No. 111860

IN THE SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Appeal from the
	)	Appellate Court of Illinois
	)	First Judicial District
Respondent-Appellant,	)	No. 1-08-0425
	)	
	)	There on Appeal from the
v.	)	Circuit Court of Cook County,
	)	County Department, Criminal Division
	)	Case No. 82 C 8655
STANLEY WRICE,	)	
	)	The Hon. Evelyn B. Clay,
	)	Judge Presiding
Petitioner-Appellee.	)	

BRIEF OF PERSONS CONCERNED ABOUT THE INTEGRITY OF THE ILLINOIS CRIMINAL JUSTICE SYSTEM AS *AMICI CURIAE* IN SUPPORT OF PETITIONER-APPELLEE

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POINTS AND AUTHORITIES

STATEMENT OF INTEREST OF *AMICI CURIAE*

The question presented in this case is stark: Can a confession obtained through the torture of a criminal suspect—perpetrated as part of a systemic pattern of abuse led and inspired by convicted former Chicago Police Commander Jon Burge—be categorized as "harmless error"? Amici believe the answer to that question must be a resounding "no." To decide otherwise would fly in the face of precedent that has stood for nearly a quarter century. But more than respect for *stare decisis* is involved here.

It has been a decade since this Court has had occasion to decide a case involving Burge's systematic use of torture to coerce confessions—some of them clearly false—from African American citizens. In that decade, the evidence against Burge and men who worked for him has continued to mount: a judicially appointed Cook County Special Prosecutor concluded in 2006 that there were "many cases" of torture under Burge's command; in January 2003, four of Burge's victims who had been sent to Death Row based on their tortured confessions received innocence pardons from the Governor of Illinois; Burge was convicted last summer in the federal District Court of perjury and obstruction of justice for falsely denying under oath that there were acts of torture under his command and is now serving time in federal prison.

In sentencing Burge to prison earlier this year, United States District Court Judge Joan Humphrey Lefkow made note of Burge's long history of denials that torture took place, including when he took the witness stand at his criminal trial. "Unfortunately for you the jury did not believe you," Judge Lefkow said, "and I must agree that I did not either." Tr. of Proceedings at 4, United States v. Burge, No. 08 CR 846 (N. D. Ill. Jan. 21,

2011). Denial that Burge and his men used torture to coerce scores of confessions is no longer plausible.

Petitioner-Appellee Stanley Wrice is one of 15 men who were interrogated by Burge or his men, who claim to have confessed under torture, who were convicted following a trial in which the tortured confession was admitted in evidence, and who remain in prison without judicial recognition of their right to a full and meaningful hearing into the validity of their claims.[1] With all that we now know about Burge's systematic torture and abuse, it is intolerable to apply the "harmless error" doctrine and allow Mr. Wrice and the 14 other men to remain incarcerated without a hearing.

Amici have witnessed the effects of the decades-long Burge scandal on our criminal justice system and civil society. Official denials of the now-proven torture—made over a period of many years —have deeply alienated many in the African American community. This scandal has complicated and prolonged many criminal cases involving Burge and his men. But it has cast a wider shadow, undermining confidence in the integrity of the entire Illinois criminal justice system. Judge Lefkow emphasized this point when she sentenced Burge earlier this year: "When [the coercion of confessions] becomes widespread, as [can be inferred in the Burge cases], the administration of justice

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[1] The still-incarcerated Burge victims whose right to a hearing on their torture claims has never been recognized include at least the following individuals in addition to Stanley Wrice, the Petitioner-Appellee: Tony Anderson, Franklin Burchette , Javan Deloney, Edward James, Grayland Johnson, Leonard Kidd, James Lewis, Jerry Mahaffey, Reginald Mahaffey, Johnny Plummer, Ivan Smith, Jackie Wilson, Vincent Wade , and Demond Weston. Other victims have been granted a hearing and remain in prison awaiting their long-deferred day in court. And, of course, there may be other victims whose cases have still not been identified.

is undermined irreparably." Tr. of Proceedings at 7, United States v. Burge, No. 08 CR 846 (N.D. Ill. Jan. 21, 2011).

Amici believe this Court should take two steps to address the vestiges of the Burge group's torture. First, the Court should declare, once and for all, that what Burge and his subordinates did was profoundly harmful—to the men they tortured, to the trust they abused, and to the Illinois justice system they defiled. Accordingly, confessions Burge and his men coerced through torture are harmful error, and the Court should so state. Second, the Court should use its supervisory authority to require an evidentiary hearing in each case in which an alleged victim of Burge and his men remains incarcerated based in whole or in part on a confession the defendant credibly claims was coerced by torture.

Amici come from a variety of backgrounds and viewpoints. They are attorneys, retired judges, former prosecutors and community activists. None of us expresses a view as to the guilt or innocence of Stanley Wrice or the other men Burge allegedly tortured who remain in prison. But we have a common and firm belief that the body politic is poisoned when claims of systematic police abuse and torture are dismissed as "harmless." Our combined experiences lead us to believe these allegations must be investigated, heard and, when warranted, redressed, and the sooner the better. We believe it will undermine the integrity of our Illinois criminal justice system, and constitute a miscarriage of justice, to allow even one of the victims to remain imprisoned without the opportunity to challenge the legitimacy of his confession in a full and meaningful hearing. We believe it is never "harmless error" to torture a confession from a suspect, and then use the confession to convict and imprison him.

Amici are:

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Jack Carey	Former President of the Illinois State Bar Association
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Stan Willis	National Conference of Black Lawyers Black People Against Police Torture
Warren Wolfson	Former Justice of the Appellate Court

INTRODUCTION: A SHORT HISTORY OF THE BURGE TORTURE SCANDAL

For close to four decades, the Illinois criminal justice system has struggled with the reality that a group of Chicago Police officers, under the command of Chicago Police Commander Jon Burge, systematically tortured confessions from African American men whom they had arrested on the south side of Chicago. The Court was first confronted

with this scandal in the 1987 appeal of Andrew Wilson, whom Burge and his men tortured into confessing in 1982 by electric shocking him with a crude generator, suffocating him with a plastic bag, beating him and pinning him against a hot radiator. *See People v. Wilson*, 116 Ill. 2d 29, 35-41 (1987). It was in that case that this Court proclaimed that "[t]he use of a defendant's coerced confession as substantive evidence of his guilt is *never* harmless error." *Id.* at 41 (emphasis added).

The first known Burge torture cases arose in the early 1970s. In May 1973, almost a decade prior to the torture of Mr. Wilson, Burge and two of his men tortured Anthony Holmes into confessing to a murder by placing a plastic bag over his head, tightening it, and then running electric current to wires that were attached to his handcuffed wrists and ankles.[2]

By the time of Burge's dismissal from the Chicago Police Department in 1991, there were scores of other torture victims. A judicially appointed Cook County Special Assistant State's Attorney conducted an independent investigation of more than 140 alleged Burge group torture cases and, in a report made public in July 2006, concluded that "many" of the defendants had been tortured. All of the victims were African American men from Cook County.

The Chicago Police Department first officially acknowledged the systemic nature of Burge's torture in 1990, when the Department's Office of Professional Standards completed an investigation into allegations of Burge-connected torture. The report of that investigation concluded that "physical abuse," including "planned torture" was

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[2] Some 28 years later, Holmes testified as a witness in Burge's federal criminal trial. At Burge's sentencing, Judge Lefkow cited the powerful content of Mr. Holmes' testimony. Tr. of Proceedings at 5-6, United States v. Burge, No. 08 CR 846 (N.D. Ill. Jan. 21, 2011).

"systematic" under Burge[3] and observed further: "Particular command members [of the Chicago Police Department] were aware of the systematic abuse and participated in it either by actively participating in same or failing to take any action to bring it to an end."[4]

In 1991, the Chicago Police Department instituted disciplinary proceedings against Burge for the torture of Andrew Wilson. In February 1993, the Police Board issued a decision terminating Burge from the Department as a result of his misconduct. *Charges Filed against Burge, Yucaitis and O'Hara*, Case Nos. 1856-58 (Police Bd. of the City of Chicago Feb. 11, 1993). The Circuit Court of Cook County affirmed the Police Board's order. *Burge v. Police Bd. of the City of Chicago*, Nos. 1-94-0999, 1-94-2462, 1-94-2475 cons. (Cir. Ct. Cook Co. Feb. 10, 1994). The Appellate Court also affirmed. *O'Hara v. Police Bd. of the City of Chicago*, 276 Ill. App. 3d 1117 (1st Dist. 1995) (unpublished order pursuant to Supreme Court Rule 23).

In January 2003, the day before announcing the commutation of every death sentence in the State, Illinois Governor George H. Ryan granted pardons on the ground of innocence to four Illinois Death Row prisoners whose convictions and death sentences rested in part on confessions that Burge and his confederates had elicited through torture. In his statement pardoning Madison Hobley, Stanley Howard, Leroy Orange, and Aaron Patterson, Governor Ryan said:

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[3] The report specifically named as significant participants in the pattern of torture Chicago Police Sergeant John Byrne and Detective Peter Dignan, the two who are alleged to have tortured Stanley Wrice.

[4] The report—commonly referred to as the Goldston Report (OPS Investigator Michael Goldston was its author)—was not made available to the public until February 7, 1992, when a United States District Court Judge ordered its public release. *Fallon v. Dillon*, No. 90 C 6722 (N.D. Ill. Feb. 7, 1992).

> The category of horrors was hard to believe. If I hadn't reviewed the cases myself, I wouldn't believe it. . . . We have evidence from four men, who did not know each other, all getting beaten and tortured and convicted on the basis of the confessions they allegedly provided. They are perfect examples of what is so terribly broken about our system. These cases call out for someone to act. They call out for justice, they cry out for reform.

Governor George H. Ryan, Statement at DePaul University College of Law (Jan. 10, 2003).[5]

Eight months earlier, in April 2002, the Chief Judge of the Criminal Division of the Circuit Court of Cook County had appointed a Special Prosecutor to investigate the allegations of police torture and abuse committed by Burge and officers acting under his command. *In re Appointment of Special Prosecutor*, No. 2001 Misc. 4 (Cir. Ct. Cook Co. Apr. 24, 2002). On July 19, 2006, after a lengthy, independent investigation, the Special Prosecutor released a Report summarizing his findings. The Special Prosecutor concluded that Burge was guilty of systematic abuses and that it therefore "necessarily follows that a number of those serving under his command recognized that if their commander could abuse persons with impunity, so could they." Edward J. Egan & Robert D. Boyle, *Report of the Special State's Attorney* 16 (2006). The Special Prosecutor also concluded that there were "many cases" in which it was reasonable to believe that African American men had been abused by Burge and officers under his command. *Id.*

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[5] All four of these cases had previously come before the Court. In three of the four, the Court affirmed the convictions and death sentences. *See People v. Orange,* 195 Ill. 2d 437, 459-60 (2001) (insufficient evidence to discredit the officers' denials of torture and abuse); *People v. Hobley*, 182 Ill. 2d 404, 448-49 (1998) (no physical evidence to corroborate the allegation of torture and abuse); *People v. Howard*, 147 Ill. 2d 103, 132 (1991) (trial court reasonably credited officers' denials of torture and abuse). In the other case, the Court directed the lower court to conduct a full, stage three post-conviction hearing into whether the torture had in fact occurred. *See People v. Patterson*, 192 Ill. 2d 93, 145 (2000). The Court had previously upheld Patterson's conviction and death sentences on direct appeal despite arguments challenging the use of his coerced confession at trial. *People v. Patterson*, 154 Ill. 2d 414, 440-46 (1992).

In May 2006, the United Nations Committee Against Torture issued its findings and recommendations regarding the use of torture and other cruel, inhuman or degrading treatment in the United States. The UN Committee expressed its "concern" regarding the Burge torture in Chicago, including, in particular, "the limited investigation and lack of prosecution in respect of the allegations of torture perpetrated in … the Chicago Police Department." *See* U.N. Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture: United States of America*, ¶ 25, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006). The UN Committee stated that the federal government "should promptly, thoroughly and impartially investigate all allegations of acts of torture or cruel, inhuman or degrading treatment or punishment" by Burge and his men. *Id.*

Finally, in 2008—25 years after the torture of Anthony Holmes and 17 years after Burge's dismissal from the Police force—the United States Attorney in Chicago indicted Jon Burge for perjury and obstruction of justice, based upon his sworn denials that he knew of or had participated in abuse and torture while a Chicago police officer. Burge was convicted by a jury on these charges. In January 2011, he was sentenced to 4 ½ years in prison. In imposing that sentence, Judge Lefkow pointedly remarked: "If others, such as the United States Attorney and the State's Attorney, had given heed long ago, so much pain could have been avoided." Tr. of Proceedings at 10, United States v. Burge, No. 08 CR 846 (N.D. Ill. Jan. 21, 2011).

Meanwhile, this Court and the Illinois Appellate Court have issued a string of decisions in individual appeals and post-conviction petitions involving allegations that Burge and his men tortured confessions from convicted persons. Many of those decisions

have acknowledged the need for a full evidentiary hearing into the defendant-appellant's torture allegations. *See People v. Wilson*, 116 Ill. 2d at 41-42 (conviction reversed and case remanded for a new trial); *People v. Patterson*, 192 Ill. 2d 93, 141-45 (2000) (remand for a post-conviction evidentiary hearing on whether the petitioner's torture was committed pursuant to a systematic pattern); *People v. King*, 192 Ill. 2d 189, 198-99 (2000) (same); *People v. Banks*, 192 Ill. App. 3d 986, 991-94, 997 (1st Dist. 1989) (conviction reversed and case remanded for a new trial); *People v. Bates*, 267 Ill. App. 3d 503, 504-07 (1st Dist. 1994) (same); *People v. Cannon*, 293 Ill. App. 3d 634, 640-42 (1st Dist. 1997) (remand for a new suppression hearing at which the defendant would be permitted to present evidence of systematic police abuse and torture); *and cf. People v. Clemon*, 259 Ill. App. 3d 5, 9-11 (1st Dist. 1994) (affirming the suppression of a confession that detectives under Burge's command obtained through torture and physical abuse).[6]

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[6] The Burge decisions are not uniform, of course. The Court—prior to the publication of the Special Prosecutor's independent investigation, prior to the indictment and conviction of Burge, and prior to the Illinois Governor's announcement of his innocence pardons on behalf of some of Burge's Death Row victims—repeatedly ruled against defendants with claims that Burge and his men coerced them into confessing. Those decisions typically reflected skepticism as to whether the physical abuse or torture had in fact occurred. *See, e.g., People v. Mahaffey*, 165 Ill. 2d 445, 464 (1995) (evidence failed to show the defendant "was brutalized into giving an inculpatory statement"); *People v. Maxwell*, 173 Ill. 2d 102, 122 (1996) ("[I] n light of the findings of the trial court . . . of 'no physical abuse' of the defendant, he has failed to make the requisite substantial showing that his constitutional rights have been violated."); *People v. Kidd*, 175 Ill. 2d 1, 26 (1996) ("no showing . . . that the defendant sustained an injury while in police custody"); *People v. Hobley*, 182 Ill. 2d at 448-49 (1998) (no physical evidence of injury); *People v. Orange*, 195 Ill. 2d at 452 (2001) ("allegedly new evidence does not tend to discredit or contradict the denial of coercion by . . . the officers"). The Court's opinions from the 1990s denying relief to alleged victims of Burge's torture typically turned on the absence of visible signs of physical injury. In fact, Burge's torture techniques were designed to leave no physical trace. Thus, in later decisions, the Court held that the availability of post-conviction relief did not turn on the presence or absence of physical injury. *See, e.g., People v. Patterson,*

As a result either of rulings by the Circuit Court of Cook County or prosecutorial consent, five Burge-group victims serving natural life sentences have been released from prison within the past four years: James Andrews, Cortez Brown, David Fauntleroy, Ronald Kitchen and Michael Tillman. Mr. Kitchen and Mr. Tillman have each received certificates of innocence from the Circuit Court. *See* 735 ILCS 5/2-702 (West 2008); *and see People v. Kitchen*, No. 88 CR 15409 (Cir. Ct. Cook Co. Aug. 19, 2009); *People v. Tillman*, No. 92 CR 27711 (Cir. Ct. Cook Co. Feb. 19, 2010).

Years ago, United States District Judge Milton I. Shadur commented: "It is now common knowledge that in the early to mid-1980s Chicago Police Commander Jon Burge and many officers working under him regularly engaged in the physical abuse and torture of prisoners to extract confessions." *United States ex rel. Maxwell v. Gilmore*, 37 F. Supp. 2d 1078, 1094 (N.D. Ill. 1999). Those words remain true today—twelve years after they were written and ten years after this Court last decided a Burge-related appeal.

PROCEDURAL HISTORY OF THE WRICE CASE

Stanley Wrice, Petitioner-Appellee, is typical both of those who are known to have been victims of Burge torture, and of the still-incarcerated men who claim to have been victims, but who have not yet had an opportunity to prove their claims at a full and fair post-conviction hearing.

Mr. Wrice alleges that, in the early morning hours of September 9, 1982—nearly thirty years ago—he was arrested and taken to the basement of Area 2 Chicago Police headquarters, where Chicago Police Sergeant John Byrne (Burge's acknowledged "right hand man") and Chicago Police Officer Peter Dignan (one of Burge's so-called

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192 Ill. 2d at 116 (2000) ("[W] e do not believe that the absence of physical injury, standing alone, precludes evidence of prior acts of brutality from being admissible.").

"Midnight Crew") beat him repeatedly with a blackjack and a flashlight in the groin area, on his arm, leg and on his head during two different episodes of torture and verbally abused him until he confessed to the commission of a brutal rape. TR. 1476-78, 326-323; TRS. 140-45, 149-52.[7] Mr. Wrice was physically injured; and there was blood in his urine, which required medical treatment at Cook County Jail. C. 582-92, 547-49, 552.

Mr. Wrice alleged these facts in a pre-trial motion to suppress the confession, filed in 1983. TRS. 140-52. At a suppression hearing, conducted in May 1983, Byrne and Dignan testified, and both denied abusing Wrice. TR. 70, 78, 205, 285. Those denials were not impeached with evidence of Byrne's and Dignan's other, similar misconduct or with evidence of the encouragement and active participation in the torture of African American suspects by Jon Burge, their commanding officer. Without the benefit of any impeachment, the Circuit Court accepted the officers' denials and summarily denied Wrice's motion to suppress. TR. 683-84. Wrice was then tried and convicted, and his conviction was affirmed on direct appeal. *People v. Wrice*, 140 Ill. App. 3d 494, 498-99, 502 (1st Dist. 1986).

As evidence of the scope and extent of the Burge-connected torture has continued to emerge, Mr. Wrice, like many of the other still-incarcerated Burge victims, has repeatedly sought a new, full, fair and thorough hearing regarding his torture claim, under the Illinois Post-Conviction Hearing Act. The first of Mr. Wrice's three post-conviction petitions was filed in 1991, around the time of the Goldston Report. The Circuit Court summarily dismissed that petition and the Appellate Court affirmed in an unpublished opinion. *People v. Wrice*, No. 1-91-2332 (1st Dist. 1994) (unpublished order pursuant to

[7] Citations to the record are in the same format as described in the Brief of Petitioner-Appellee. *See* Br. of Petitioner-Appellee 2 n.1.

Supreme Court Rule 23). Mr. Wrice's second *pro se* post-conviction petition, filed in 2000, was also dismissed in the Circuit Court as procedurally barred, and the Appellate Court again affirmed in an unpublished decision. *People v. Wrice*, No. 1-01-1697 (1st Dist. 2003) (unpublished order pursuant to Supreme Court Rule 23).

In 2007, Mr. Wrice filed a third post-conviction petition—the petition at issue in this appeal—this time arguing that the Special Prosecutor's findings concerning the scope and extent of the abuses under Burge warranted a further hearing into Mr. Wrice's torture claim. The Circuit Court dismissed the petition, as it had the two previous filings, finding that it did not satisfy the criteria for consideration of a successive post-conviction petition. *People v. Wrice*, No. 82 C 8655 (Cir. Ct. Cook Co. Jan. 14, 2008). The Appellate Court reversed, holding that the results of the Special Prosecutor's independent investigation provided "significant corroboration" of Mr. Wrice's torture claims and warranted a hearing. *People v. Wrice*, 406 Ill. App. 3d 43, 55 (1st Dist. 2010). It is this decision that is now before this Court.

In its appeal, the State accepts that significant new evidence corroborates Mr. Wrice's torture claim. Nonetheless, the State contends that the admission of Mr. Wrice's confession—even if it was the product of torture—was harmless error. The State asks this Court to ignore the physical abuse that Mr. Wrice alleges was inflicted upon him, as well as the pattern of similar abuses that Burge and his men routinely employed against African American citizens. The State grounds its position solely on the argument that there is sufficient other evidence of Mr. Wrice's guilt to support his conviction.

The State's position is at odds not only with decades of precedent in this Court, but also with the fundamental values of our criminal justice system.

ARGUMENT

I. CONFESSIONS OBTAINED THROUGH TORTURE INSPIRED AND LED BY JON BURGE CANNOT BE HARMLESS ERROR.

Our courts have long recognized that some official misconduct strikes so deeply at the heart of our justice system that it can never be swept aside as "harmless." Almost a quarter century ago, this Court decided in *People v. Wilson* that admission at trial of a confession that police extracted by physical brutality is at odds with our core values, and thus "is *never* harmless error." 116 Ill. 2d at 41 (emphasis added); *accord People v. Woods*, 184 Ill. 2d 130, 150 (1998). Those of us who appear as amici believe this Court should not, indeed must not, retreat from that principle. The outcome of this case ought to serve as a beacon of hope to those who live in the communities most traumatized by Burge's reign of terror. Abandonment of that powerful rule of law will, we fear, lend support to cynicism and feelings of helplessness in Cook County's African American community, as well as among the many who are aware of the sordid history underlying these cases.

Condemnation of police torture of criminal suspects is a longstanding, bedrock judicial principle. It is based upon both federal and state constitutional law. Years ago, in its landmark decision in *Brown v. Mississippi*, 297 U.S. 278, 285-86 (1936), the United States Supreme Court stood firm against the use of physical brutality to coerce incriminating statements: "[t]he rack and torture chamber may not be substituted for the witness stand." The Court made clear that a confession obtained by violence not only destroys the legitimacy of the trial, but also threatens the integrity of the entire judicial system:

> The state may not deny to the accused the aid of counsel. Nor may a state, through the action of its officers, contrive a conviction through the

> pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. *And the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence.*

Id. at 286 (emphasis added); *see also Jackson v. Denno*, 378 U.S. 368, 378 (1964) (It is "axiomatic" that a criminal defendant "is deprived of due process of law if his conviction is founded, *in whole or in part*, upon an involuntary confession.") (emphasis added).

This Court has likewise held that the use of violence to obtain confessions has no place either in civilized society or in our system of criminal justice. For example, in *People v. Escobedo*, 28 Ill. 2d 41, 47 (1963), *overruled on other grounds*, 378 U.S. 478 (1964), this Court noted that, even in the case of a "reliable" coerced confession, "a free society cannot condone police methods that outrage the rights and dignity of a person whether they include physical brutality or psychological coercion." Illinois Appellate Courts have held fast to this principle. When confronted with a credible claim that Burge and his men coerced a confession by torture and physical abuse, the Appellate Courts—following the guidance of *Wilson*—have repeatedly held that the admission of the confession cannot be considered "harmless." *See, e.g., People v. Cannon*, 293 Ill. App. 3d at 639; *People v. Banks*, 192 Ill. App. 3d at 992. In *Banks*, the court explained that the use of tortured confessions "perverts" our State's system of justice:

> When trial judges do not courageously and forthrightly exercise their responsibility to suppress confessions obtained by [torture], they pervert our criminal justice system as much as the few misguided law enforcement officers who obtain confessions in utter disregard of the rights guaranteed to every citizen—including criminal suspects—by our constitution.[8]

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[8] The Chicago Police detectives involved in the coercion of Banks' statement were Sergeant John Byrne and Detective Peter Dignan, the same two whom Mr. Wrice has named as his torturers.

Id. at 993; *see also Cannon*, 293 Ill. App. 3d at 639 ("No citation of authority is required for the proposition that in a civilized society torture by police officers is an unacceptable means of obtaining confessions from suspects.").

These holdings reflect what the United States Supreme Court has characterized as the "'strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.'" *Jackson*, 378 U.S. at 378 (quoting from *Blackburn v. Alabama*, 361 U.S. 199, 206-07 (1960)).

Yet the State contends that these values, deeply rooted in Illinois law and tradition, should give way in light of *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). That case involved the admissibility of the defendant's confession to a prison inmate (working as an informant for the state) who, in order to extract the confession, promised the defendant he would protect him from other inmates who had been threatening him. The Supreme Court held that the governmental misconduct in securing this confession could be overlooked if the admission of the confession were found to be harmless error.

The State's reliance on *Fulminante* is misplaced for two reasons. *First*, the coerced confession at issue in that case did not involve the use of physical or psychological torture by a practicing law enforcement officer. The prison inmate who secured the defendant's confession in *Fulminate* was not an acting police officer, and he did not employ any form of physical coercion to obtain the confession. 499 U.S. at 283. It would be a significant step—and an ill-advised one—to extend *Fulminante* to a case like those of the still-incarcerated Burge victims, where police officers, sworn to uphold the

law, are credibly alleged to have engaged in extreme forms of physical brutality in order to coerce a confession from a suspect in their custody.

As the Appellate Court noted in *People v. Cannon*, the Burge torture is "no ordinary case" of involuntary confession. 293 Ill. App. 3d at 639. The Burge torture cases are akin to the facts presented in *Brown v. Mississippi*, where the Court overturned a conviction based on physical torture and reasoned that a state may not substitute a jury trial with "trial by ordeal." 297 U.S. at 285. Amici know of no case—state or federal—in which any court has held harmless the admission of a confession obtained with the kind of physical abuse that was at issue in *Brown* or that Mr. Wrice and the other Burge victims allege was employed against them. Nor has the State drawn this Court's attention to any such case. Certainly, the Burge torture scandal—characterized by extreme physical brutality and disregard for law and basic human rights—should not be the occasion to announce an unprecedented extension of the harmless error doctrine.

Second, *Fulminante* should not lead this Court to overrule *Wilson* and the decades of precedent that have followed it, since to do so would constitute an abandonment of the core values of this State. Simply put, there are some forms of official misconduct that are so offensive to the values of the State of Illinois that they can never be ignored. The Burge torture is one example. Innocent men have been tortured and sent to Death Row or to prison for natural life. Scores of others were brutalized "with impunity," in the words of an independent Special Prosecutor. Our citizens require an emphatic rejection of Burge and the many injustices he and his men perpetrated. Amici know that our State cannot and must not dismiss as "harmless" the admission of a confession that Burge and his men elicited with torture.

Almost eighty years ago, Justice Brandeis recognized that "a single courageous state may … serve as a laboratory" in defining the rights of its people. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). And in this light, each state retains the "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980). In a seminal article describing the protections of individual rights within the federalist system, Justice Brennan emphasized that state constitutional provisions were not "adopted to mirror the federal Bill of Rights." William J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489, 501 (1977). Rather, he noted, "[t]he lesson of history is otherwise," since "the drafters of the federal Bill of Rights drew upon corresponding provisions in the various state constitutions." *Id.*

In light of this country's historical reliance on local rights-making, Justice Brennan explained that "the decisions of [the United States Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law." *Id.* at 501. He called for states to "step into the breach" left by more limited federal remedies, and to strengthen the liberties and protections afforded its citizens. *Id.* at 503; *see also* Ellen A. Peters, *Capacity and Respect: A Perspective on the Historical Role of the State Courts in the Federal System*, 73 N.Y.U. L. REV. 1065, 1067 (1998) (Justice Brennan's article "was a clarion call to lawyers and judges not to overlook the capacity of state law … to assist in the pursuit of justice for all.").

The Court has repeatedly heeded that call, holding in a variety of constitutional circumstances over the course of the past sixty years that the Illinois constitution is no

mere copy of the federal counterpart. *See, e.g.*, *People v. Washington*, 171 Ill. 2d 475, 480-89 (1996) ("as a matter of Illinois constitutional jurisprudence . . . a claim of newly discovered evidence showing a defendant to be actually innocent of the crime for which he was convicted is cognizable as a matter of due process," despite the fact that a freestanding claim of innocence is not cognizable as a federal due process claim under the Fourteenth Amendment); *In re May 1991 Will County Grand Jury*, 152 Ill. 2d 381, 391 (1992) (the "Illinois Constitution offers greater protection against the invasion of an individual's privacy rights than does the Federal Constitution" so that "some showing of individualized suspicion as well as relevance must be made before physical evidence of a noninvasive nature ... is demanded of a witness [in a grand jury subpoena]"); *People v. Bernasco*, 138 Ill. 2d 349, 366 (1990) ("[i]ndependently of *Miranda* and its Federal voluntariness principles, Illinois courts have long held that, to be admissible, a confession must be 'voluntary' in the State-law sense and that a defendant's mental ability, familiarity with the English language, age, education, and experience are among factors to be weighed in determining from the totality of the circumstances whether a confession or waiver of rights is 'voluntary' in that sense."); *People ex rel. Daley v. Joyce*, 126 Ill. 2d 209, 213, 222 (1988) (the Illinois constitutional jury trial right goes beyond the federal jury trial right by including the right of the accused to unilaterally waive trial by jury); *People v. Duncan*, 124 Ill. 2d 400, 415 (1988) ("Illinois case law ... independent of [federal] constitutional doctrine" requires deletion of references to defendant to avoid prejudice by "admission of incriminating extrajudicial statements of nontestifying codefendants").

The decision in *People v. Washington* is emblematic of the Court's willingness to depart from federal constitutional decisions where justice and respect for human rights demand. There, the Court "looked to [Illinois'] traditions and values to determine that denial of a new trial on the basis of evidence of actual innocence would be fundamentally unfair and would shock the conscience." *People v. Caballes*, 221 Ill. 2d 282, 310-11 (2006) (quoting *Washington*, 171 Ill. 2d at 487-88). Our State's traditions and values abhor the imprisonment of an actually innocent person and mandate a holding that imprisonment of such a person violates the Illinois Due Process Clause, independent of an arguably contrary interpretation of the federal Due Process Clause in *Herrera v. Collins*, 506 U.S. 390 (1993).

Similarly in this case, the traditions and values of Illinois are starkly at odds with the harmless error approach to coerced confessions that the United States Supreme Court adopted in *Fulminante* and which the State urges upon this Court. It is simply intolerable that any person should languish in prison as a result of a conviction that rests even in part on a confession that Burge and his men are credibly claimed to have obtained by torture. Our commitment to that position cannot be half-hearted. We have never believed that Burge's actions were tolerable in some situations—where, for instance, the use of the tortured evidence might be rationalized after the fact as not having mattered to the outcome of the case. Instead, we believe Burge's torture is so profoundly antithetical to our notions of justice and fair play that it cannot be permitted to taint *any* conviction, no matter the imagined strength of the other evidence against the defendant.

Furthermore, this Court has a responsibility to help heal the wounds that the Burge torture has inflicted on the African American men who were abused, on the

African American community as a whole, on the City of Chicago, and on the Illinois criminal justice system. Retreat from the principle that this Court articulated in *Wilson*—that the use of tortured evidence can *never* be harmless error—would foster cynicism on the part of some, provoke despair in others, and further prolong this scandal.

For all of these reasons, this Court should reaffirm its holding in *Wilson* and should reject the application of harmless error to a confession extracted through torture by Burge-connected police officers.

II. THIS COURT SHOULD EXERCISE ITS SUPERVISORY AUTHORITY TO REQUIRE A FULL INQUIRY INTO THE CASE OF EACH STILL-INCARCERATED BURGE VICTIM WHO HAS YET TO RECEIVE A HEARING ON CREDIBLE CLAIMS THAT HIS CONFESSION WAS COERCED THROUGH TORTURE.

The Burge cases confront this Court with officially acknowledged systemic torture—an occurrence that is not only unique to this State, but a blatant violation of human rights. This extraordinary circumstance calls for this Court to employ the Illinois Constitution in the most forceful possible way, to the end that this kind of disgraceful police conduct will not be repeated in our State. The Court should exercise its constitutional supervisory powers.

This case is the first occasion the Court has had to weigh in on the Burge torture scandal since 2001. As recounted above, much has happened in the past decade to ameliorate the toxic effects of Burge's misconduct. Yet Mr. Wrice and a number of other men with credible torture claims remain incarcerated without having had a full and fair hearing into their allegations that they were tortured.

None of the prosecutorial offices with jurisdiction over these cases (the Cook County State's Attorney, the Illinois Attorney General, the Special Prosecutor who is

prosecuting this appeal) has offered a systemic solution to this obvious problem. As a result, the cases of the remaining imprisoned Burge victims are being dealt with piecemeal. While it is true that in a few cases, procedural defaults have been waived and hearings have been or will be held, there are still 15 cases in which either prosecutors are aggressively opposing hearings (as they are in this case), or the prisoners have abandoned hope that the justice system will rectify the injustice, and their cases are languishing.

We respectfully submit to the members of this Court that this is not an acceptable state of affairs. The Court has the authority to rectify this sad situation, and to put Illinois back at the forefront of states that protect the human rights and dignity of all its citizens, including those accused of heinous crimes. We ask the Court to acknowledge and address the likelihood that our State's prisons currently house at least 15 men who were convicted based, in whole or in part, on confessions extracted by torture. We urge this Court not to allow these convictions to remain on the books without making certain that in each a full and fair inquiry is conducted. For this Court not to take the action it has the power to take risks a serious, and justifiable, erosion of confidence—particularly in the African American community—in the agencies of government that comprise Illinois' criminal justice system.

The Court has the authority to require an organized, systemic evaluation of the cases of the still-incarcerated alleged victims of Jon Burge. *See* ILL. CONST. art. VI § 16 (granting "[g]eneral administrative and supervisory authority" to the Illinois Supreme Court). The Court has repeatedly noted that its supervisory authority is a sweeping power, constrained only by the exigencies that summon forth its use. *See, e.g.*, *McDunn v. Williams*, 156 Ill. 2d 288, 301-02 (1993) (internal quotation marks omitted) (the

Court's supervisory power is "unlimited in extent[,]. . . undefined in character[, and]. . . unsupplied with means and instrumentalities"). In fact, in *McDunn*, the Court specifically noted that, as new occasions for the use of the supervisory authority arise, the authority can be shaped and fashioned to deal with those new exigencies. *Id.* at 304.

The Court has often used its power to regulate practice in the lower courts. *See, e.g.*, *People v. Strain*, 194 Ill. 2d 467, 475-76 (2000) (citing *People v. Lobb*, 17 Ill. 2d 287, 299 (1957) (regulation of jury trials)); *Ford Motor Credit Co. v. Sperry*, 214 Ill. 2d 371, 383 (2005) (rules governing attorney conduct). In *People v. Warr*, the Court exercised its supervisory jurisdiction to craft a post-conviction remedy for defendants convicted of misdemeanors, recognizing the need for an "expeditious, fair and simple" proceeding for defendants alleging constitutional defects in misdemeanor convictions. 54 Ill. 2d 487, 491-93 (1973). To address this need, the Court created procedures modeled after the Post-Conviction Hearing Act but with modifications, which enabled misdemeanor defendants—who asserted the substantial denial of constitutional rights in the proceedings that resulted in their convictions—to pursue a judicial remedy. *Id.* at 493.

This Court has had frequent occasion to employ its supervisory powers to create remedies for would-be post-conviction petitioners who were otherwise procedurally barred from seeking relief. *See, e.g.*, *People v. LaPointe*, 239 Ill. 2d 571, 571 (2011) (requiring the lower courts to allow defendant to file a successive post-conviction petition on ineffective assistance of counsel issue); *People v. Williams*, 226 Ill. 2d 631, 631 (2008) (advancing a post-conviction proceeding to the second stage in order to "foreclose any possibility [of] a miscarriage of justice"); *People v. Lyles*, 217 Ill. 2d 210, 215-16, 218 (2005) (reinstating the appeal of a post-conviction proceeding to save judicial

resources and because the defendant's claim of "deprivation of constitutional rights . . . and possibly an erroneous deprivation of liberty" outweighed the importance of the procedural rule barring reinstatement); *People v. Davis*, 156 Ill. 2d 149, 160 (1993) (vacating an improper, lesser-included conviction despite finding the defendant had waived the issue, because of the possible prejudice caused by the improper conviction).

Unquestionably, therefore, the Court has the power and authority to fashion a systemic remedy that will lead to a full inquiry into the legitimacy of the convictions of the 15 remaining prisoners whose right to an evidentiary hearing into their Burge torture claims has yet to be recognized. Specifically, amici urge this Court to employ its supervisory authority to:

(1) direct the Office of the Special Prosecutor (with input from the Illinois Torture Inquiry and Relief Commission[9]) to identify each case in which a currently incarcerated prisoner of the State of Illinois claims that he confessed under torture or physical abuse by Jon Burge or a Chicago Police officer working under his command; the confession was used against the prisoner (either at trial or to induce a guilty plea); and the prisoner's right to a full and fair hearing into the allegations of torture or physical abuse has not yet been recognized;

(2) direct the Special Prosecutor to furnish a list of all identified cases to this Court within 30 days;

[9] The Illinois Torture Inquiry and Relief Commission is an independent agency established by statute to investigate and make recommendations with respect to cases involving allegations of torture committed by Burge and his men. *See* 775 ILCS 40/1 *et seq*. (West Supp. 2011).

(3) appoint counsel in each identified case if counsel is not already actively assisting the prisoner;

(4) direct the Chief Judge of the Criminal Division of the Circuit Court of Cook County to coordinate the scheduling of evidentiary hearings in each case to determine whether the prisoner's conviction rests in whole or in part on a confession that was coerced by torture or physical abuse perpetrated by Jon Burge or a Chicago Police Officer working under his command;

(5) direct the Circuit Court of Cook County to vacate the convictions of each prisoner whose conviction is found to rest in whole or in part on a confession that was coerced by torture or physical abuse perpetrated by Jon Burge or a Chicago Police Officer working under his command and to take further appropriate steps in all such cases.

Other state supreme courts have not hesitated to use their inherent supervisory authority to create a remedy for a class of litigants, when faced with systemic problems within the criminal justice system. For example, the West Virginia Supreme Court, confronted with proof that serologist Fred Zain had prepared fraudulent forensic reports, issued a series of opinions establishing a conclusive presumption that all serology evidence Zain and his subordinates prepared was invalid, waiving procedural defaults for all convicted persons against whom Zain-tainted evidence had been received and directing the lower courts to hold evidentiary hearings in all such cases. *In re Investigation of the West Virginia State Police Crime Laboratory, Serology Division*, 190 W. Va. 321, 324 (1993) and *In re Renewed Investigation of the State Police Crime*

Laboratory, Serology Division, 219 W. Va. 408, 415-16 (2006). Other courts have fashioned similar remedies. *See, e.g., State v. Peart*, 621 So.2d 780, 790-91 (La. 1993) (creating a rebuttable presumption of ineffective counsel for a class of indigent defendants who were particularly affected by underfunding of the indigent defense system); *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130, 1138-39 (Fla. 1990) (tailoring the habeas procedure for indigents with meritorious petitions in face of a substantial backlog in the indigent appeals system).

Amici propose a modest use of this Court's supervisory authority. Amici do not propose a conclusive presumption that all Burge-connected confessions are invalid as the West Virginia Supreme Court did with respect to evidence and testimony provided by serologists working under Fred Zain. We suggest that this Court use its supervisory authority to orchestrate an *inquiry* into whether certain Burge-connected confessions were in fact coerced by torture and to take appropriate additional steps in all such cases in which the prisoner was tortured. This judicious but decisive and courageous step is needed to remove from the history of Illinois the stain of Burge and his cohorts' misconduct. With the greatest of respect for the members of this Court, we believe that the sound administration of justice in this State requires no less.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Appellate Court and remand Mr. Wrice's petition to the Circuit Court of Cook County for a full hearing into his allegations that he was physically abused and tortured by Chicago Police officers acting under the command of Jon Burge.

Furthermore, Amici urge the Court to employ its supervisory authority to take the steps outlined in Part II above.

Respectfully submitted,

PERSONS CONCERNED ABOUT THE INTEGRITY OF THE ILLINOIS CRIMINAL JUSTICE SYSTEM AS *AMICI CURIAE*

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 27 pages.

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PROOF OF SERVICE

The undersigned, an attorney, hereby certifies that he served three (3) paper copies of the foregoing *Brief of Persons Concerned About the Integrity of the Illinois Criminal Justice System as Amici Curiae in Support of Petitioner-Appellant* to the counsel of record listed below by depositing said copies in United States Postal Service first class mail, postage paid, on this 9th day of August, 2011.

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