No. 128373

In The Supreme Court Of Illinois

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. DARRELL FAIR, Petitioner-Appellant.	On Appeal from the Illinois Appellate Court, First Judicial District, Case No. 1-20-1072. There on Appeal from the Circuit Court of Cook County, Illinois, No. 98 CR 25742. Hon. Peggy Chiampas, Judge Presiding.

BRIEF OF *AMICI CURIAE* THE INNOCENCE PROJECT, THE RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER, THE PEOPLE'S LAW OFFICE, AND THE CENTER ON WRONGFUL CONVICTIONS IN SUPPORT OF PETITIONER-APPELLANT

Of Counsel:

Lauren Gottesman (not admitted in IL)
The Innocence Project
40 Worth Street, Suite 701
New York, New York 10013

David M. Shapiro (ARDC #6287364)
Roderick and Solange MacArthur Justice Center
375 East Chicago Avenue
Chicago, Illinois 60611-3069

Joey L. Mogul (ARDC #6243516)
People's Law Office
1180 N. Milwaukee
Chicago, Illinois 60660

Steven Drizin (ARDC #6193320)
Laura Nirider (ARDC #6297299)
Center on Wrongful Convictions
375 East Chicago Avenue
Chicago, IL 60611-3069

Charles F. Smith (ARDC #6195537)
Alexander J. Kasparie (ARDC #6324149)
William S. Edwards (ARDC #6338930)
Serena Patel (ARDC #6339494)
Michael T. Morrell (ARDC #6342997)
Kathleen C. Schmidt (ARDC #6342700)

155 N. Wacker Drive, Suite 2700
Chicago, Illinois 60606
(312) 407-0700
Charles.Smith@probonolaw.com
Alexander.Kasparie@probonolaw.com

Counsel for Amici Curiae

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CYNTHIA A. GRANT
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Page(s)

INTEREST OF *AMICI CURIAE*

The Innocence Project, Inc. ("Innocence Project") was established 30 years ago to provide pro bono representation to individuals who may be able to prove their actual innocence through the development of a post-conviction record. To date, the work of the Innocence Project, together with affiliated organizations, has led to the exoneration of 375 people who, through DNA testing, established that they never committed the offenses for which they had been convicted.[1] In addition to providing pro bono post-conviction legal services, the Innocence Project works to prevent future miscarriages of justice. Relying on data compiled from over nearly three decades of exonerations, the Innocence Project has identified the chief risk factors for wrongful convictions and advocates to legislatively or administratively remediate those risk factors. The Innocence Project also participates in cases that are not in the post-conviction phase of litigation—on a consult or co-counsel basis or, as here, as amicus curiae—where the outcome of an issue in dispute may create precedent that either significantly aggravates or significantly mitigates one or more risks of wrongful conviction.

The Roderick and Solange MacArthur Justice Center ("RSMJC") is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC fights for civil rights protections in areas including police misconduct, the rights of the indigent in the criminal justice

[1] The Innocence Project has documented 375 DNA exonerations to date, and has been directly involved in the litigation of 194 of those exonerations. *See* The Innocence Project, Explore the Numbers: Innocence Project's Impact, https://innocenceproject.org/exonerations-data/ (last visited November 29, 2022).

system, compensation for the wrongfully convicted, and the treatment of incarcerated people.

The People's Law Office (the "Office") was established over 50 years ago and has dedicated itself to representing individuals in their criminal and civil rights cases involving police violence and other governmental misconduct. The Office is nationally known for successes in uncovering secret abuses by police and government officials and for forcing systemic changes in the criminal legal system in Chicago. The Office was the first to uncover the systemic racially motivated pattern and practice of torture committed by former Chicago Police Commander Jon Burge and the detectives under his command when representing Andrew Wilson in his federal civil rights proceeding in the Northern District of Illinois in the late 1980s. Thereafter, the Office has represented scores of police torture survivors in their post-conviction and civil rights proceedings, successfully securing the exoneration or release of many of the survivors from prison and multi-millions of dollars in civil rights settlements. The Office also presented the Chicago Police Torture cases to the United Nations Committee Against Torture ("CAT") in Geneva, Switzerland, obtaining a specific finding from the CAT calling for the prosecution of the perpetrators in these cases in May of 2006, and worked with and supported Chicago Torture Justice Memorials in drafting and advocating for the successful passage of unprecedented reparations legislation in Chicago's City Council in May of 2015 for Chicago Police (Burge) torture survivors.

The Center on Wrongful Convictions ("CWC", together with the Innocence Project, RSMJC, and the Office, "Amici") is dedicated to identifying and rectifying wrongful convictions and other serious miscarriages of justice. To date, the CWC has

exonerated more than 40 innocent men, women, and children from states around the country, and it receives thousands of inquiries a year. The CWC also houses some of the nation's leading legal experts on false confessions and police interrogations and has helped exonerate more than twenty false confessors.

False confessions are among the leading causes of wrongful convictions.[2] Police violence or threats of violence during interrogation have induced an alarming number of innocent people to falsely "confess" to crimes they did not commit. Nowhere is that problem more prevalent than in Chicago, which accounts for an extraordinarily large proportion of the nation's known false confessions.

This case calls upon the Court to determine, among other things, whether a petitioner's confession to a prosecutor is admissible where the petitioner presented unrebutted evidence that he was physically assaulted by a police detective during the course of the interrogation that ultimately resulted in the confession. As leading advocates for the wrongfully convicted and those whose rights have been violated by unlawful police violence, Amici are deeply invested in ensuring that individuals who confess in response to physical coercion are provided meaningful opportunities to contest the constitutionality of their coerced confession's admission—particularly in cases where, as here, the reliability of a confession is in dispute and was the lynchpin of the prosecution's case.

Here, after the Illinois Torture Inquiry and Relief Commission referred petitioner Darrell Fair's claim to the circuit court, pursuant to 775 ILCS 40/45(c), to assess whether his confession was unlawfully elicited by police torture, petitioner was denied relief

[2] *See* The Innocence Project, DNA Exonerations in the United States, https://innocenceproject.org/dna-exonerations-in-the-united-states (Aug. 29, 2021) ("*DNA Exonerations*").

because the courts below found that his confession was not the "product of torture," reasoning, among other things, that the interrogating officer who physically assaulted him had done so a day before he ultimately provided a confession to a prosecutor who did not himself engage in any physical violence. *People v. Fair*, 2021 IL App (1st) 201072-U, ¶¶ 113-15. The appellate court's opinion here, if upheld, would allow for the admission of a confession—and for a corresponding conviction based upon that confession to stand—despite uncontroverted evidence that the confession was elicited after the defendant was physically attacked during the course of the interrogation, so long as the confession was ultimately memorialized by someone other than the abusing officer and the physical attack did not directly precede the confession. Such a ruling would increase the risk that wrongful convictions premised on physically coerced false confessions are not remedied and, consequently, that the innocent remain in custody—a particularly grave risk here, where "the case against petitioner 'was practically non-existent without the [petitioner's] statement.'" *Id.* ¶ 32 (quoting *In re: Claim of Darrell Fair*, TIRC Claim No. 2011.018-F, at 3 (Ill. Torture Inquiry & Relief Comm'n May 20, 2013) ("*In re: Fair*")).

Accordingly, the undersigned submit this brief to urge this Court to reverse the ruling below and issue an opinion that ensures courts properly deem confessions inadmissible, and grant the requisite relief under 775 ILCS 40/50, whenever they find a defendant confessed after suffering violence, threats of violence, or physical deprivation at the hands of police.

BACKGROUND

I. CHICAGO'S HISTORY OF POLICE VIOLENCE AND FALSE CONFESSIONS.

False confessions elicited during coercive police interrogations are a leading cause of wrongful convictions, having contributed to nearly one quarter of all wrongful convictions that were later overturned by DNA evidence.[3] Chicago has been called the "false confession capital" of the nation, due largely to the Chicago Police Department's historical use of torture, violence, and threats of violence to coerce confessions from overwhelmingly Black and Latinx subjects of custodial interrogation.[4] A 2006 Special Prosecutors' Report, a 2006 United Nations Committee Against Torture Report, an Office of Professional Standards Report, the Illinois Torture Inquiry and Relief Commission's findings,[5] numerous civil suits, and the criminal prosecution of former Chicago Police Commander Jon Burge have yielded overwhelming evidence "of decades of abuse [by

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[3] *See* The National Registry of Exonerations (November 29, 2022), https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (establishing that 135 of the 566 DNA exonerations, or approximately 24%, documented by the National Registry of Exonerations involved false confessions).

[4] *See* Report on the Failure of Special Prosecutors Edward J. Egan and Robert D. Boyle to Fairly Investigate Systemic Police Torture in Chicago (Apr. 24, 2007), https://www.prisonlegalnews.org/media/publications/report%20on%20failure%20to%20investigate%20police%20torture%20in%20chicago-2007.pdf (including over 100 victims of torture, nearly all of whom were Black or Latinx).

[5] In 2009, to address the pervasive use of torture and its lingering consequences, the Illinois Legislature passed the Illinois Torture Inquiry and Relief Commission Act (the "TIRC Act" or "Torture Act"), P.A. 96-223, 775 ILCS 40/1 *et seq.* (2009). The TIRC Act established the Illinois Torture Inquiry and Relief Commission (TIRC), a state agency tasked with documenting instances of torture and coercion. *Id.* at 40/15. Pursuant to its authority under the TIRC Act, the Commission may refer cases to the Circuit Court of Cook County for evidentiary hearings. The TIRC's prior investigations have often led to litigation that exonerated innocent people who were physically coerced into falsely confessing, as in the case of Arnold Day. *Arnold Day*, The National Registry of Exonerations (Jan. 15, 2020), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5473.

Burge and under Burge's watch] that is unquestionably horrific." *United States v. Burge*, 711 F.3d 803, 808 (7th Cir. 2013); *see also Hinton v. Uchtman*, 395 F.3d 810, 822 (7th Cir. 2005) (Wood, J., concurring) (noting that a "mountain of evidence indicates that torture was an ordinary occurrence" in the Chicago Police Department under Burge's command).

Before he was appointed a police commander in 1988, Burge was the lieutenant in charge of the Violent Crimes Unit of Area Two from 1982 to 1986.[6] *Tillman v. Burge*, 813 F. Supp. 2d 946, 955 (N.D. Ill. July 20, 2011). During his tenure, Burge and Chicago Police detectives under his command employed interrogation tactics that were compared to those used in the "notorious Abu Ghraib facility in Iraq," *Hinton*, 395 F.3d at 822, and included electric shocks, beatings, cigarette burnings, suffocation, kicking, screaming, and threats with assault weapons to secure confessions from often innocent victims. *See, e.g.*, *People v. Wilson*, 116 Ill. 2d 29, 34-41 (1987), *holding modified by People v. Wrice*, 2012 IL 111860, ¶ 71.[7] Such torture was both "systematic" and "methodical," and commanding officers, like Burge, not only knew of the abuse but actively participated in it.[8] In 1993,

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[6] Area Two refers to a precinct of the Chicago Police Department located on Chicago's south side. *Burge*, 711 F.3d at 807. During Burge's time as a commanding officer in Area Two, "torture was an ordinary occurrence at the Area Two station of the Chicago Police Department." *Uchtman*, 395 F.3d at 822 (Wood, J., concurring). A report by the Office of Professional Standards within the CPD found that physical abuse at Area Two "did occur and that it was systematic. . . . [T]he type of abuse described was not limited to the usual beating, but went into such esoteric areas as psychological techniques and planned torture. The evidence presented by some individuals convinced juries and appellate courts that personnel assigned to Area [Two] engaged in methodical abuse." Michael Goldston, *Special Project Conclusion Report*, Off. of Pro. Standards, (Sept. 28, 1990), https://peopleslawoffice.com/wp-content/uploads/2012/02/Goldston-Report-with-11.2.90-Coversheet.pdf ("*Special Project Report*"), at 3.

[7] *See also generally* G. Flint Taylor, *The Chicago Police Torture Scandal: A Legal and Political History*, 17 CUNY L. Rev. 329, 330-31 (2014) ("*Flint Taylor*").

[8] *See Special Project Report*, *supra* note 6, at 18-21; Letter from David M. Hardy, Section Chief, Record/Information Dissemination Section, Information Management Division, Dept. of Justice to J. Ader (Nov. 1, 2019), at 275 (on file at https://www.documentcloud.org/

after nearly two decades of torture and coerced confessions, Burge was fired.[9] Nonetheless, after Burge's removal, the violent, coercive practices employed by Burge and his team persisted.[10]

Detective Michael McDermott—the officer who physically assaulted petitioner Darrell Fair during the course of his interrogation—worked under Burge at Area Two for several years during the early and mid-1980s. *United States v. Burge*, No. 08 CR 846, ECF No. 396, at 1964:5-12 (N.D. Ill. July 1, 2011).[11] During that time, McDermott witnessed Burge place a bag over the suspect's face while Burge pointed a gun at him, demanding he confess.[12] McDermott went on to create a reputation for brutality in his own right.[13] At least thirteen allegations of abuse have been made against him, four of which the TIRC referred for judicial review.[14] Further, there is evidence that McDermott has physically and

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documents/6539136-Burge-Litigation-1st-Interim-Release-19-Cv-04048.html#document/p275/a535179).

[9] *See generally* Natalie Y. Moore, *Payback*, The Marshall Project (Oct. 30, 2018), https://www.themarshallproject.org/2018/10/30/payback ("*Payback*"); *see also Flint Taylor*, *supra* note 7, at 339-40, 363-64, 378-79.

[10] *See, e.g.*, Andy Thayer, *High-Ranking Torture Cop Proteges Sued in Sign that Chicago is Not Over the Burge Era*, Loevy & Loevy (Feb. 8, 2018), https://loevy.com/blog/high-ranking-torture-cop-proteges-sued-sign-chicago-not-burge-era/; Micah Uetricht, *Accused Torturer Jon Burge Died Last Week, But His Legacy of Brutal, Racist Policing Lives On in Chicago*, The Intercept (2018), https://theintercept.com/2018/09/25/jon-burge-chicago-police-torture/ (noting the history of post-Burge police problems in Chicago and concluding that "[t]he broader culture of racism and brutality that he was at the helm of in the Chicago Police Department appears to be firmly intact" even decades after Burge's departure).

[11] McDermott was a detective in the Area Two Violent Crimes Unit from 1981 to 1999. *Burge*, No. 08 CR 846, ECF No. 396, at 1963:8-11.

[12] *Id*. at 1976:16-23; 1978:15-25; 1988:17-1989:4.

[13] *See, e.g.*, *In re: Claim of Michelle Clopton*, TIRC Claim No. 2012.112-C, at 19 (Ill. Torture Inquiry & Relief Comm'n July 22, 2021) ("Detective McDermott, whose proclivity for abuse and questionable testimony became widely publicized years later.").

[14] *See In re: Claim of Tony Anderson*, TIRC Claim No. 2011.014-A, at 2 (Ill. Torture Inquiry & Relief Comm'n May 13, 2020); *In re: Claim of Jesse Calatayud*, TIRC Claim No. 2013.135-

psychologically abused witnesses and defendants alike, *Fair*, 2021 IL App (1st) 201072-U, ¶¶ 75-76, and the 2006 Special Prosecutors' Report found that McDermott had criminally assaulted a suspect in his custody.[15] Significantly, McDermott has engaged in violence against custodial subjects of interrogation that, in turn, has elicited confessions that his victims assert were false. *See, e.g.*, *Mitchell v. City of Chi.*, No. 18-cv-07357, ECF No. 1, ¶ 67 (N.D. Ill. Nov. 5, 2018). He has also been accused of fabricating false confessions out of whole cloth when suspects refused to incriminate themselves. *See, e.g.*, *id.* ¶ 40. And McDermott has allegedly denied suspects in his custody their Sixth Amendment right to counsel, despite suspects' clear invocations of the right. *See, e.g., id.* ¶¶ 38-39. He is also an admitted perjurer.[16] This is who Darrell Fair encountered when he was brought to Area Two in September 1998.

II. THE FACTS OF MR. FAIR'S CASE

On July 22, 1998, Lamont Reaves robbed two men at gunpoint in a parking lot outside a Southside Chicago bar. *Fair*, 2021 IL App (1st) 201072-U, ¶ 8. When one of the men tried to move away, Reaves shot him in the back and killed him. *Id.* Not one of the at least twenty eyewitnesses to the crime implicated petitioner (hereinafter, "Mr. Fair").

C, at 22 (Ill. Torture Inquiry & Relief Comm'n Apr. 22, 2021) ("Michael McDermott, who is implicated in three cases that the Commission has referred for judicial review" (citations omitted)); *In re: Claim of Ebony Reynolds*, TIRC Claim No. 2012.116-R, at 1 (Ill. Torture Inquiry & Relief Comm'n Aug. 18, 2021) (fourth case involving McDermott referred for judicial review).

[15] *See* Report of the Special State's Attorney, Appointed and Ordered by The Presiding Judge of The Criminal Division of The Circuit Court of Cook County in No. 2001 MISC. 4 (July 19, 2006) ("*Special Prosecutors' Report*"), at 3.

[16] In *People v. Mitchell*, 2012 IL App (1st) 100907, the Illinois Appellate Court described McDermott as "an admitted perjurer," and cited the unreliability of his trial testimony. *See id.* ¶ 56.

(R. 409:24.)[17] In fact, at trial, a witness testified that Mr. Fair was talking with her and another friend on the other side of the parking lot in the moments immediately before Reaves committed this crime. (R. 420:16, 563:9-567:19, 570:2-19, 573:10-575:18.) Nonetheless, over a month later, after detectives learned that the car Reaves had been driving on the day in question was registered to Mr. Fair, Mr. Fair was arrested. *Fair*, 2021 IL App (1st) 201072-U, ¶¶ 9, 11-12; (R. 556:10-15).

Upon his arrest, the police brought Mr. Fair to Area Two, where Detective McDermott was assigned. *Fair*, 2021 IL App (1st) 201072-U, ¶ 11. While some of the facts concerning what happened during the course of Mr. Fair's nearly thirty-hour long custodial interrogation are in dispute, at the post-conviction evidentiary hearing following the TIRC's referral of his case to the circuit court, Mr. Fair presented unrebutted evidence that McDermott physically kicked him during his interrogation.[18] Further, the State did not rebut the evidence presented by Mr. Fair that he has chronic asthma and an allergic skin condition, *id*. ¶¶ 69, 78, or that he was denied his asthma inhaler, despite repeated requests for it, thereby placing his physical health at risk, *id*. ¶ 37. Mr. Fair also testified that, at

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[17] This brief refers to the post-TIRC referral evidentiary hearing transcript as "R," the common law record as "C," and the secured record on appeal as "S."

[18] The trial court "gave little to no weight to petitioner's allegations of abuse" because it found that his testimony at the post-conviction hearing was "repeatedly contradicted by other evidence including his interview with the Commission." *Fair*, 2021 IL App (1st) 201072-U, ¶ 91. This credibility finding, however, was reversed by the appellate court, which "[c]ontrary to the trial court, [] accept[ed] petitioner's unrebutted and consistent claims of being kicked by McDermott as true." *Id.* ¶ 106. Although it explicitly reversed the trial court's findings regarding McDermott's kicking of Mr. Fair, the appellate court did not make any specific holdings regarding Mr. Fair's other allegations of misconduct, which included, inter alia, allegations that McDermott threatened to shoot him, and that the officers refused to provide him with his inhaler, and denied his requests for counsel. *See generally id.* However, the State did not present evidence to specifically rebut many of these allegations at evidentiary hearing that followed the TIRC referral. *See generally id.* ¶ 77 (noting the state did not call any witness at the evidentiary hearing and listing ten pieces of documentary evidence that it submitted).

Area Two, another interrogating officer, Detective Ted Przepiora, handcuffed Mr. Fair to a ring in the interrogation room and, in addition to denying his requests for his asthma medication, also ignored his repeated requests for a lawyer. *Id.* ¶ 38. And Mr. Fair explained that when the officers told him he was under arrest for murder, he repeatedly asserted his innocence. (R. 979:12-14; 992:3-9.)

As Mr. Fair recounted at the evidentiary hearing, he was sitting handcuffed, struggling to breathe, when an angry McDermott entered the room. *Fair*, 2021 IL App (1st) 201072-U, ¶ 39; (R. 980:22-982:17). After initially calling him names, McDermott eventually kicked Mr. Fair, hard, below the kneecap. *Fair*, 2021 IL App (1st) 201072-U, ¶ 39. Mr. Fair testified that McDermott then put his hand on his gun and threatened Mr. Fair to "make a move." *Id.* at 26; (R. 985:17-986:4). McDermott then continued to kick Mr. Fair in the legs, though Mr. Fair reported being able to dodge and deflect the additional blows. *Fair*, 2021 IL App (1st) 201072-U, ¶ 39. Several hours later, according to Mr. Fair, Przepiora reentered the room and Mr. Fair told him about the attack and again asked for his asthma medication and a lawyer. *Id.* ¶ 40. Again, Przepiora reportedly ignored him. *Id.* When Przepiora then asked about the murder, Mr. Fair testified that he told Przepiora that he did not know anything about it and continued to assert his innocence. (R. 992:3-9.) Mr. Fair testified that he asked multiple officers for his medication and a lawyer, and that the officers ignored him each time. *Fair*, 2021 IL App (1st) 201072-U, ¶¶ 40, 42-43.

More than 24 hours passed as Mr. Fair was held in the room and denied food, sleep, medication, and counsel. (R. 969:8-974:18, 999:8-1002:3.) Mr. Fair testified that, while denying Mr. Fair his basic needs and placing his physical safety at risk, Detective Maverick Porter promised that he would bring Mr. Fair food if Mr. Fair began to cooperate and speak

with the officers. *Fair*, 2021 IL App (1st) 201072-U, ¶ 46. Mr. Fair then told Porter that he had been in the parking lot on the night of the shooting and, thereafter, Porter brought Mr. Fair two cheeseburgers. *Id*. Mr. Fair testified that the detectives told him that they knew he "didn't do anything," assured him he was "not the target of [the] investigation," and that they just "need[ed] [his] help" to build the case against Reaves. *Id*. ¶ 47; (R. 1013:16-1014:3). Mr. Fair also testified that Porter told him the officers would "let [him] know" what to say. (R. 1013:16-1014:3.)

The police then lied to Mr. Fair by assuring him that he if repeated what they told him to say, he would be able to go home. *Fair*, 2021 IL App (1st) 201072-U, ¶ 47. Mr. Fair testified that he was scared and exhausted, and believed there was no way to end the abuse other than to repeat what he had been told, so he ultimately agreed to tell Cook County Assistant State's Attorney Adriane Mebane what the detectives had instructed him to say. *Id*. ¶¶ 47, 49; (R. 1016:2-1018:1). Mr. Fair testified that when Mebane then gave Mr. Fair a written version of his oral statement, Mr. Fair realized that, instead of being allowed to go home as the detectives had said, Mebane was planning to charge him with involvement in the murder. *Fair*, 2021 IL App (1st) 201072-U, ¶ 49; (R. 1019:21-1020:12). Following that realization, Mr. Fair refused to sign the statement that Mebane had prepared. *Fair*, 2021 IL App (1st) 201072-U, ¶¶ 49-50.

Mr. Fair's oral custodial statements and the unsigned written statement, drafted by Mebane, were the only direct evidence tying him to the murder.[19] Before trial, Mr. Fair's

[19] While the State presented evidence that the car the shooter arrived and left in was registered to Mr. Fair, along with the testimony of a witness who observed people in that car, the witness did not identify Mr. Fair as one of the passengers. *See In re: Fair*, TIRC Claim No. 2011.018-F, at 3; (R. 383:15-22, 556:10-15). Indeed, the TIRC noted that "[t]here was no physical evidence, other than the car, . . . linking [Mr. Fair] to the offense." *Id.* In fact, the TIRC concluded Mr. Fair's "conviction rest[ed] almost entirely upon [his confession]" and

trial counsel filed a motion to suppress the statements, citing the abuse Mr. Fair would later present to the TIRC and at his post-conviction evidentiary hearing. *Id.* ¶ 52. However, trial counsel subsequently withdrew the motion because, according to Mr. Fair's testimony at the evidentiary hearing, his lawyer felt it was unlikely the judge would suppress the oral statement. *Id.*; (R. 1029:2-18). The custodial statements were thus admitted into evidence at trial. (S. 267.) Mr. Fair was convicted of aiding and abetting murder and, subsequently, sentenced to fifty years' imprisonment. *Fair*, 2021 IL App (1st) 201072-U, ¶ 16; (C. 64). His appeal and post-conviction appeal were denied. *Fair*, 2021 IL App (1st) 201072-U, ¶¶ 17-18. In 2011, Mr. Fair filed a claim with the TIRC asserting that he was violently attacked and denied necessary medical care during his interrogation, and that his confession was coerced, maintaining his innocence of the crime. *Id.* ¶¶ 22, 26-27.

The TIRC found his claims credible and referred his case for judicial review.[20] Following a hearing—in which the circuit court heard evidence to assess whether there was newly discovered evidence that would likely have resulted in the suppression of Mr. Fair's statement to Mebane—the circuit court denied Mr. Fair's request to suppress the written statement and dismissed his torture claim. *Id.* ¶¶ 3, 80. Specifically, and among other things, the court concluded that "the totality of the circumstances showed the State [had] met its burden of establishing that [Mr. Fair's] statement was voluntary." *Id.* ¶ 92. On appeal, the appellate court accepted Mr. Fair's consistent and unrebutted assertions of abuse by McDermott as true. *Id.* ¶ 106. However, the court upheld the circuit court's denial of his

highlighted that "none of the prosecution witnesses identified [Mr. Fair] as being an occupant of the car or otherwise being present at the scene." *Id.*

[20] *See In re: Fair*, TIRC Claim No. 2011.018-F, at 4.

claim, crediting the circuit court's finding that Mr. Fair's will was not overcome with respect to the written statement prepared by Mebane on the basis that, among other reasons, the kicking incident with McDermott occurred the day before Mr. Fair gave the statement to Mebane, who did not engage in any coercive conduct. *Id.* ¶ 113. Thus, in light of all the circumstances surrounding Mr. Fair's statements, the appellate court affirmed the lower court's finding that the statements given to Mebane were voluntary and not the product of torture. *Id.* In addition, the appellate court dismissed Mr. Fair's allegations that the police had ignored his clear invocations of the right to counsel, in violation of his Sixth Amendment right, reasoning that the scope of its ruling on Mr. Fair's TIRC claim was limited to his claims of physical torture, and thus Mr. Fair was not entitled to relief under the Torture Act based on the denial of his repeated requests for counsel. *Id.* ¶ 112.

SUMMARY OF ARGUMENT

Police violence and threats of violence during interrogations not only grossly violate individuals' constitutional rights but also may coerce innocent suspects into providing false confessions, resulting in tragic miscarriages of justice for both the innocent "confessor" and the community at large.[21] This problem is particularly acute in Chicago, the country's "false confession capital."[22] Indeed, nearly *25 percent* of all known false

[21] *See DNA Exonerations*, *supra* note 2 (noting that 48 additional crimes, including 25 murders, were committed by the true perpetrators of crimes who were not held accountable when innocent false confessors were wrongfully convicted).

[22] *See, e.g.*, *60 Minutes: Chicago: The False Confession Capital* (CBS television broadcast Dec. 9, 2012), https://www.cbsnews.com/news/chicago-the-false-confession-capital/ (transcript of broadcast); Kevin Davis, *The Chicago Police Legacy of Extracting False Confessions is Costing the City Millions*, A.B.A. J. (July 1, 2018), https://www.abajournal.com/magazine/article/chicago_police_false_confessions.

confessions nationwide were elicited from Cook County police interrogations.[23] In light of Illinois's uniquely problematic history of police interrogation violence and resulting false confessions, meaningful judicial scrutiny of substantiated claims of police coercion is critical.

In precedent dating back nearly a century, this Court has recognized that confessions elicited by violence must be excluded. *See People v. Holick*, 337 Ill. 333, 338 (1929) (suppressing a custodial statement procured by, inter alia, police physically twisting the defendant's arm, swinging a "blackjack" at him, and threatening additional violence, reasoning that "[a] confession is not voluntary where *any* degree of influence amounting to duress is used to obtain it by those having authority over the . . . accused, and a confession so obtained must be excluded." (emphasis added)). Likewise, this Court has held that any conviction tainted by an involuntary confession is constitutionally infirm. *See People v. Hughes*, 2015 IL 117242, ¶ 31 ("It is 'axiomatic' that a conviction based 'in whole or in part, on an involuntary confession, regardless of its truth or falsity' violates a defendant's constitutional rights." (quoting *Miranda v. Arizona*, 384 U.S. 436, 464 n.33 (1966))). And, more recently, this Court has 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, ¶ 71 (quoting *Wilson*, 116 Ill. 2d at 41).

In contrast to this Court's precedent, the appellate court's opinion here sanctioned a conviction premised upon a confession that was elicited during the course of a thirty-hour detention—during which the defendant was physically attacked by an officer with a

[23] *See* The National Registry of Exonerations (August 29, 2021), https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx; Janet Moore, *Reviving* Escobedo, 50 Loy. U. Chi. L.J. 1015, 1029 (2019).

demonstrated history of brutality—merely because the confession was ultimately memorialized by someone other than the abusing officer and the physical attack occurred many hours before the confession was ultimately transcribed. *See Fair*, 2021 IL App (1st) 201072-U, ¶¶ 108-13.

To help safeguard against and rectify wrongful convictions procured by physically coerced confessions, this Court should reverse the appellate court's decision and hold that any confession elicited during a custodial detention in which a court finds that police officers used violence, threats of violence, or physical deprivation against the defendant is per se involuntary and inadmissible. Such a narrow but significant holding is critical to ensure that defendants are not wrongfully convicted—nor wrongfully denied post-conviction relief—as a result of confessions collected in response to physical coercion, regardless of whether the police violence was committed by the state actor to whom the defendant eventually confessed or whether the confession is temporally attenuated from the acts of violence. Otherwise, individuals will be at risk of—or in Mr. Fair's case, continue to suffer—unjust incarceration as a result of an unreliable and, potentially, false confession procured by physical violence.[24]

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[24] Amici also support Mr. Fair's position that a circuit court who receives a case referral from the Illinois Torture Inquiry and Relief Commission (TIRC) should address any additional constitutional violations or allegations of police misconduct regarding the relevant interrogation, as such allegations implicate the admissibility of the custodial statements under consideration in the proceeding. This issue, however, would be moot if the Court were to adopt Amici's proposed per se rule, and thus Amici will not address this issue at length in the instant brief.

Amici nonetheless urge the Court to clarify that once a case has been referred by the TIRC to a circuit court for a hearing on the admissibility of the petitioner's custodial statements, the court must not ignore corresponding claims of interrogating officers' misconduct that violated the petitioner's constitutional rights, even if such misconduct does not amount to physical torture. Moreover, this Court should urge circuit courts assessing TIRC-referred claims to consider the petitioner's evidence of torture when making credibility determinations about the accused officer(s)' testimony, as such evidence of torture necessarily implicates the officers'

ARGUMENT

I. POLICE VIOLENCE, THREATS OF VIOLENCE, AND OTHER ACTS OF PHYSICAL COERCION DURING INTERROGATION PLACE INNOCENT PEOPLE AT RISK OF FALSE CONFESSION AND WRONGFUL CONVICTION.

False confessions are a primary cause of wrongful convictions in the United States, contributing to nearly 24 percent of the convictions underlying all known DNA exonerations.[25] Strikingly, two-thirds of all known cases nationwide in which police misconduct led to false confessions involved threatened or actual violence during the relevant interrogations.[26] As of 2019, violence or threats of violence were present in 68 percent of known false confessions that were elicited in interrogation rooms in Chicago, Illinois.[27] These known false confession cases necessarily represent only a fraction of the actual number of innocent people who were coerced into "confessing" and who were wrongfully convicted as a result. As leading experts in false confessions have explained, the available data "most surely represent the tip of an iceberg" given the number of "false

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credibility regarding the allegations of other constitutionally infirm conduct during the interrogation. A contrary ruling would allow unlawful police conduct during interrogation to be unjustly ignored, and would likely result in the continued wrongful incarceration of individuals who have confessed in response to police violence and other forms of misconduct and coercion, but who may be unable to substantiate their burden solely on the basis of the torture claim.

[25] *See* The National Registry of Exonerations (Nov. 25, 2022), https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (establishing that 135 of the documented 566 (24 percent) exonerations involved false confessions).

[26] Samuel Gross et al., *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement*, Nat'l Registry of Exonerations 31 (2020), https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf.

[27] *See* Klara Stephens, *Misconduct and Bad Practices in False Confessions: Interrogations in the Context of Exonerations*, 11 Ne. U.L. Rev. 593, 598 (2019); *see also* Gross, *supra* note 26, at 31.

confessions that are disproved before trial, many that result in guilty pleas, those in which DNA evidence is not available, those given to minor crimes that receive no post-conviction scrutiny, and those in juvenile proceedings that contain confidentiality provisions."[28]

The history of policing in this country informs Chicago's persistent issues with false confessions. Prior to the 1930s, police throughout the country more routinely used physical violence and aggressive confrontational tactics that became known as the "third degree"—"i.e., the use of physical force during interrogation, deprivation of food and sleep"[29]—to force suspects into confessing.[30] After significant public backlash and reform efforts, most police departments began utilizing new interrogation techniques, most notably the "Reid Technique."[31]

The Reid Technique—named after one of its founders, a former Chicago police detective, John E. Reid—is the "most widely publicized and probably most widely used" interrogation method in the United States, and has been linked to many psychologically coerced false confession.[32] Indeed, as the United States Supreme Court has recognized, even in the absence of violence or explicit threats of violence, custodial interrogations that, like the Reid Method, are designed to psychologically induce the suspect to confess, create

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[28] Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & Hum. Behav. 3, 3 (2010) ("*Police-Induced Confessions*").

[29] Gisli H. Gudjonsson & John Pearse, *Suspect Interviews and False Confessions*, 20 Curr. Directions in Psych. 33, 33 (2011).

[30] Richard A. Leo, *Police Interrogation and American Justice* 66-70 (Harvard University Press 2008).

[31] Wyatt Kozinski, *The Reid Interrogation Technique and False Confessions: A Time for Change*, 16 Seattle J. for Soc. Just. 301, 306-09 (2017).

[32] *Police-Induced Confessions*, *supra* note 28, at 7 (noting that the Reid Method is characterized by physical isolation and psychologically manipulative techniques intended to "lead suspects to see confession as an expedient means of escape").

"inherently compelling pressures," *Miranda v. Arizona*, 384 U.S. 436, 467 (1966), that "can induce a frighteningly high percentage of people to confess to crimes that they never committed," *Corley v. United States*, 556 U.S. 303, 321 (2009) (citing Drizin & Leo, *The Problem of False Confessions in the Post–DNA World*, 82 N.C. L. Rev. 891, 906-07 (2004)). The Reid Method, in which psychological manipulation is key, is today deemed sufficiently controversial—due to its outsized role in producing false confessions—that "a consulting group that . . . has worked with a majority of U.S. police departments, said . . . it will stop training detectives in the [Reid] method" and will instead "use the Reid technique only to educate police on the risk and reality of false confessions."[33]

In Chicago, the psychological manipulation of the Reid Technique did not actually replace the third-degree tactics of the past, but was often seen in use alongside the continued practice of violence, threats of violence, and denial of basic human needs by officers under Burge's command, which persisted long after he was suspended in 1991. Indeed, as recently as 2015, it was revealed that Chicago police officers were operating a "black site" detention center where detainees were routinely held incommunicado, repeatedly "den[ied] access to basic constitutional rights[,]" and reportedly subjected to physical violence and abuse, such as "[b]eating by police, resulting in head wounds . . . [and] [s]hackling for prolonged periods."[34]

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[33] Eli Hager, The Marshall Project, *The Seismic Change in Police Interrogations* (Mar. 7, 2017), https://www.themarshallproject.org/2017/03/07/the-seismic-change-in-police-interrogations?utm_medium=email&utm_campaign=newsletter&utm_source=opening-statement&utm_term=newsletter-20170308-708#.OF0yiMfDd.

[34] *See, e.g.*, Spencer Ackerman, *The Disappeared: Chicago Police Detain Americans at Abuse-Laden 'Black Site'*, The Guardian (Feb. 24, 2015, 4:43 PM), https://www.theguardian.com/us-news/2015/feb/24/chicago-police-detain-americans-black-site (reporting on the existence of "Homan Square," the "black site" facility run by Chicago Police officers in a warehouse where

Whether elicited by psychological or physical coercion, once elicited, false confessions have an enormous influence on all parties involved in the case and present a distressingly high risk that the confessor will be wrongfully convicted. False confessions often thwart criminal investigations because of a confession's power to "taint[] the perceptions of eyewitnesses, forensic experts, and others."[35] Indeed, "confessions have exceptional persuasive force." *People v. Sanchez*, 2018 IL App (1st) 143899, ¶ 87.

The case of Mark Maxson, an exoneree from Cook County, Illinois, exemplifies the overwhelming impact a false confession has on the fair administration of justice—often elevated by fact finders above even scientific evidence of innocence. In August 1992, six-year-old Lindsey Murdock was murdered, sexually assaulted, and left in an abandoned garage in Chicago. *Maxson v. Dwyer*, 2017 WL 1493712, *1 (N.D. Ill. Apr. 26, 2017). The body was discovered on August 30, 1992. *Id*. Later that day, Mr. Maxson gave a television interview saying he had seen the boy earlier. *Id*. When police learned of the interview, they contacted Mr. Maxson asking if he would be willing to help the police. *Id*. Mr. Maxson was eager to help and was brought to the Area Two police station where he willingly gave blood and hair samples. *Id*. At the station, over a three-day period, police detectives threatened Mr. Maxson, slapped him, kicked him, denied his request for an attorney, and ultimately coerced him into giving a false confession. *Id*.

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police held "people without legal counsel for between 12 and 24 hours, including people as young as 15" and engaged in unlawful, violent practices).

[35] Saul M. Kassin, *Why Confessions Trump Innocence*, 67 Am. Psych. 431, 436-38 (2012) (noting the high prevalence of additional evidentiary errors, such as mistaken eyewitness identification, when a false confession is involved); *see also* Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J. Am Acad. Psychiatry L. 332, 340 (2009).

At trial, a serologist testified that there was blood found on the crime scene that did not belong to the victim, and that none of the blood found matched Mr. Maxson's. *Id*. at *2. The only evidence linking Mr. Maxson to the murder was his violently coerced confession. *Id.* Despite the exculpatory serology evidence—which demonstrated that an unknown person's blood was found at the crime scene and that blood did not match to Mr. Maxson—the jury convicted Mr. Maxson, and he spent 24 years in prison before DNA testing of the crime scene evidence revealed the identity of the true perpetrator. *Id.* Ultimately, on September 27, 2016, the Cook County State's Attorney's Office moved to vacate Mr. Maxson's conviction and he was released. *Id.* Mr. Maxson's case is but one of several examples of wrongful convictions, caused in part by coerced, false confessions, that occurred despite compelling scientific evidence of innocence available at the time of trial. Strikingly, *22 percent* of individuals who falsely confessed and were later exonerated by DNA testing had exculpatory DNA evidence available at the time of trial but were nonetheless wrongfully convicted.[36]

As this Court has recognized, when police officers use violence, threats of violence, physical deprivation, or other "brutality" to extract a confession, the resulting confession evidence is "wholly unreliable," *People v. Hall*, 413 Ill. 615, 624 (1953), and thus places the "confessor" at risk of wrongful conviction. As explored below, to ensure that convictions premised upon such unreliable and, potentially, false confession evidence may be properly remedied in post-conviction proceedings, this Court should issue a ruling that provides clear guidance to courts assessing the admissibility of a confession extracted after police engage in violence or other forms of physical coercion.

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[36] *See DNA Exonerations*, *supra* note 2.

II. TO PREVENT AND RECTIFY WRONGFUL CONVICTIONS OF INNOCENT PEOPLE WHO WERE COERCED INTO CONFESSING BY POLICE VIOLENCE, THREATS OF VIOLENCE, OR PHYSICAL DEPRIVATION, CONFESSIONS ELICITED AFTER SUCH POLICE MISCONDUCT MUST BE DEEMED PER SE INVOLUNTARY.

Although this Court has repeatedly, and rightfully, denounced police violence in interrogations, it has never expressly articulated a per se rule that a confession elicited in response to violence, threats of violence, or physical abuse is per se involuntary and inadmissible, regardless of whether the confession is temporally attenuated from the violence, or whether the offending officers are physically present when the confession is ultimately elicited. A clear per se rule would deter such unconstitutional police conduct and provide necessary guidance to courts assessing the admissibility of confessions extracted by such egregiously coercive means, thereby both preventing future false confessions and helping to rectify unjust and, potentially, wrongful convictions that were secured by the admission into evidence of violently procured confessions.

A per se rule that renders any confession elicited after interrogating officers engage in physical violence is consistent with the relevant United States Supreme Court precedent. Specifically, in *Stein v. People of New York*, 346 U.S. 156 (1953), the Supreme Court reasoned that "[p]hysical violence or threat of it by the custodian of a prisoner during detention serves no lawful purpose, invalidates confessions that otherwise would be convincing, and is universally condemned by the law. When present, *there is no need to weigh or measure its effects on the will of the individual victim*." *Id*. at 182, *overruled on other grounds by Jackson v. Denno*, 378 U.S. 368 (1964) (emphasis added).[37] In holding

[37] Specifically, the Court in *Jackson* examined *Stein*'s previous affirmance of New York's rule that "if the evidence present[ed] a fair question as to [a confession's] voluntariness, as where certain facts bearing on the issue are in dispute or where reasonable men could differ over the inferences to be drawn from undisputed facts, the judge 'must receive the confession and leave

that the presence of violence by an interrogator negates the need to attempt to "measure [the] effect" of such violence on the custodial subject, the Court noted the risk of such tactics producing false confessions, explaining that:

> "[t]he tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain is so strong that judges long ago found it necessary to guard against miscarriages of justice by treating any confession made concurrently with torture or threat of brutality as too untrustworthy to be received as evidence of guilt."

Id.[38]

Applying *Stein*, some courts have expressly held that confessions are per se involuntary and inadmissible when elicited or "accompanied" by police violence. For example, the Connecticut Supreme Court has expressly noted that "[c]onfessions accompanied by physical violence wrought by the police have been considered per se inadmissible." *State v. Fields*, 827 A.2d 690, 698 (Conn. 2003) (explaining "[s]uch confessions properly are presumed involuntary because of, among other things, both their unreliability and the great likelihood that the use or threatened use of violence overbears a suspect's will") (citing *Stein*, 346 U.S. at 182); *see also State v. Correa*, 696 A.2d 944, 953

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to the jury, under proper instructions, the ultimate determination of its voluntary character and also its truthfulness.'" *Jackson*, 378 U.S. at 377 (quoting *Stein*, 346 U.S. at 172). After analyzing the requirements of the Fourteenth Amendment, the Court in *Jackson* concluded that "the New York procedure [fell] short of satisfying th[ose] constitutional requirements" and overruled *Stein*, holding that the resolution of factual and legal issues cannot be left to a jury room deliberation, where it will be unknowable whether the jury in fact properly assessed voluntariness, separately from the veracity of the confession. *Jackson*, 378 U.S. at 391. Rather, the *Jackson* Court held that a voluntariness hearing must be held by the trial court, and the hearing must be "fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend." *Id.* Nothing in the *Jackson* decision overruled or denounced the *Stein* Court's language regarding physical coercion.

[38] Likewise, when addressing the admissibility of a confession procured by a threat of physical violence, the Supreme Court in *Beecher v. Alabama*, 389 U.S. 35, 38 (1967), reasoned that there is an "inescapable conclusion" that a confession is involuntary if the confessor has been threatened "at gunpoint to speak his guilt." *Id.* at 38.

(Conn. 1997) ("[P]er se involuntariness rule applies when an interrogation is accompanied by physical violence") (citing *Stein*, 346 U.S. at 182). Further, at least three federal circuit courts have similarly noted that *Stein* effectively created a per se rule that confessions elicited by police violence are, categorically, inadmissible. *See Dassey v. Dittmann*, 877 F.3d 297, 303 (7th Cir. 2017) ("Physically abusive interrogation tactics would constitute coercion *per se*.") (citing *Stein*, 346 U.S. at 182); *United States v. Haswood*, 350 F.3d 1024, 1027 (9th Cir. 2003) (holding that "[a] confession accompanied by physical violence is *per se* involuntary"); *United States v. Jenkins*, 938 F.2d 934, 938 (9th Cir. 1991) (holding that "in some cases, the need for such an individual calculus is obviated by the egregiousness of the custodian's conduct" and finding that a defendant's confession was involuntary after he was beaten and threatened) (citing *Stein*, 346 U.S. at 182); *Miller v. Fenton*, 796 F.2d 598, 604 (3d Cir. 1986) (explaining that "a *per se* involuntariness rule applies when an interrogation is accompanied by physical violence") (citing *Stein*, 346 U.S. at 182); *cf. Cooper v. Scroggy*, 845 F.2d 1385, 1390 (6th Cir. 1988) ("The use of physical force by interrogators creates a heavy presumption, if not a *per se* rule, that there has been a violation of due process.").

While this Court has yet to expressly hold that confessions elicited after police violence are per se involuntary, regardless of temporal attenuation, it has strongly, and consistently, condemned such physical coercion and, in precedent dating back to the 1920s, suggested that interrogation violence will render a confession involuntary. As noted above, in *People v. Holick*, where the defendant was physically threatened and harmed by interrogating officers, this Court held that "[a] confession is not voluntary where *any degree* of influence amounting to duress is used to obtain it by those having authority over

the . . . accused, and a confession so obtained must be excluded." *Holick,* 337 Ill. at 338 (emphasis added). This Court has repeatedly echoed *Holick*'s sentiment in the nine decades since it was decided. Indeed, just this year, this Court held 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)); *see also Wrice*, 2012 IL 111860, ¶ 84 (holding that the use of a "defendant's physically coerced confession as substantive evidence of his guilt is never harmless error"). Likewise, and significantly, this Court has repeatedly suppressed confession evidence where it was extracted by police violence or threats of violence, regardless of whether—as here—the violence was temporally attenuated from the confession or elicited by an officer who did not directly engage in the violence. *See e.g.*, *People v. Rogers*, 413 Ill. 554, 564-65 (1953) (invalidating a confession as involuntary where the confession occurred following repeated beatings by police because "[a] confession apparently voluntary may be rendered inadmissible by violence, threats, promises or coercion which took place at another time while the defendant was in custody under charge or suspicion of the same offense"); *People v. Thomlison*, 400 Ill. 555, 563 (1948) (invalidating a confession a defendant made to police officers after separate police officers assaulted him the day before, and noting that if the "fear and brutality did not influence what [the defendant] said the next day, still in the presence of three or four police officers, he would be a most unusual person"); *People v. Santucci*, 374 Ill. 395, 401 (1940) (invalidating a confession obtained after physical assault even when the confession was made three days after the assaults, because "it is obvious defendant would in all probability be afraid to invite the hostility and wrath of the officers by insisting he was innocent").

A per se rule is not only consistent with this Court's and the U.S. Supreme Court's precedent regarding interrogation violence but is also the most effective deterrent to police misconduct in interrogation that places innocent people at risk of false confessions. *Accord State v Hillery*, 956 N.W.2d 492, 499 (Iowa 2021) (affirming that a common law, per se rule applies to confessions extracted by officers' promises of leniency, and reasoning that a per se rule will "deter[] police from using a tactic that might induce the innocent to confess falsely" (citation omitted)). Accordingly, several courts, including the U.S. Supreme Court, have announced per se rules to deter the use of particularly manipulative police interrogation tactics that, like police violence, raise concerns about eliciting false confessions in response to dangerously coercive interrogation tactics. For example, in *Ashcraft v. Tennessee*, 322 US 143 (1944), the U.S. Supreme Court held that a specific type of egregious inquisitorial coercion—continuous custodial interrogation for thirty-six hours—is "so inherently coercive that" any resulting confession cannot be deemed constitutionally admissible, and thus effectively created a rule that such a lengthy, continuous interrogation will render a resulting confession per se involuntary. *Id*. at 154 (reasoning that it is "inconceivable that any court of justice in the land . . . would permit prosecutors . . . to keep a defendant witness under continuous cross examination for thirty-six hours without rest or sleep in an effort to extract a 'voluntary' confession"); *see also State v. Matsumoto*, 452 P.3d 310, 324 (Haw. 2019) (creating a per se rule barring a specific form of police deception—namely, lying to a suspect about the results of their polygraph test because such lies "are of a type reasonably likely to procure an untrue statement or to influence an accused to make a confession regardless of guilt") (quoting *State v. Kelekolio*, 849 P.2d 58, 73 (Haw. 1993)); *Wilson v. State*, 311 S.W.3d 452, 465 (Tex. Crim. App.

2010) (holding that it is, categorically, unlawful for Texas officers to fabricate physical evidence and use it during interrogation).

Although this Court has admonished that the "use of physical force to coerce confessions" is "revolting to the sense of justice," *Salamon*, 2022 IL 125722, ¶ 83, without a per se rule, lower courts may still—as the courts did here—apply a totality-of-circumstances test and find that some confessions elicited after physical violence are voluntary and admissible. The current totality-of-the-circumstances approach will thus undoubtedly result in inconsistent and, potentially, tragically unjust outcomes, as exemplified by this case. Here, Mr. Fair has presented compelling evidence that his interrogators—at least one of whom has an alarming history of police brutality in interrogation—coerced from him the only direct evidence of his purported guilt. Yet, the appellate court found that Mr. Fair's confession was voluntary and denied relief—even after hearing unrebutted testimony that he was kicked by McDermott, and allegedly threatened at gunpoint—because McDermott was absent when Mr. Fair provided his confession and because the physical coercion took place the day before the confession was ultimately elicited. *Fair*, 2021 IL App (1st) 201072-U, ¶ 113; (R. 986). However, the facts of Mr. Fair's case are analogous to those in *Thomlison*, noted above, in which this Court held that a defendant's confession was involuntary when the defendant was beaten while in custody, and then confessed after a full day had passed since the beating. *See* 400 Ill. at 563. Unlike the appellate court here, the *Thomlison* Court found the confession involuntary despite the fact that the defendant gave the confession a day later to a different group of officers, who did not themselves engage in the physical abuse. *Id.* The lack of a per se rule allows for such inconsistent and unjust outcomes.

Consistent with its decades-old jurisprudence, this Court can and should give lower courts greater clarity and help assure more reliable, just outcomes by expressly holding that confessions made after police violence, threats of violence, or physical abuse are per se inadmissible, regardless of whether time has passed between the violence and the confession, or whether the individual who memorializes or ultimately elicits the confession is a different state actor than the actor who committed the violence. Amici propose that, so long as the violence and confession occur within the same custodial period, the per se rule must apply. *Cf. Santucci*, 374 Ill. at 401 (explaining that a defendant who was assaulted by police officers one day is likely to make a false confession the next day because "it is obvious defendant would in all probability be afraid to invite the hostility and wrath of the officers by insisting he was innocent").[39]

Of course, if this Court adopts Amici's proposed rule, petitioners bringing claims under the Torture Inquiry and Relief Commission Act, 775 ILCS 40/1 *et seq*, would still, as they do now, have to prove to the TIRC by a "preponderance of the evidence that there is sufficient evidence of torture to merit judicial review." 775 ILCS 40/45(c). Then, before the circuit court, a petitioner would have to show that "newly discovered evidence *would likely have* altered the result of a suppression hearing." *See People v. Wilson*, 2019 IL App (1st) 181486, ¶ 52 (citations omitted). The only difference under Amici's proposed rule is

[39] Amici acknowledge that, if there is a significant break in custody—for example, if the person is released, and not interrogated again for another several months, in a different police precinct, and by an entirely different set of officers—and then is questioned without any physical coercion, then the totality-of-the-circumstances test may be appropriate to allow lower courts discretion to determine the impact of the prior, attenuated incident of violence or abuse. However, the rule proposed by Amici acknowledges the reality that this Court recognized in *Santucci* over 80 years ago, and reaffirmed again in *People v. Sloss*, 412 Ill. 61 (1952), "[t]he effect of abuse, brutality, constant and continued interrogation, or third-degree methods in obtaining a confession affect [a] later [confession] when made in the same place of confinement." *Id*. at 70.

that lower courts, if they reach the stage of proceedings in which they must assess the voluntariness of a confession, and if they find after relevant hearings that police violence occurred during the petitioner's interrogation, would be directed to find the resulting confession per se involuntary, and hold it inadmissible. This bright light rule would prevent courts from, as here, relying on temporal attenuation or the physical absence of the offending officers to ignore the undeniable impact of the physical coercion at issue. *See e.g.*, *People v. Plummer*, 2021 IL App (1st) 200299, ¶ 113 ("The effects of abuse committed by law enforcement does not walk away with the offending officers, it very well may linger.") (citing *Thomlison*, 400 Ill. at 569). Such a rule would also clarify and actualize this Court's nearly century-old holding that "[a] confession is not voluntary where *any degree* of influence amounting to duress is used to obtain it." *Holick*, 337 Ill. at 338.

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In sum, consistent with this Court's precedent, as well as the relevant jurisprudence from the U.S. Supreme Court, this Court should now expressly hold that *any* confession elicited during the same continuous custodial interrogation in which police officers physically abused the confessor is per se inadmissible. *Accord Haswood*, 350 F.3d at 1027*; People v. Easley*, 148 Ill. 2d 281, 314 (1992) (noting that certain coercive tactics can invalidate a confession, even in isolation, because they "are so offensive to a civilized system of justice that they must be condemned" (quoting *Miller v. Fenton*, 474 U.S. 104, 109 (1985)). Adopting this per se rule would deter the use of physical coercion during interrogations, provide lower courts with greater clarity when assessing suppression and post-conviction motions, prevent inconsistent outcomes of those motions, and align Illinois with the ideal that this Court has repeatedly recognized—that the use of physical violence

to elicit confessions is "revolting to the sense of justice." *Salamon*, 2022 IL 125722, ¶ 83. Consequently, a per se rule would help prevent the elicitation of false confessions by physical violence or physical deprivation, and would help rectify wrongful convictions that were secured by confessions extracted by such police abuse.

III. THE UNREBUTTED EVIDENCE SHOWS MR. FAIR'S INTERROGATION INVOLVED POLICE VIOLENCE AND PSYCHOLOGICAL COERCION; ACCORDINGLY, THE DECISION BELOW SHOULD BE REVERSED.

A. Applying the Per Se Rule Proposed by Amici, Mr. Fair's Confession Should Be Suppressed and His TIRC Claim Granted.

The evidence presented at the hearing below established that McDermott physically attacked Mr. Fair during his interrogation. *Fair*, 2021 IL App (1st) 201072-U, ¶ 39. Mr. Fair further testified that McDermott also threatened to shoot him. (R. 985:17-986:20.) Mr. Fair also averred that all three officers who interrogated him over approximately 30 hours engaged in other conduct that was physically coercive—by, for example, withholding necessary medication and depriving him of food. *See Fair*, 2021 IL App (1st) 201072-U, ¶¶ 106-07, 111.

Indeed, Mr. Fair's testimony at the post-conviction hearing describes an interrogation that was physically coercive from the start. Mr. Fair testified that after he was arrested and brought to an interrogation room at Area Two, officers ignored Mr. Fair's request for his asthma medication and then McDermott stood over him and screamed insults as he was handcuffed to a metal ring on the wall. *Id*. ¶ 38-39. McDermott then kicked Mr. Fair hard below his knee, which felt to Mr. Fair as if something had "exploded" against his leg. *Id*. McDermott then tried to kick Mr. Fair repeatedly while Mr. Fair attempted to dodge the blows as best he could while chained to the wall. *Id*.; (R. 985).

Following this attack, McDermott put his hand on his service weapon and told Mr. Fair to "[g]o for it. Give me a fucking reason . . . make a move, go for it. I'll shoot your ass right here." (R. 986.)

Mr. Fair testified at the evidentiary hearing—and the State offered no evidence to the contrary—that, as long as Mr. Fair denied involvement in the murder, police kept Mr. Fair chained to a wall and denied him medication, food, counsel, and sleep. *Fair*, 2021 IL App (1st) 201072-U, ¶ 107. When he began to talk to the police, he was given food and told, falsely, that he would be released if he continued to cooperate. *Id.* ¶ 47. Mr. Fair reported that, bleeding from McDermott's attack and struggling to breathe because several detectives—including Porter, who conducted the questioning that produced the false confession to Mebane—denied him asthma medication, Mr. Fair ultimately cooperated with the interrogators' repeated exhortations to confess, and he repeated to Mebane the false confession that Porter suggested to him. *Id.*; (R. 1017:19-1018:20).

The appellate court accepted at least some of this proffered evidence as true, specifically finding that McDermott had physically attacked Mr. Fair. *Fair*, 2021 IL App (1st) 201072-U, ¶ 106. Thus, applying Amici's proposed per se rule, in light of the finding below that Mr. Fair was physically assaulted during the course of his custodial interrogation, the confession Mr. Fair gave after being interrogated, off-and-on, during thirty hours in custody at Area Two should be found to be per se involuntary and inadmissible, Mr. Fair's TIRC claim granted, and his case remanded for further proceedings.

B. Even Under the Totality of the Circumstances, the Evidence Proffered by Mr. Fair Compels a Finding That His Confession Was Not Voluntary.

Even applying current law, Mr. Fair should be granted relief based on the unrebutted evidence he presented, which compels a finding that his confession was involuntary under the totality of the circumstances. *See People v. Richardson*, 234 Ill. 2d 233, 253-54 (2009) (explaining that "[i]n determining whether a statement is voluntary, a court must consider the totality of the circumstances . . . includ[ing] . . . [the defendant's] physical condition at the time of questioning; the legality and duration of the detention; . . . the duration of the questioning; and any physical or mental abuse by police, including the existence of threats or promises").

In addition to McDermott's physical attack, the circumstances surrounding Mr. Fair's interrogation during the thirty hours he spent in police custody at Area Two were highly psychologically coercive. Indeed, Mr. Fair testified that he was subjected to an environment of intimidation and trickery throughout the thirty-hour detention and was subjected to psychologically manipulative interrogation tactics that social science has shown are so powerful that, even without accompanying violence, they can convince an innocent person to falsely incriminate themselves.

Specifically, the officers here used the "false evidence ploy"—a tactic in which the police deceive a suspect about the evidence they possess—as well as "maximization" and "minimization" tactics, which have all been conclusively demonstrated to place innocent people at risk of falsely incriminating themselves, and have thus been classified by relevant experts as "situational risk factors" for false confessions.[40] The last thirty years of relevant

[40] *See Police-Induced Confessions*, *supra* note 28, at 4.

scientific research and expert analyses—which make plain the power of such tactics to coerce a confession from a suspect, regardless of guilt—warrants serious consideration by this Court.

The false evidence ploy—a technique in which police lie about evidence, for example, as here, falsely telling the suspect that eyewitnesses have implicated him in a crime when no such eyewitnesses exist—is a tactic that functions to engender feelings of helplessness as the suspect, regardless of guilt or innocence, feels "trapped" based on the perceived "inevitability" of evidence against them and, consequently, views acceding to officers' suggestions of guilt as the only option.[41] An innocent suspect, counterintuitively, may feel particularly incentivized to confess under such circumstances *because of* their innocence and corresponding naive belief that the truth will ultimately prevail regardless of the words they utter in the interrogation room.[42] Indeed, a vast number of the nation's proven false confessions have been elicited during interrogations in which officers used the false evidence ploy against innocent suspects.[43] Here, there is evidence that McDermott used a false evidence ploy, by lying about incriminating witnesses against Mr. Fair that did not exist. Specifically, McDermott told Mr. Fair that the police had "people that got statements on" him, and that it was "a matter of time" before he was charged because witnesses had implicated him in the shooting. (R. 995-96.) In fact, not one of the almost

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41 *Police-Induced Confessions*, *supra* note 28, at 16-17; *see also* Saul M. Kassin, *The Social Psychology of False Confessions*, 9 Soc. Issues Pol'y Rev. 25, 34 (2015) (concluding, based on scientific studies, that the false evidence ploy has a grave psychological impact and leads to false confessions).

42 See *Police-Induced Confessions*, *supra* note 28, at 22-23 (explaining that "*innocence* itself may put *innocents* at risk").

43 *Id.* at 12.

two dozen witnesses to the murder ever implicated Mr. Fair or provided a statement to police against him. (R. 420.)[44]

In addition to the false evidence ploy, officers here seemingly used two tactics that are central to the Reid Method, discussed above, known as "maximization" and "minimization." The maximization technique "convey[s] the interrogator's rock-solid belief that the suspect is guilty and that all denials will fail."[45] Maximization involves implicitly or explicitly threatening harsher consequences if the suspect persists in a claim of innocence, as well as "making an accusation, overriding [the suspect's] objections, and citing evidence . . . to shift the suspect's mental state from confident to hopeless."[46] Often used in conjunction with maximization, minimization is "designed to provide the suspect with moral justification and face-saving excuses for having committed the crime in question."[47] "Using this approach, the interrogator offers sympathy and understanding," and often provides "a choice of alternative explanations—for example, suggesting to the suspect that the murder was spontaneous, provoked, peer-pressured, or accidental."[48] "[R]esearch has shown that this tactic communicates by implication that leniency in punishment is forthcoming upon confession," and may "lead innocent people who feel trapped to confess."[49] Both the maximization and minimization techniques "have been

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44 *See In re: Fair*, TIRC Claim No. 2011.018-F, at 3.

45 *Id.*; *see also* Fred Inbau et al., *Criminal Interrogation and Confessions* 192-93 (2013) (the "Reid Technique" manual, instructing interrogating officers to express "absolute certainty in the suspect's guilt").

46 *Police-Induced Confessions, supra* note 28, at 12.

47 *Id*. at 10.

48 *Id.* at 12.

49 *Id.* at 12, 18.

repeatedly present in known cases of false confessions."[50] Indeed, one scientific study even found that the use of minimization techniques significantly increased "the false confession rate" by as much as 200 percent.[51] Further, analyses of the known false confession cases "have shown that minimization and maximization interrogation techniques—communicating implicit promises and threats (if not explicit promises and threats)[—]are almost always present in police interrogations leading to proven false confessions."[52]

First, using maximization techniques, the interrogating officers apparently insisted on Mr. Fair's guilt and confronted him with the purported strength of the evidence they had in their possession. Specifically, several hours after McDermott violently assaulted Mr. Fair, there is evidence that he re-entered the interrogation room holding a handful of files, folders, and photographs. *Fair*, 2021 IL App (1st) 201072-U, ¶ 41. Consistent with the maximization technique, McDermott insisted that the police *knew* Mr. Fair was involved in the armed robbery and murder, that they had witnesses, and that they were preparing to put Mr. Fair in a lineup. *Id*.

Second, Mr. Fair testified that, during his interrogation, police used tactics consistent with the minimization technique, and that they explicitly promised him that, if he cooperated and confessed, he would be allowed to go home. *Id*. ¶ 47. Mr. Fair testified that Porter made statements implying that they believed he was not really culpable for the

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50 Jeffrey Kaplan et al., *Perceptions of Coercion in Interrogation: Comparing Expert and Lay Opinion*s, 26 Psych. Crime & Law 384, 387 (2019); *see also Police-Induced Confessions*, *supra* note 28, at 12.

51 Eidam, Lindemann & Ransiek, eds., *Interrogation, Confession, and Truth: Comparative Studies in Criminal Procedure* (Baden-Baden: Nomos Verlagsgesellschaft, 2020), *Structural Police Deception in American Police Interrogation: A Closer Look at Minimization and Maximization* ("*Interrogation, Confession, and Truth*"), at 199.

52 *Id*. (emphasis omitted).

homicide and in fact was not even the target of the investigation, stating: "We know you didn't do anything but—and you're not the target of our investigation. You know, we just need your help getting . . . getting [Reaves] . . . so we're going to need you to—we're going to get a statement, you know, just whatever—I'm going to let you know how to say it but I need you to say it, so I say it and you just repeat along with me." (R. 1013:16-1014:3.) Porter then told Mr. Fair that if he repeated a statement along with Porter, Mr. Fair could go home—a false promise. *Fair*, 2021 IL App (1st) 201072-U, ¶ 47; (R.1014:4-7). This is significant, because when minimization tactics are used in combination with the communication of an "explicit deal," the false confession rate has been demonstrated to significantly increase.[53]

In addition to the officer's false promise, the false evidence ploy, and the combination of minimization and maximization tactics, was Mr. Fair's sleep deprivation. Mr. Fair was arrested at 11:30 a.m. on September 1 and was held in the interrogation room for thirty hours. *Fair*, 2021 IL App (1st) 201072-U, ¶¶ 11, 20. He testified that he did not sleep at all the night of September 1, or indeed the entire time he was at Area Two. *Id.* ¶¶ 92, 107. Sleep deprivation is yet another coercive tactic scientifically proven to increase the risk of false confession, because a sleep deprived person is much more vulnerable to coercion.[54] The impact of sleep deprivation on the human brain has been studied both in laboratory environments and in the real world, and has been demonstrated to affect decision-making and performance of surgeons, motorists, and pilots alike.[55] Such studies

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53 *Interrogation, Confession, and Truth*, *supra* note 51, at 199.

54 *Police-Induced Confessions*, *supra* note 28, at 16 (noting that sleep deprivation "is historically one of the most potent methods used to soften up [suspects] and extract confessions from them").

55 *Id*.

reveal that sleep deprivation markedly impairs the ability to sustain attention, flexibility of thinking, and suggestibility in response to leading questions, thereby leaving a custodial subject more vulnerable to interrogation coercion.[56]

In sum, in addition to the outright physical violence and deprivation of basic health needs, the officers seemingly used interrogation tactics that amount to situational risk factors for false confession, all of which should cause this Court concern as to both the voluntariness and the reliability of the purported "confession" at issue. Accordingly, the totality of the circumstances, informed by the relevant social science discussed above, should compel a finding that Mr. Fair's confession was involuntary.

[56] *Id*.; *see also* Mark Blagrove, *Effects of Length of Sleep Deprivation on Interrogative Suggestibility*, 2 J. Experimental Psych. Applied 48, 56 (1996) (demonstrating increased suggestibility in sleep deprived test subjects).

CONCLUSION

For the foregoing reasons, the Court should adopt a per se rule that a confession elicited after the police have physically assaulted, violently threatened, or physically deprived the defendant is involuntary and inadmissible. The Court should thus reverse the judgment of the appellate court and remand the case to the trial court with instructions to vacate Mr. Fair's conviction and suppress his confession.

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Respectfully submitted,

/s/ Alexander J. Kasparie
Charles F. Smith (ARDC #6195537)
Alexander J. Kasparie (ARDC #6324149)
William S. Edwards (ARDC #6338930)
Serena Patel (ARDC #6339494)
Michael T. Morrell (ARDC #6342997)
Kathleen C. Schmidt (ARDC #6342700)

155 N. Wacker Drive, Suite 2700
Chicago, Illinois 60606
(312) 407-0700
Charles.Smith@probonolaw.com
Alexander.Kasparie@probonolaw.com

Counsel for Amici Curiae

Of Counsel:

Lauren Gottesman (not admitted in IL)
The Innocence Project
40 Worth Street, Suite 701
New York, New York 10013

David M. Shapiro (ARDC #6287364)
Roderick and Solange MacArthur Justice Center
375 East Chicago Avenue
Chicago, Illinois 60611-3069

Joey L. Mogul (ARDC #6243516)
People's Law Office
1180 N. Milwaukee
Chicago, Illinois 60660

Steve Drizin (ARDC #6193320)
Laura Nirider (ARDC #6297299)
Center on Wrongful Convictions
375 East Chicago Avenue
Chicago, IL 60611-3069

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b), and 345(b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to appended to the brief under Rule 342(a), is 13,915 words.

*/s/ Alexander J. Kaspariere*__
Alexander J. Kasparie