael McDermott. Not one of the accused officers has ever denied Mr. Fair's abuse, deprivations, or outcry allegations. Mr. Fair's opening brief demonstrated that the lower courts erred in denying his suppression claims because the State failed to meet its *prima facie* burden at the evidentiary hearing and the appellate court's attenuation ruling failed to correctly apply the law.

The State responds to none of this argument. In other words, via forfeiture the State effectively concedes that if what occurred below was, in fact, a suppression hearing, the lower courts' rulings were erroneous, and Mr. Fair is entitled to relief. Instead, the State argues here that the hearing below was not a suppression hearing at all, but rather a hearing on whether Mr. Fair was a torture victim. The State's reasoning, however, is refuted by the Torture Act's statutory language and interpretative case law, as well as the history and purpose behind the law. It is also directly refuted by the prosecutor's arguments during the hearing itself, wherein she expressly acknowledged that the evidentiary hearing was to consider the merits of Mr. Fair's suppression claim.

The Torture Commission's referral entitled Mr. Fair to a suppression hearing; the State failed to meet its burden at that hearing; and suppression of Mr. Fair's statements and remand for a new trial is now required.

I. The Torture Act is an Extraordinary Remedy That Allows Torture Victims Like Mr. Fair to Seek Suppression of Their Coerced Confessions and/or Reversal of Their Convictions in the Circuit Court

The Torture Act is an extraordinary vehicle to allow proven victims of police torture a simple path to suppress coerced confessions and/or to vacate their convictions, despite any procedural hurdles they might have otherwise faced. As stated in the opening brief and *infra*, this interpretation is supported by the express intention of the statute (demonstrated by both its language and legislative history); the decisions that interpret the statute; the Torture Commission itself; and the interests of justice. Under the Torture Act, when the Commission finds sufficient evidence of torture causing a confession that results in a conviction, it refers the case to the circuit court where procedural hurdles like the Post-Conviction Hearing Act's cause-and-prejudice test or *res judicata* are cast aside. Torture victims are then given the opportunity to prove that "newly discovered evidence would likely have altered the result of a suppression hearing." *People v. Wilson*, 2019 IL App (1st) 181486, ¶ 52 (citing *People v. Whirl*, 2015 IL App (1st) 111483, ¶ 80, and *People v. Galvan*, 2019 IL App (1st) 170150, ¶ 74). With scant authority, the State argues contrary to this background.

The State is not without the ability to contest the Torture Commission's referral. If the State believes that there is insufficient evidence of torture to warrant the referral to the circuit court for this extraordinary collateral review, it can seek judicial review of the referral under the Administrative Review Law, 735 ILCS 5/3-101, and if still dissatisfied, it can appeal. Notably absent from the State's brief is any mention of the fact that it already unsuccessfully appealed the Commission's circuit court referral. The appellate court rejected the State's arguments, affirmed the Torture Commission's referral, and

ordered an evidentiary hearing. App.8-9, ¶ 33; SUP C.300 (appellate court finding there was sufficient and credible evidence to warrant judicial review of Mr. Fair's claims).

The State here seeks a second bite of the same apple: it claims that the question before the circuit court after a Commission referral is, yet again, whether torture occurred and whether that torture caused a confession used to obtain the conviction. St. Br. at 28-48. As discussed *infra*, this interpretation conflicts with the express purpose of the statute, and it is not supported by the statutory language or the case law interpreting the statute. And the State ignores that its incongruous interpretation would make it unreasonably *harder* for torture victims to get relief from coerced statements, and it would create a procedural nightmare, forcing repeated piecemeal litigation of suppression claims.

A. The Plain Language and History of the Torture Act Support Mr. Fair's Interpretation of the Act as a Vehicle to Relief

The amicus briefs from the Innocence Project, The Roderick and Solange Macarthur Justice Center, The People's Law Office, and the Center on Wrongful Convictions and from the Chicago Torture Justice Center describe the abhorrent history of police torture, a scourge that should be unimaginable in civilized society, that led the legislature to pass the Torture Act. The Act was in response to those heinous abuses—an "extraordinary procedure" for reopening a class of cases where an accused was tortured by the police, offering police torture victims a more generous avenue for obtaining relief than previously available. 775 ILCS 40/10; *See* 96th General Assembly, Senate, 3/25/09, p. 26 (comments of Senator Kwame Raoul); *Wilson*, 2019 IL App (1st) 181486, at ¶ 52 ("The legislature clearly did not create a new form of postconviction relief with the intent that a petitioner satisfy a heavier burden than that imposed by the Post-Conviction Act."); *People v. Gibson*, 2018 IL App (1st) 162177, ¶ 136 ("the General Assembly did

not establish the TIRC because victims of police torture needed a remedy that was *harder* to secure than what they already had. Accepting the State's argument would take the 'extraordinary' out of the 'extraordinary procedure to investigate and determine factual claims of torture' that the General Assembly created.").

The Act imposes a specific proof requirement on the Torture Commission to make a circuit court referral of a torture claim: if the required number of members of the Commission conclude "by a preponderance of the evidence that there is sufficient evidence of torture to merit judicial review, the case shall be referred" by filing an opinion "with supporting findings of fact, as well as the record in support of such opinion." 775 ILCS 40/45(c). If the State disputes the Commission's finding that there is sufficient proof of torture to warrant judicial review, it can contest the referral by seeking review under the Administrative Review Law ("ARL"). 735 ILCS 5/3-101. *See People v. Mitchell*, 2016 IL App (1st) 141109 ("*Fair I*"), SUP C.300; *People v. Johnson*, 2022 IL App (1st) 201371, ¶ 142 ("The TIRC Act makes clear that the TIRC functions as an administrative agency whose findings are subject to judicial review."); 775 ILCS 40/55(a) (expressly incorporating the ARL for review of the torture referral).

In contrast, once the case is referred to the circuit court, the Torture Act no longer limits what the adjudicator may consider. The Act simply states that the case should be assigned to a trial judge "for consideration," and delineates:

> [t]he court may receive proof by affidavits, depositions, oral testimony, or other evidence. In its discretion the court may order the petitioner brought before the court for the hearing. Notwithstanding the status of any other postconviction proceedings relating to the petitioner, if the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and such supplementary orders as to rearraignment, retrial, custody, pretrial release or discharge, or for such relief as may be granted under a petition for a certificate of innocence, as may be necessary and proper.

775 ILCS 40/50. This places a specific requirement for proving entitlement to relief—proof of the torture—to be made before the Commission but provides a more generous vehicle to an evidentiary hearing in circuit court for torture victims once they have made a sufficient showing that their convictions were caused by torture (and, in Mr. Fair's case, survived an appeal on that question).

Upon referral, courts are tasked with conducting what is essentially a third-stage post-conviction evidentiary hearing on the petitioners' suppression claims without the procedural hurdles they might otherwise have faced. *See, e.g., Whirl*, 2015 IL App (1st) 111483, at ¶ 51 ("The State conceded that the judicial review contemplated under the TIRC Act is akin to a third-stage evidentiary hearing under the Postconviction Act."); *People v. Christian*, 2016 IL App (1st) 140030, ¶ 78 (""[i]f a matter is referred to court, a claimant can receive what is referred to in Illinois as a 'third stage post-conviction hearing[,]'…a full court hearing before a judge to show by a preponderance of the evidence that his confession was coerced.") (quoting TIRC Mission and Procedure Statement); App.25 ¶ 95; *Wilson*, 2019 IL App (1st) 181486, at ¶ 52; *Gibson*, 2018 IL App (1st) 162177, at ¶ 136; *see also* St. Br. at 41 ("The evidentiary hearing conducted by the circuit court is similar to a third-stage evidentiary hearing under the Post-Conviction Hearing Act.") (citations omitted); Torture Commission's website ("If a case is referred to the Circuit Court by TIRC, it normally gives the claimant an automatic opportunity for a full hearing before a judge. *If the Circuit Judge decides that it is likely that a confession was coerced,* the judge can award a new trial to the claimant.") (https://tirc.illinois.gov/about-us.html#faq-whatreliefcanthecommissiongive-faq_copy (last checked 4/27/2023, emphasis added).

Nothing in the statute's direct language nor its history to create a more generous remedy to torture victims suggests that the circuit court's post-referral consideration must be limited only to the question of whether torture caused a confession, rather than the broader question of whether the torture victim can prove that suppression of his statement and/or a new trial are warranted. Instead, appellate courts have interpreted the statute, consistent with the statutory language (and the State's prior concessions), as authorizing a hearing akin to a third-stage post-conviction hearing, considering either whether newly discovered evidence would likely have altered the result of a suppression hearing or whether the petitioner is entitled to suppression of his statement. *E.g., Whirl*, 2015 IL App (1st) 111483, at ¶ 51; *Christian*, 2016 IL App (1st) 140030, at ¶ 78; App.25 ¶ 95; *Wilson*, 2019 IL App (1st) 181486, ¶ 52; *Gibson*, 2018 IL App (1st) 162177, at ¶ 136.

The *Gibson* court's discussion of this issue is informative. In *Gibson*, the court ascertained whether a post-Commission referral hearing was similar enough to a third-stage post-conviction evidentiary hearing that the same rules of evidence should apply. *Id.* at ¶ 128. The court closely compared the relevant language of the Post-Conviction Hearing Act and the Torture Act and decided that the two evidentiary hearings were essentially the same, holding, "It seems arbitrary and unfair to limit the evidence that a TIRC petitioner may present, relative to the evidence that a petitioner may present when pursuing relief under the Post-Conviction Hearing Act." *Id.* at ¶¶ 128-38, quote at ¶ 136. In other words, the vehicle for arriving at that evidentiary hearing could be a post-conviction petition or a Torture Act claim, but the remedy should be no harder to obtain in a TIRC hearing than a third-stage evidentiary hearing. There is simply no support for the State's suggestion that a torture victim's proof requirements should be far higher.

B. The State Erroneously Conflates the Commission's Role Under Section 45(c) with the Circuit Court's Adjudication Per Section 50(a)

The State's position is that a post-referral circuit court hearing imposes a higher burden than an ordinary suppression hearing or post-conviction hearing: proof of torture causing a conviction. However, the State arrives at this interpretation by erroneously conflating two distinct parts of the Torture Act.

Specifically, the State's claimed support for its elevated proof requirement at the evidentiary hearing cites provisions related to the Torture Commission's obligations as the gatekeeper (Section 45(c)), not to the parts of the statute related to the circuit court's role once a case has been referred by the Commission to the circuit court (Section 50(a)). Notably, the State cannot point to any statutory language supporting its interpretation imposing the Commission's gatekeeping torture query on the circuit court post-referral adjudication (because there is none). *See* St. Br. at 42. Instead, the State cites rulings from the Commission finding that **the Commission** cannot refer a case to the circuit court for review without a sufficient finding of torture. *See, e.g.,* St. Br. at 36-37. This, however, is consistent with the divided obligations under the Act—it is the Commission as the gatekeeper that adjudicates whether the requisite torture occurred (appealable via the Administrative Review Law). 775 ILCS 40/45(c), 55(a).[1]

[1] Indeed, if the State is correct that the circuit court merely repeats the Commission's torture adjudication, this would render the Torture Act's incorporation of the ARL superfluous. Under the State's interpretation, it can seek a prompt judicial review of the Commission's torture finding under the ARL, appeal any loss, and then again contest the torture finding when the case is referred to circuit court. This Court should not interpret the Torture Act to create this redundant procedure. *See, e.g., Citizens Opposing Pollution v. ExxonMobil Coal U.S.A.*, 2012 IL 111286, ¶ 29 (courts are "obligat[ed] not to construe a statute in a way that makes one of its provisions redundant and superfluous.").

Similarly, the State cites the Torture Act's definition and multiple uses of the word "torture" to argue that torture cannot be read out of the Act, and on this point Petitioner agrees. St. Br. at 32-36, 42-43. But the State again erroneously conflates adjudications under Section 45(c) and Section 50(a). Torture is absolutely the decisive factor for the Commission's referral determination under Section 45(c), as supported by the statutory language and the cases the State cites. But none of the cited cases implies that the definition carries over and binds the circuit court's Section 50(a) adjudication. In fact, the only mention of the word "torture" in Section 50(a) is its preface discussing what should happen after "*the Commission* concludes there is sufficient evidence of torture to merit judicial review." 775 ILCS 40/50(a) (emphasis added). The Act's discussion of the procedures and process for the ensuing judicial review after that finding omits the word torture entirely. *Id.*[2]

Likewise, the State argues that to present a "claim of torture," 775 ILCS 40/5(1) requires proof that a petitioner was tortured "into confessing." St. Br. at 36-37. But regardless of the definition of the phrase "claim of torture," the cases cited by the State and the language of the Act require only that petitioners present a "claim of torture" to the Commission under Section 45(c) to merit the extraordinary relief. Once that gatekeeping function is served, the circuit court's adjudication under Section 50(a) is not

[2] The State also argues that TIRC, Mission and Procedures Statement § 3 states that "petitioner's burden at evidentiary hearing is 'to show by a preponderance of the evidence that his confession was coerced' to obtain 'a judicial finding . . . that a confession was coerced by torture.'" St. Br. at 41-42, citing https://tinyurl.com/2s4k4za5 . However, the information provided at that link actually states, "If a matter is referred to court, a claimant can receive what is referred to in Illinois as a 'third stage post-conviction hearing.' This means that the claimant can have a full court hearing before a judge to show by a preponderance of the evidence **that his confession was coerced**." (emphasis added, last checked 4/27/2023). The State's inaccurate quotation underscores the lack of support for its position.

bound by a similar proof requirement in the statute or the cases interpreting the statute. Mr. Fair long ago made his torture showing before the Commission, the State appealed, and the appellate court affirmed the referral. The circuit court below was therefore required to conduct a hearing on his suppression claims.

The State observes that the proceedings before the Commission are non-adversarial and that the threshold for the Commission to advance a case to the circuit court is too low. St. Br. at 39-41. Be that as it may, this is the framework the legislature chose. To be sure, the Commission's threshold is certainly not a rubberstamp. *See* St. Br. at 36-37 (collecting cases where the Commission rejected torture claims). And the legislature's choice to spare petitioners an adversary in a proceeding where they are not represented by counsel and are testifying about severe trauma is not an unreasonable statutory framework for the legislature to have created to address such abhorrent abuse by State actors. Moreover, the framework has not led to a flood of overturned convictions because petitioners still carry a burden once their claims advance to the circuit court—they receive reprieve from some procedural obstacles, but they must still win their underlying suppression claim to merit relief.

The State's jurisdictional argument suffers the same flaw as its other arguments: the State conflates what the Commission is authorized to refer (only cases that it determines sufficiently involve torture) with what the circuit court has jurisdiction over after the referral (all cases referred by the Commission). St. Br. at 43. There is no statutory requirement that the circuit court relitigate the question of torture to establish jurisdiction. Nor has any court held that, despite a Commission referral, the circuit court

is jurisdictionally barred from considering whether a torture victim's coerced confessions should be suppressed. This argument is a nonstarter.

The State relies on *dicta* from *Christian*, but that case is also consistent with Petitioner's interpretation. In *Christian*, the petitioner tried to rely on the Commission's findings of torture to estop the State from disputing his claims before the circuit court upon referral. *Christian*, 2016 IL App (1st) 140030, at ¶ 1. The question before the appellate court was whether the Commission findings had any preclusive effects in the circuit court, and the appellate court determined they did not. *Id.*, at ¶¶ 1, 79-102.

In so ruling, the court recognized the distinction between the Section 45(a) determination by the Commission and the Section 50(c) adjudication by the circuit court. *See Christian*, 2016 IL App (1st) 1400030, at ¶ 97 ("Defendant's argument would render section 50 of the Act, which provides for postcommission judicial review, to be superfluous."). Admittedly, at times the *Christian* court's *dicta* described the ultimate question before the circuit court as whether torture occurred (*e.g.,* ¶ 107, 113), and at other times it acknowledged that the circuit court's inquiry pertained to whether the petitioner could make a case for suppression (*e.g.,* ¶ 78), but the court's casual equation of torture and coercion is likely because the issue of what precisely the Section 50(c) hearing need address was not litigated in that case, and courts often use the words "torture" and "coercion" interchangeably. *See* Amicus Brief of Chicago Torture Justice Center at 14-15. The *dicta* in *Christian* does not support ignoring the statutory language

or history of the statute specifying its goal of creating a remedy that is easier, not harder, for torture victims to secure relief. [3]

The State argues that *Wilson* was wrongly decided, but *Wilson* followed the statutory framework precisely. St. Br. at 44-45. The State is correct that "the showing that must be made to prevail on a particular claim turns on the elements of that claim, not the procedural mechanism through which they are proved[.]" St. Br. at 45. This is the crux of Petitioner's argument. But what that means is that regardless of whether a suppression claim reaches the circuit court via the Post-Conviction Hearing Act or the Torture Act, once it is before the court, the elements of that suppression claim should be the same, not harder for the torture victims. *Wilson*, 2019 IL App (1st) 181486, ¶¶ 51-52; *see also Whirl*, 2015 IL App (1st) 111483, at ¶ 80; *Galvan*, 2019 IL App (1st) 170150, at ¶ 74.

C. The State's Interpretation is Contrary to Justice and Would Create Procedural Problems and Confusion

The State fails to grapple with the many ways in which its position would make an utter mess of post-conviction advocacy and render profoundly unfair results. On a practical level, if a petitioner who arrives at the circuit court via a Torture Act claim could only litigate his claim of torture, but not his general claim of suppression, there are no clear lines for what may come in and what must be reserved for post-conviction. So,

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[3] The State also cites *Johnson*, 2022 IL App (1st) 201371, ¶ 117-18 (St. Br. at 37, 45), but the *Johnson* Court held that the petitioner was erroneously denied his circuit court evidentiary hearing precisely because the circuit court misunderstood its obligations. *Id.* Thus, *Johnson* is consistent with the distinction Petitioner draws here between the Commission's and the circuit court's proof requirements, and the case undermines, rather than supports, the State's interpretation. *Johnson* recognizes that the Commission's and the circuit court's queries are distinct and cannot be conflated. The issue of what the court was required to hear during the Section 50(c) post-referral hearing was not before the court in *Johnson*, so its *dicta* use of "coercion" and "torture" interchangeably was also likely unintentional. *See* Amicus Brief of Chicago Torture Justice Center at 14-15.

for instance, if an officer threatens an accused with a gun, slaps him a half hour later, and then an hour later beats him unconscious, must the court parse out that a slap is arguably not torture, so that portion of the officer's conduct must be omitted and reserved for any potential post-conviction evidentiary hearing? And if one officer beats a suspect, while a second deprives the suspect of needed medication, and a third officer issues veiled threats to kill the suspect, must the circuit court have a pre-hearing hearing to determine which of those actions constitutes torture before allowing testimony? What are the *res judicata* implications of a court ruling that makes findings about such allegations and concludes that they occurred but fell short of torture? Would such factual findings be binding on the parties at a subsequent suppression hearing? Or could a party recall the abusive officers? And, most importantly, what message would be sent by Illinois courts finding that someone was coerced by police violence into confessing, but that violence fell short of torture, so no suppression is required despite the abuse the accused suffered that caused their confession?

This Court should not pave the way for confusing and disturbing blessings bestowed on unlawful police violence that might fall short of torture. The victims of the Burge era torture have already waited decades for justice. Telling the public that, despite proving to the Commission that they were tortured, such petitioners must wait for a post-conviction evidentiary hearing (should they be able to navigate the procedural obstacles) to present their allegations in a suppression motion defies the purpose of the Torture Act. It would be dangerous precedent inviting abuses.

The State responds that the Torture Act specifies that only claims of torture are cognizable, and this is true. St. Br. at 48-49. But that is precisely why the Commission

serves its gatekeeper function, to make sure that only sufficiently proven torture claims reach the circuit court for further adjudication. The Commission appropriately draws the line at torture and, as the legislature intended, only advances cases to the circuit court where claims of torture have been sufficiently proven.

But once those cases advance to the circuit court, the State's unfounded paradigm would be very troubling. Court rulings could list an array of proven violence that a petitioner suffered, coercing him to give an inculpatory statement, but nevertheless deny relief because the violence was not creative or egregious enough, in the court's mind, to be dubbed torture. The delay of forcing torture victims to litigate their cognizable, meritorious suppression claims through the Post-Conviction Hearing Act (where procedural hurdles might prevent them from ever being heard) would be unconscionable.

D. The State Concedes the Elements for Proving a Suppression Claim at a Post-Trial Evidentiary Hearing

Should this Court accept Petitioner's position that the hearing the circuit court is tasked with conducting after a Commission referral is essentially a third-stage post-conviction evidentiary hearing on the suppression claim, the State does not dispute the contours of that hearing. *See* St. Br. at 47-48 (distinguishing the well-established case law discussing how post-trial suppression claims should be adjudicated on the grounds that they involved post-conviction evidentiary hearings or hybrid, post-Commission referral/post-conviction evidentiary hearings). Thus, if the Court accepts Petitioner's argument that it was correct for the hearing below to address his full-bodied suppression claim, the standards set forth in his opening brief are not in dispute.

In keeping with a long line of undisputed case law, at the post-referral evidentiary hearing, all aspects of the coercive circumstances—the totality of the circumstances—

must be considered. *See e.g., People v. Gilliam*, 172 Ill.2d 484, 500 (1996) ("Whether a statement is voluntarily given depends upon the totality of the circumstances….no single fact is dispositive."); *People v. Prude*, 66 Ill.2d 470, 475 (1977) ("this court has long looked to the 'totality of the circumstances' to determine the voluntariness of any confession."); *People v. Sykes*, 341 Ill. App. 3d 950, 975 (1st Dist. 2003) (the voluntariness of a confession depends on the totality of the circumstances, including consideration of "compulsion or inducement of any sort," "any physical or mental abuse by police," and "the existence of threats or promises"); *See also* Amicus Brief of Illinois Torture Inquiry and Relief Commission in Support of Petitioner-Appellant; Amicus Brief of Chicago Torture Justice Center at 14-19. The question to be answered should be whether the evidence should be suppressed or whether "newly discovered evidence would likely have altered the result of a suppression hearing." *Wilson*, 2019 IL App (1st) 181486, at ¶ 52 (citing *Whirl*, 2015 IL App (1st) 111483, at ¶ 80, and *Galvan*, 2019 IL App (1st) 170150, at ¶ 74).

Given its position that no hearing on Mr. Fair's suppression claim was warranted, the State fails to engage with the *amicus* brief from the Innocence Project**,** The Roderick and Solange Macarthur Justice Center, The People's Law Office, and the Center on Wrongful Convictions on where the line should be drawn for suppressing coerced statements, but that is an essential issue this Court should address to rectify the situation where Chicago is known as the "false confession capital" of the nation. *See Id.* at 5 n.4.

With strong support from this Court as well as the United States Supreme Court, the *amici* advocate for a *per se* rule that in instances where physical abuse occurs during an interrogation there can be no attenuation from that violence. *Id.* at 21. This Court has

come close to such a ruling, holding that the "use of physical abuse to coerce confessions from a suspect is *prohibited* because it is 'revolting to the sense of justice.'" *See People v. Salamon*, 2022 IL 125722, ¶ 83 (emphasis added) (quoting *Brown v. Mississippi*, 297 U.S. 278, 286 (1936)). This Court has also held that the use of a "defendant's physically coerced confession as substantive evidence of his guilt is never harmless error." *Wrice*, 2012 IL 111860, ¶ 84.

Adopting an explicit bright line rule would prevent courts from relying, as the courts below here did, on arguable temporal attenuation or the physical absence of the offending officers during the commemoration of the statement to ignore the undeniable impact of the unrebutted physical coercion suffered. A *per se* rule would make it clear that Illinois courts will not tolerate violently coerced confessions and that the State must honor that dictate.

II. Properly Interpreting the Torture Act, Mr. Fair Proved His Claim and the State Failed to Meet its Burden of Proof, so a New Trial with Suppression of Mr. Fair's Statements is Required

On the merits of Mr. Fair's claims, the State presumes that it is correct, and it only addresses its proposed paradigm of a duplicative hearing about whether torture occurred. The State does not address whether suppression was warranted due to the proofs presented at the evidentiary hearing. *Compare* St. Br. Argument II; Opening Br. at Argument II(B) and II(D). If the Court accepts Petitioner's position that the lower court was tasked with conducting a Post-Conviction Hearing Act-type evidentiary hearing on Mr. Fair's suppression claim, the State forfeits any argument that it met its burden at that hearing. *People v. Williams*, 193 Ill.2d 306, 347-48 (2000) ("State may waive an argument… by failing to argue [it]") (citation omitted).

Because Petitioner's suppression argument rests on application of the lower court's factual findings to the law and the lower courts' legal errors—their misapplication of the law—this argument warrants a *de novo* review. *In re G.O.*, 191 Ill.2d 37, 50 (2000); *People v. Williams*, 188 Ill.2d 365, 369 (1999).

When the appellate court affirmed the Commission's referral in *Fair I*, it ordered the circuit court to consider "Fair's claim of a forced confession while being held in police custody." SUP C.333. In keeping with that clear directive, the circuit court conducted a suppression hearing. App.70-71. Indeed, even the prosecutor litigating the evidentiary hearing recognized that the court was conducting a suppression hearing and discussed the burdens of proof that inquiry imposed. *See, e.g.,* R.965-66 (State's opening argument at the post-referral hearing, concluding, "We believe that after you hear all of the evidence in the case, you will find that the statement was in fact voluntary, was not the product of coercion, and it should not be suppressed, and that these proceedings should be resolved by denying Mr. Fair's claim[.]"); *see also* SUP2 R. 78, 89, 90.

At that hearing, the State bore the burden of proving Mr. Fair's confession was voluntary by a preponderance of the evidence. *Wilson*, 2019 IL App (1st) 181486, at ¶ 53 (quoting *People v. Slater*, 228 Ill.2d 137, 149 (2008)). Had the State established a *prima facie* case that the statement was voluntary, then the burden would have shifted back to Mr. Fair to convince the court that the statement was involuntary. *Wilson*, 2019 IL App (1st) 181486, at ¶ 53 (citing *Richardson*, 234 Ill.2d at 254).

As the State's failure to respond to this argument here implicitly concedes, the State did not meet its burden to establish a *prima facie* case that the statements attributed to Mr. Fair were voluntary. Mr. Fair presented his well-supported claims that the officers

induced his statements with threats to shoot him, McDermott's physical assault, and a lengthy deprivation of food, sleep, and necessary asthma medications. To establish voluntariness, the State presented only felony prosecutor Mebane's testimony about what he saw after hour thirty—there is no evidence refuting the allegations of abuse that Mr. Fair suffered during the first thirty hours. None of the accused officers has ever denied the abuse, threats, denials of counsel, deprivations, or Mr. Fair's contemporaneous outcries. In other words, the State failed to present a *prima facie* case that Mr. Fair's statements were not coerced. Additionally, the State failed to refute Mr. Fair's unrebutted allegation that his right to counsel was repeatedly violated.

The State fails to acknowledge its burden to set forth a *prima facie* case, and instead tries to poke holes in Mr. Fair's claims and essentially argues that he failed to meet his ultimate burden of persuasion. But without any State evidence establishing its *prima facie* case, the burden never shifted back to Mr. Fair. *Id.* Thus, the State's claims that the circuit court ultimately found Mr. Fair's testimony incredible are irrelevant: With the State's failure to rebut the allegations, the Court cannot skip to the third step, the petitioner's burden of persuasion (although Mr. Fair maintains that his testimony was credible and substantiated and his evidence amply would have met the burden of persuasion as well).[4]

[4] With a heartfelt apology to Mr. Fair, there is not the space—nor the need, from a legal perspective—to defend his integrity and testimony from the State's scattershot effort to discredit it and him, so counsel regretfully relies on Mr. Fair's opening brief to refute this attack. Mr. Fair was a United States military veteran who served his country; was a senior at Roosevelt University at the time of his arrest; is a thoughtful and talented artist (*see, e.g.,* https://www.newberry.org/calendar/surviving-the-long-wars); and has been wrongfully imprisoned for decades. He, like everyone in this country, is deserving of the due process rights and right to counsel that our constitution protects. The State's efforts to unjustly malign him should be ignored.

The appellate court held that Mr. Fair met his initial burden to present a claim and shift the burden to the State. *See, e.g.,* App.29, ¶ 104 ("Petitioner has consistently alleged he was kicked and his resulting statements were coerced."). The State has not disputed that ruling, forfeiting any argument that it was incorrect. *Williams*, 193 Ill.2d at 347-48.

The appellate court, however, held that the State did successfully meet its *prima facie* burden, with regards to the second statement only, by presenting the prosecutor's testimony from hour thirty in support of the alleged voluntariness of that statement to the prosecutor. *See* App.29-33, ¶¶ 109-11.

Mr. Fair's opening brief explains how this ruling ignores well-established law from this Court about how to determine when a second statement is sufficiently attenuated from a coerced first statement to be considered voluntary. *See* Opening Br. Argument II(E). The taint of the detectives' coercion remained when Mr. Fair spoke to the prosecutor because: (1) there was no time lag at all between when Mr. Fair's will was overborne by the detectives and when he made the inculpatory statement to the prosecutor (*See* R.478-79; R.1059); (2) both interrogations happened in the same interrogation room at Area 2, so there was no change of location; and (3) even the interrogator remained unchanged with Detective Porter present for both statements. (App. ¶¶ 9, 49; R.1088). The State's brief ignores this argument too, once again forfeiting any contention that there was sufficient attenuation between the first coerced statement and the almost immediate subsequent statement. *Williams*, 193 Ill.2d at 347-48.

Instead, the State places all its eggs in one basket, arguing the legally irrelevant question at this juncture of whether the circuit court correctly determined that Mr. Fair failed to prove that he was tortured. St. Br. at 54-60. That ship has sailed—the State

appealed whether the torture referral was correct, the appellate court affirmed the referral in *Fair I*, and the State did not seek leave to appeal to this Court.

The circuit court seemingly understood that and, as the prosecutor acknowledged below, conducted a suppression hearing. App.70-71, R.956-55; SUP2 R 78, 89, 90. The circuit court just failed to require the State to prove its *prima facie* case. The appellate court also recognized that a suppression hearing was required; however, it found that the State proved a *prima facie* case by ignoring the coercion inducing the first oral statement and ignoring this Court's clear requirements for proving attenuation, to find that the second statement could be voluntary at hour thirty, even if Mr. Fair's rights were violated for the first twenty-nine hours. This ruling must be corrected.

Additionally, by conflating the gatekeeping of the Commission and the adjudicative function of the courts, the appellate court found that Mr. Fair's right to counsel was violated, but that this rights violation was not cognizable because it was not torture. *See* App.34, ¶ 112. This ruling, too, needs correction. Application of the correct law and consideration of the totality of the circumstances demonstrates that Mr. Fair's coerced statements and the State's unrebutted violation of Mr. Fair's right to counsel, despite his repeated requests for an attorney, require suppression of the statements used to convict him. Had this claim been brought during a third-stage post-conviction evidentiary hearing, there is no question suppression would have been required by the unrebutted proof that Mr. Fair's right to counsel was violated. The Torture Act should not be construed as a more challenging avenue to relief than the Post-Conviction Hearing Act. The Torture Act, its interpretative case law and legislative history, and the interests of justice all align—a new trial, with suppression of Mr. Fair's statements is warranted.

CONCLUSION

The State convicted Mr. Fair based on his coerced confessions, statements that were unsupported by any other evidence and were directly contradicted by the eyewitness accounts. Mr. Fair has been proclaiming his innocence and fighting his accountability conviction, obtained solely based on his statements, since the beginning. When the Torture Act provided an avenue for relief, Mr. Fair presented his torture claim, and the Commission found it credible. Mr. Fair defended the Commission's referral in the appellate court and prevailed. Thereafter, he was entitled to the relief the legislature created for him—an evidentiary hearing on his suppression claim. The State has not defended the lower courts' erroneous suppression rulings, nor could it, since it failed to meet its burden at the evidentiary hearing when none of the accused detectives denied their violence, threats, and deprivations. A new trial with suppression of Mr. Fair's coerced statements is required.

Respectfully Submitted,

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RULE 341(c) 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) table of contents and 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 20 pages.

DATED: May 4, 2023

/s/ Debra Loevy
Debra Loevy

DOCKET NO. 128373
IN THE
SUPREME COURT OF ILLINOIS

DARRELL FAIR Appellant, v. PEOPLE OF THE STATE OF ILLINOIS, Appellee.	)	Appeal from the Appellate Court, First District, No. 1-20-2072 There on Appeal from the Circuit Court of Cook County, No. 98 CR 25742-01 Honorable Peggy Chiampas Judge Presiding

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I hereby certify that on this 5th day of May, 2023, I caused a copy of the foregoing Proof of Service and accompanying Appellant's Reply Brief, Oral Argument Requested to be served on the following via the Court's Odyssey E-File and Serve system. Under penalties 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.

DATED: May 5, 2023

Respectfully submitted,

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