No. 12-1529

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DARRELL CANNON

Plaintiff-Appellant,

v.

JON BURGE, JOHN BYRNE, PETER DIGNAN, MICHAEL BOSCO, DANIEL MCWEENY, RAYMOND MADIGAN, RAY BINKOWSKI, THE ESTATE OF CHARLES GRUNHARD, TERRY HILLARD, THOMAS NEEDHAM, LEROY MARTIN, GAYLE SHINES, AND THE CITY OF CHICAGO

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
Case No. 05 CV 2192
The Honorable Judge Amy J. St. Eve

BRIEF OF THE PLAINTIFF-APPELLANT, DARRELL CANNON

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Seventh Circuit Rule 26.1, counsel for Plaintiff-Appellant states as follows:

1. The full name of every party that the undersigned attorneys represent in this case is: Darrell Cannon

2. The names of all law firms and the partners and associates that appeared for the party now represented by us in the trial court or are expected to appear in this Court are:

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3. The parent corporations and any publicly held companies that own ten percent or more of the stock of the party represented by the attorneys: N/A

Respectfully submitted,

/s/ Locke E. Bowman

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JURISDICTIONAL STATEMENT

On April 13, 2005, Plaintiff Darrell Cannon filed a complaint in the District Court alleging, *inter alia*, civil rights claims pursuant to 42 U.S.C. § 1983 against Defendants Burge, Byrne, Dignan, Bosco, McWeeny, Madigan, Binkowski, the Estate of Grunhard, Hillard, Needham, Martin, Shines and the City of Chicago (the "City Defendants"); and Defendants Devine, Cook County and the Cook County State's Attorney's Office (the "County Defendants"). R. 1, Plaintiff's Complaint.[1] Mr. Cannon's complaint also alleged state law claims against these defendants. *Id.* The lower court had jurisdiction over the federal claims pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a), and had jurisdiction over the supplemental state law claims pursuant to 28 U.S.C. § 1367(a).

On February 2, 2006, the lower court granted in part and denied in part the City and County Defendants' motions to dismiss Mr. Cannon's complaint, and the Cook County State's Attorney's Office was dismissed with prejudice. A. 1-45, 2/2/06 Mem. Op. & Order. On August 8, 2007, the lower court granted in part and denied in part Mr. Cannon's motion for leave to file an amended complaint. A. 46-58, 8/8/07 Mem. Op. & Order. On September 19, 2011, the District Court granted the City Defendants' motion for summary judgment. A. 59-76, 9/19/11 Mem. Op. & Order.

[1] Citations to the required Short Appendix are in the form "A. ___." Citations to the record are in the form "R. ___". The first time a brief or other document from the trial record is cited, the citation includes the document number from the record on appeal followed by a description of the document. Subsequent citations to the same document list only the document number.

On March 1, 2012, the lower court entered a Rule 58 judgment as to all defendants. R. 472, Second Amended Judgment. Pursuant to Federal Rule of Appellate Procedure 4(a)(1), Plaintiff timely filed his Notice of Appeal on March 5, 2012. R. 478**.** The Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. MAY THE DEFENDANTS OBTAIN THE BENEFIT OF A STIPULATION SECURED BY FRAUD?

II. IF THE DEFENDANTS FRAUDULENTLY CREATED GROSSLY UNEQUAL BARGAINING POSITIONS, WOULD IT BE UNCONSCIONABLE TO LET THEM BENEFIT FROM THEIR FRAUD?

III. DOES THE 1988 STIPULATION BAR CLAIMS THAT DID NOT YET EXIST AND WERE NOT CONTEMPLATED BY THE PARTIES WHEN THE STIPULATION WAS ENTERED?

IV. CAN MR. CANNON USE THE CIVIL RICO STATUTE TO RECOVER FOR THE LOSS OF EMPLOYMENT PROXIMATELY CAUSED BY THE DEFENDANTS' PATTERN OF RACKETEERING ACTIVITY?

STATEMENT OF THE CASE

On September 24, 1986, Plaintiff-Appellant Darrell Cannon, then serving a life sentence at Menard Correctional Center, filed a *pro se*, handwritten complaint under 42 U.S.C. § 1983 in the United States District Court for the Northern District of Illinois. R. 391, Plaintiff's Statement of Additional Facts ¶ 8; R. 363-10, Defendants' Statement of Facts, Exhibit J (Plaintiff's 1986 Complaint). Prepared from a form provided to prisoners by the institution, Cannon's four-page complaint alleged that Chicago Police Officers John Byrne, Peter Dignen (sic), and Charles Grunhard had arrested him at his Chicago

apartment and tortured him at a remote site on Chicago's south side. *Id.* He sought a declaration that his constitutional rights had been violated, an order awarding "reasonable attorney's fee and cost" (sic), and an order awarding "compensatory and punitive damages in the amount of $15,000, plus [damages for] physical injuries, pain, suffering, mental distress, from each defendants" (sic), and for "other and further relief that this court may deem just and proper." *Id.*

On February 5, 1988, Cannon, by now acting through court-appointed counsel, ended this litigation by agreeing to a Stipulation prepared by the defendants. The Stipulation substituted the City of Chicago as a "party defendant" "for the sole purpose of having a judgment entered against it in the total amount of $3,000." R. 363-18, Defendants' Statement of Facts, Exhibit R (1988 Stipulation). It provided that "if called upon to testify before this court [the officers'] testimony would be substantially the same as that contained in their statements made in the Police Department investigations made as a result of this incident and their depositions herein." *Id.* The Stipulation also provided that the judgment was:

> a final and total settlement of all claims [Cannon] has, or may have in the future, arising either directly or indirectly out of the incident which was the basis of this litigation, and that such finality is applicable to the remaining Defendant, the City of Chicago, its officers, agents and employees.

Id.

In April 2004—after two appeals, two remands, a second trial, and, ultimately, a second hearing on his motion to suppress his confession—the State of Illinois dismissed all charges against Mr. Cannon. R. 1, Plaintiff's Complaint ¶ 25. A year later, Mr.

Cannon filed this lawsuit. He sued the three original defendants as well as eleven new defendants, whose role had been unknown and unknowable to Mr. Cannon at the time of his *pro se* complaint. The gravamen of the new complaint was a Fourteenth Amendment claim for wrongful conviction, a state law claim for malicious prosecution, and a *Monell* claim against the City of Chicago. The first two claims had not ripened until Cannon's criminal case had been dismissed, and the *Monell* claim depended on facts that had been suppressed by the defendants until long after Mr. Cannon settled his *pro se* case.

The defendants moved to dismiss the complaint, alleging that Mr. Cannon's litigation was foreclosed by the 1988 Stipulation. The lower court denied the motion. Though the lower court found that the language of the Stipulation was sufficiently broad to cover all of Mr. Cannon's claims, it held nonetheless that Mr. Cannon's allegations of fraud by the Area 2 defendants brought his case within *Bell v. City of Milwaukee*, 746 F. 2d 1205 (7th Cir. 1984), *overruled on other grounds by Russ v. Watts*, 414 F. 3d 783 (7th Cir. 2005). A. 9-14, 2/2/06 Mem. Op. & Order. Mr. Cannon then moved to amend his complaint to add, *inter alia*, a civil RICO claim, pursuant to 18 U.S.C. §1961 *et seq*., and to join City policymakers Richard M. Daley and Jane Byrne in that claim. R. 175, Plaintiff's Motion for Leave to Amend. The Court denied leave to amend. A 49-52, 8/8/07 Mem. Op. & Order.

After discovery, the City defendants moved for summary judgment, renewing their argument that the 1988 Stipulation foreclosed Mr. Cannon's claims. This time, the lower court granted the motion. A. 60, 76, 9/19/11 Mem. Op. & Order. Abandoning *Bell*

and relying instead on *Thompson v. Boggs*, 33 F.3d 847 (7th Cir. 1994), the lower court found facts adverse to Mr. Cannon and held as a matter of law that because Mr. Cannon knew he had been tortured, he was not the victim of fraud. After Mr. Cannon settled his claims against former State's Attorney Richard Devine, the lower court's decisions with regard to the City and its agents were reduced to final judgments and Mr. Cannon filed a timely Notice of Appeal. R. 472, 478.

STATEMENT OF FACTS

A. The Torture

On November 2, 1983, Defendants John Byrne, Peter Dignan, and Charles Grunhard burst into Plaintiff Darrell Cannon's apartment and arrested him for the murder of Darrin Ross, a murder he did not commit. R. 391, Plaintiff's Statement of Additional Facts ¶ 1. *En route* to Area 2 headquarters, these defendants warned Mr. Cannon that they had "a scientific way of interrogating niggers," and that he was in for the "hardest day of his life." *Id*. Dignan then began to crack Mr. Cannon across the knee with his heavy-duty police flashlight. *Id*.

At Area 2, these defendants marched Mr. Cannon into an interrogation room and handcuffed him to a wall. *Id.* at ¶ 2. Defendant Michael Bosco entered the room and asked Mr. Cannon if he was ready to talk. *Id.* When Mr. Cannon elected instead to exercise his constitutional right to silence, Bosco opened a brown paper sack and revealed an electric cattle prod. *Id.* He assured Mr. Cannon he would think better of his decision and talk before the end of the day. Bryne, Dignan and Grunhard then drove

Mr. Cannon to a secluded location on the far southeast side of Chicago, where the torture began. *Id.* at ¶ 3.

Over the next several hours, these defendants subjected Mr. Cannon to a course of abuse that can only be described as sadistic. At one point, Dignan orchestrated an elaborate ploy to convince Mr. Cannon that he had loaded a shotgun. *Id.* at ¶ 3. He held up a shotgun shell and directed Mr. Cannon to take a good look as he turned his back on his handcuffed prisoner and "loaded" the gun. *Id*. Wheeling around to face Mr. Cannon, Dignan jammed the gun in Cannon's mouth and demanded that he confess. Mr. Cannon refused. Dignan pulled the trigger. *Id*. Dignan then repeated his actions, leaving Mr. Cannon to wonder whether this time was for real. Again he rammed the gun into Mr. Cannon's mouth. Again he demanded that he confess. Again, when Mr. Cannon refused, Dignan pulled the trigger. *Id*. Dignan repeated this charade at least three times. *Id*.

Though these mock executions were the worst of the psychological torture, the physical torture was equally barbaric. Dignan, Byrne, and Grunhard forced Mr. Cannon, who remained handcuffed with his hands behind his back, into the back seat of the car and yanked his pants down. They then pulled out a cattle prod, pressed it against Mr. Cannon's testicles and repeatedly administered electric shocks, each of which sent Mr. Cannon into paroxysms of pain. *Id.* at ¶ 3. On another occasion, Byrne tried to lift Mr. Cannon off the ground by the handcuffs encircling his wrists behind his back. *Id*. Eventually, Mr. Cannon succumbed and agreed to say, as the defendants demanded, that he had knowingly participated in the murder of Darrin Ross. *Id*.

The defendants then drove Mr. Cannon to a Chicago Police auto pound, where Mr. Cannon, believing he was safe, immediately recanted his confession. *Id.* at ¶ 4. Almost as quickly, the torture resumed. Byrne, Grunhard, and Dignan were now joined by defendant Daniel McWeeny. At the auto pound, the defendants replaced the shotgun with the cattle prod; instead of ramming the gun into his mouth, they shoved in the cattle prod. *Id*. Mr. Cannon's agony continued until finally he once again agreed to tell the defendants he had knowingly participated in the murder of Darrin Ross. *Id*. With that, they returned him to Area 2, where Mr. Cannon repeated the false confession he had given before. *Id*.

Almost immediately after leaving police custody, Mr. Cannon recanted his confession yet again, and began what has now become a decades-long odyssey to seek redress and expose the defendants' abuse. On November 7, 1983, five days after his arrest, Mr. Cannon's wife—acting at his behest—filed a complaint with the Chicago Police Department's Office of Professional Standards ("OPS"). *Id.* at ¶ 5. Later, once the State of Illinois had charged Mr. Cannon with murder, his attorney moved to suppress the confession, alleging it had been coerced by the officers' torture. *Id.* at ¶ 6. But these complaints and motions were for naught: Byrne, Dignan, and Grunhard lied to the OPS investigators and, joined by McWeeny, perjured themselves in court, repeatedly denying that Mr. Cannon had been subjected to anything untoward. *Id*. The OPS complaint was dismissed as "not sustained," and the motion to suppress was denied. *Id.* at ¶ 7. In June 1984, after his false confession came before the jury, Mr. Cannon was convicted and sentenced to spend the rest of his life in prison. *Id*.

B. The Settlement

Mr. Cannon tried again to seek redress in September 1986, when he filed a *pro se* complaint using a form he found in the prison library. *Id.* at ¶ 8. He sued the three officers who had been most directly involved in his torture: Byrne, Dignan, and Grunhard. The district court appointed E. Paul Lanphier to represent him. *Id.* at ¶ 9. Lanphier deposed Byrne, Dignan, Grunhard, and McWeeny, all of whom committed perjury when they denied wrongdoing. *Id*. Lanphier, for instance, asked Grunhard whether he had used a cattle prod to abuse Mr. Cannon. "We don't do any of that stuff," Grunhard said. *Id*. "As far as touching him with a gun," Dignan explained, "he was never touched with a gun by any police officer in my presence. As far as the cattle prod, I don't even know—I have never seen one. I don't even know what a cattle prod looks like." R. 391-4, Plaintiff's Statement of Additional Facts, Exhibit 7 (Dignan Deposition Excerpts). "As a matter of fact," McWeeny volunteered, "if I remember right, the State's Attorney asked him, and he said everything—he said all the police treated him pretty good." R. 391-4, Plaintiff's Statement of Additional Facts, Exhibit 9 (McWeeny Deposition Excerpts).

What Lanphier did not know, and could not have known at the time, was that Bryne, Grunhard, Dignan and McWeeny, along with a score of other Chicago police officers, supervisors, and command personnel, had long been involved in the darkest chapter in the history of the Chicago Police Department—a scandal that would eventually lead to the torture and abuse of more than 110 African-American suspects (that have been documented), send its disgraced ringleader to prison, and cost the City

tens of millions of dollars. R. 391, Plaintiff's Statement of Additional Facts, ¶ 175. Mr. Cannon may have learned from a single newspaper article that his particular attackers may have been accused of abusing other suspects. R. 361, Defendants' Statement of Facts ¶ 46. But these disclosures did nothing to shed light on the broader pattern of abuse or alert him to the complicity of Jon Burge and other supervisory and command officials, all of which had been carefully concealed by the defendants named in this litigation. In 1988, when Lanphier deposed the officers who tortured Mr. Cannon, "Burge's Asskickers" was a moniker known only to those inside the Chicago Police Department.

What Lanphier knew, and all he could have reasonably learned, was that Mr. Cannon had confessed to complicity in a murder; that he had been convicted; and that he had been sentenced to life in prison. Now Mr. Cannon had accused the officers responsible for his conviction of having tortured him, an accusation for which there was no physical evidence and which they had repeatedly denied, including under penalty of perjury. As a result of his confession and conviction, the entire case pitted the credibility of Darrell Cannon, convicted of the underlying murder, against defendants Byrne, Dignan, and Grunhard, apparently blameless and highly decorated Chicago Police Officers. R. 391, Plaintiff's Statement of Additional Facts ¶ 12. Under these circumstances, Lanphier correctly assessed that Mr. Cannon's chances were slim and recommended that he accept the nuisance offer tendered by the City. *Id*. Mr. Cannon settled his case in 1988 for $3,000, of which he netted $1,247.70. *Id.* at ¶ 13.

C. The Broader Scandal

Today, the public finally knows what Lanphier and Cannon could not have uncovered in 1988. Indeed, the Burge torture scandal has now been described and documented in scores of newspaper articles, several court opinions, a long series of official investigations, and by the United Nations Committee Against Torture. In 1999, for instance, Judge Milton Shadur made this observation in a case brought by Area 2 torture victim Andrew Maxwell:

> 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 . . . . [T]hose beatings and other means of torture occurred as an established practice, not just on an isolated basis.

U.S. ex. rel. Maxwell v. Gilmore, 1999 WL 130331 at *14 (N.D. Ill.). More recently, Circuit Judge Diane Wood, concurring in *Hinton v. Uchtman*, wrote that "a mountain of evidence indicates that torture was an ordinary occurrence at the Area Two station of the Chicago Police Department during the exact time period pertinent to Hinton's case." *Hinton v. Uchtman*, 395 F.3d 810, 821 (7th Cir. 2005) (Wood, J., concurring). Mr. Cannon's torture took place less than two weeks before Mr. Hinton's.

The details in each case are shocking; collectively, they risk running together. To avoid unnecessary repetition, Mr. Cannon describes only three of the most typical cases, neither more nor less sickening than many others that are now a matter of public record:

- In 1979, Burge and another Chicago Police detective tortured Willie Porch. They stepped on his groin, struck him with a revolver, and tried to hang him from a hook while his hands were cuffed behind his back. At a hearing on

Porch's motion to suppress, Burge denied under oath that he had done anything wrong. The motion to suppress was denied and Porch was sentenced to prison. R. 391, Plaintiff's Statement of Additional Facts ¶ 34.

- In 1981, Sylvester Green was subjected to racial slurs, punched, choked, kneed in the groin, and hurled against the wall. "We're going to put you through some real fucking changes," Burge told him. "We're going to start with your fucking balls." Burge placed a plastic bag over Green's head, pushed his head against the wall, and continually tightened the bag. Burge told Green: "I'm going to do this eighty seven more times, and I will try shock treatments if necessary." Burge, Grunhard, and other detectives who participated in Green's torture denied wrongdoing at Green's motion to suppress. The motion was denied and Green was convicted and sentenced to 80 years in prison. *Id.* at ¶ 44.

- Four days before they tortured Mr. Cannon, defendants Byrne, Dignan and Grunhard tortured Gregory Banks and David Bates. They suffocated the two suspects with a plastic bag, abused them with racial epithets, and, in Banks' case, struck him in the mouth with a gun. At a hearing on their motion to suppress, the three officers denied participating in or witnessing the torture. The motion to suppress was denied and both defendants were convicted and sentenced to prison.[2] *Id.* at ¶ 84-88.

It is important to stress that these accounts are merely representative. It is now clear that the torturers in Area 2 employed a relatively small number of techniques, which they used over and over again to coerce African-American men like Mr. Cannon into confessing:

- Sixteen victims alleged, like Mr. Cannon, that they were tortured by electric shock. *Id.* at ¶ 133.

[2] Banks' and Bates' convictions were subsequently reversed by the Illinois Appellate Court. In *People v. Banks*, 192 Ill. App. 3d 986, 994 (1st Dist. 1989), the court held that the trial court erred when it excluded evidence at trial that Byrne, Dignan and Grunhard had tortured another suspect 13 months before Banks was arrested. R. 391, Plaintiff's Statement of Additional Facts ¶ 143. In *People v. Bates*, 267 Ill. App. 3d 503, 505 (1st Dist. 1994), the court held that the trial court erred in Bates' 1991 attenuation hearing when it refused to consider the Goldston and Sanders reports on Area 2 abuse of suspects. These reports are discussed *infra*.

- Eighteen victims reported that they, like Mr. Cannon, were subjected to mock executions, gun threats, and beatings with a pistol or shotgun. Most frequently, this took the form of "Russian roulette"—with guns placed next to the victim's head or, as with Mr. Cannon, in his mouth. *Id*.

- On 32 occasions, the victim alleged, like Mr. Cannon, that the police attacked his genitals by shocking, kicking or striking them with an object. *Id*.

- Twenty two victims alleged the officers used a typewriter cover or plastic bag to suffocate them. Ten of these victims identified Burge as directly involved in the torture, Byrne in 9, Dignan in 4, and Grunhard in 5. *Id*.

- Thirteen victims reported that they, like Mr. Cannon, were beaten with a flashlight; five reported they were beaten with a phone book; seven said they were beaten with a rubber hose, lead pipe, or nightstick. One victim reported he was beaten with a small baseball bat. *Id*.

- Seventeen victims were, like Mr. Cannon, subjected to racial epithets, almost always including the word "nigger." On at least one occasion the electric shock box was referred to as the "nigger box," and on another occasion the box was described as "what we've got for niggers like you." One victim was threatened with hanging, "like they had other niggers," while, in the Banks torture, suffocation by bagging was introduced by announcing, "we have something special for niggers." One victim had a gun put to his head and the detective threatened to "blow his black brains out." *Id*.

- Two victims were threatened with hanging, and two victims were suspended by their handcuffs. *Id*.

- Another five victims alleged they were choked or gagged. *Id*.

D. The Cover-Up

But what is known today must not be confused with what was concealed yesterday. For many years before Mr. Cannon was tortured and for many years afterwards, Jon Burge and his "Asskickers" went to elaborate lengths to conceal their crimes. And in this conspiracy, they were abetted by some of the most senior officials in the Chicago Police Department, several of whom are now named as defendants in this

case. Collectively, the defendants lied to dozens of state and federal judges, hundreds of jurors, countless teams of OPS investigators, and scores of civil and criminal defense lawyers. R. 391, Plaintiff's Statement of Additional Facts ¶ 135. They destroyed and suppressed evidence (including the implements of torture), filed false reports, and withheld exculpatory evidence, all so they could continue their torture with impunity. *Id.* at ¶ 137; *see also, e.g., People v. Cannon*, 293 Ill. App. 3d 634, 642 (1st Dist. 1997) (question of whether Byrne, Dignan and Grunhard suppressed evidence of the shotgun used to torture Mr. Cannon must be revisited by trial court at new suppression hearing).

From 1972 to Mr. Cannon's settlement in 1988, Burge, Byrne, Dignan, Grunhard, and McWeeny denied under oath that they had tortured or abused suspects in a total of 28 appearances in 16 different cases. *Id.* at ¶ 135. They also denied all wrongdoing in 10 OPS statements taken during 5 separate OPS investigations, as well as in 5 sworn depositions in two different civil cases. *Id*. In total, these five officers alone lied and denied their misconduct 43 separate times. *Id*. Ten of these denials were in Mr. Cannon's case. *Id*. And throughout this time, not a single officer was disciplined for his behavior. On the contrary, they were routinely promoted. In 1980, for instance, Jon Burge was made Commanding Lieutenant of the Violent Crimes Unit at Area 2, and in 1986, the year Darrell Cannon filed his *pro se* lawsuit, Burge was promoted to Commander. *Id.* at ¶ 38, 43, 128, 132. From 1972 to 1988, the cover-up was an accomplished fact.

E. Cracks in the Wall

In 1989, a year after Mr. Cannon's settlement, the cover-up began to unravel. Even then, however, line officers continued to deny their abuse and senior police and city officials fought vigorously to block the release of information into the public domain that would reveal the pattern and practice of police torture at Area 2. In early 1989, during the Andrew Wilson civil rights trial, an anonymous police source sent a series of letters to Wilson's lawyers. R. 391, Plaintiff's Statement of Additional Facts ¶ 137. In these letters, which provided the first indication of a broader pattern of abuse, the anonymous officer disclosed that Byrne and Dignan were part of an Area 2 torture team known as Burge's "Asskickers," that the abuse was racially motivated, and that Burge was the "common cord" that tied the cases together. *Id*.

This was an act of exemplary courage. In 1982, an Area 2 detective, Frank Laverty, had come forward to expose the department's illegal "street files" practice. For his apostasy, he had been assaulted by Burge and other Area 2 detectives, moved out of Area 2, and assigned to take urine samples from police recruits. *Id.* at ¶ 139. In 1989, David Fogel, the Chief Administrator of the Office of Professional Standards, would tell the Chicago City Council that there was a "code of silence" within the police department, a conclusion echoed by Chicago Police Superintendent and former Area 2 Commander Leroy Martin. *Id*. at ¶ 142.

The anonymous letters to Wilson's lawyers started the long, slow process that eventually uncovered the Burge scandal. In the immediate term, the letters led to the discovery of other torture victims, as well as a confidential report by OPS investigator

Michael Goldston. The Goldston Report was approved in November 1990 by OPS Director Gayle Shines and sent to Chicago Police Superintendent Martin. *Id.* at ¶ 144. This Report identified 50 cases, including Mr. Cannon's, in which African-American men had been tortured or abused by Area 2 detectives under Burge's command. *Id*. The report found that the abuse was "systematic," that it included "planned torture," and that it was known to "particular command members" who "participated in it either by actively participating in same or failing to take any action to bring it to an end." *Id*. In a follow-up memo, Goldston further found that Burge, Byrne, Dignan, and Grunhard were "players" whose names "repeatedly appeared as connected to allegations of abuse." *Id.* at ¶ 147. Contemporaneously, OPS investigator Francine Sanders produced a report finding that Burge and two Area 2 confederates tortured Andrew Wilson and recommended that Burge be fired. Superintendent Martin approved Sanders' recommendations in November 1991 and initiated termination proceedings against Burge. *Id*. at ¶ 145.

Still, however, the City of Chicago vigorously objected to the release of the Goldston Report. When Judge Shadur entered an order permitting the public release of the Report in 1992, Superintendent Martin insisted the suggestion that Area 2 commanders knew about or condoned torture was an "outright lie." *Id.* at ¶ 150. For his part, Mayor Richard M. Daley, who had been State's Attorney when most of the torture took place, said that "these are only allegations ... not sustained cases" and insisted that the torture at Area 2 had not been "systematic." *Id*. at ¶ 151. He said the allegations were only "rumors" and "stories." *Id*. Yet only two weeks earlier, City lawyers, on

behalf of Superintendent Martin, had judicially admitted in the Burge Police Board proceedings that testimony by other Burge torture victims "reveals an astounding pattern or plan on the part of respondents [Burge, Yucaitis, and O'Hara] to torture certain suspects." *Id*. at ¶ 154.

In 1993, the OPS reopened several of its closed cases involving Burge, Byrne, and Dignan. After extensive re-investigations, the OPS investigators recommended that the allegations be sustained in six re-opened cases, including Mr. Cannon's. *Id.* at ¶ 19, 156. OPS Investigator Tillman found that Byrne, Dignan, and Grunhard had tortured Mr. Cannon with a cattle prod, had conducted mock executions with a shotgun, and had suspended him by his handcuffs. *Id*. at ¶ 19-20. Still, however, the City, including some of the defendants in this action, failed to take steps to correct the injustice. For the next five years, the new OPS Administrator, Gayle Shines (who had replaced David Fogel), failed to act on the new recommendations. Instead, she hid the files in her office. *Id*. at ¶ 157.

In 1998, defendant Thomas Needham, then General Counsel to Superintendent of Police Terry Hillard, directed the acting Administrator of OPS, Leonard Benefico, to overturn the results of the new investigation and change the findings in Mr. Cannon's case to "not sustained." *Id.* at ¶ 158-159. Mr. Cannon's criminal defense counsel did not learn of the earlier recommendation that the allegations be sustained because of Shines' suppression of the file, and the OPS' refusal to inform Cannon's lawyer of the findings during his 1994 re-trial. *Id.* at ¶ 20, 23. Although the City filed pleadings in 1995 in *Wilson v. City of Chicago* admitting that Jon Burge had tortured Andrew Wilson and

Melvin Jones in 1982, Dignan and Byrne continued to insist they had never tortured or abused a suspect in their custody, including Mr. Cannon. *Id.* at ¶ 161-162.

F. The Truth Finally Comes Out

In 1997, the Illinois Appellate Court, relying on 28 newly discovered cases of alleged torture by Dignan, Byrne, and Grunhard, ruled that Mr. Cannon was entitled to a new suppression hearing. *People v. Cannon*, 293 Ill. App. 3d 634 (1st Dist. 1997). On April 22, 2004, more than twenty years after he was tortured, the State of Illinois dismissed the charges against him. R. 391, Plaintiff's Statement of Additional Facts ¶ 25.[3] Mr. Cannon filed this lawsuit the following year.

Meanwhile, the revelations have continued. In 2003, former Illinois Governor George Ryan pardoned as innocent Leroy Orange, Stanley Howard, Madison Hobley, and Aaron Patterson, all of whom had been tortured by Burge and his crew and sentenced to death based on their false confessions. *Id.* at ¶ 164. In 2004, the City produced documents showing that Superintendent Rice was notified in late 1984 of a series of cases involving electric shock by cattle prod, including Mr. Cannon's, but that he took no investigative action. R. 391-4, Plaintiff's Statement of Additional Facts, Exhibit 10 (Declaration of G. Flint Taylor) at ¶ 14-17, 22, 25-28, 30-31, 44-45. In 2005, Superintendent Brzeczek admitted for the first time that in 1982 he had internally reprimanded his command personnel for their participation in, and cover-up of, Andrew Wilson's torture. R. 391, Plaintiff's Statement of Additional Facts ¶ 59. In 2006,

[3] As a result of a parole hold imposed by the Illinois Prisoner Review Board, which was later vacated as unsupported by the evidence, Mr. Cannon remained in prison for three more years, until April 30, 2007. R. 391, Plaintiff's Statement of Additional Facts ¶ 25.

Special Prosecutors Edward Egan and Robert Boyle completed a four-year investigation into the Area 2 torture scandal. *Id.* at ¶ 170. The Special Prosecutors found that Burge was "guilty [of] abus[ing] persons with impunity," and that "a number of those serving under his command recognized that if their commander could abuse persons with impunity, so could they." *Id*. Relying on his admissions, they singled out former Police Superintendent Richard Brzeczek for special condemnation, finding that he knew about and believed that Burge had tortured suspects as early as 1982, but "remained silent" for 20 years, and that he had "misled" this Court during the *Wilson* litigation. *Id.* (internal citations omitted).

Burge was finally prosecuted in 2010. *Id*. at ¶ 183. To the end, he denied that he had tortured or abused anyone, or that he had lied in his answers to interrogatories put to him in a civil case. *Id*. at ¶ 182. The jury disagreed and found him guilty of two counts of obstruction of justice and one count of perjury. *Id*. at ¶ 183. Judge Joan Lefkow sentenced him to 54 months in prison and stated that she, like the jury, did not believe Burge when he denied torturing suspects. Coerced confessions under Burge, she said, had been "widespread," and she condemned "the dismal failure of leadership" in the Chicago Police Department for the way it handled Burge's misconduct. *Id*. at ¶ 186.

SUMMARY OF ARGUMENT

The lower court erred in four respects. Each of these errors entitles Mr. Cannon to a remand for additional proceedings.

First, the defendants may not take shelter behind the 1988 Stipulation because, like the defendants in *Bell v. Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), they secured it by fraud. Defendants Byrne, Dignan, and Grunhard tortured Mr. Cannon into making a false confession then lied about it under oath. Their fraud and deceit culminated in Mr. Cannon's wrongful conviction. At their hand, Darrell Cannon served more than two decades in a maximum security prison for a crime he did not commit. Their crimes irreparably tilted the playing field in their favor by manufacturing false facts (Mr. Cannon's confession) and suppressing true ones (their systematic torture). Rather than a contest between presumptively equal litigants, their fraud insured that Mr. Cannon litigated with the artificial burden of a false confession and wrongful conviction, which deprived him of meaningful access to the courts.

It is irrelevant that Mr. Cannon knew he had been tortured. He also knew he had been wrongly convicted. Because of the defendants' fraud, however, he was powerless to undo the damage caused by their fabrications. Solely as a result of their fraud, Mr. Cannon had no choice but to litigate his constitutional claims from the position of having been convicted of the underlying murder—a litigation handicap imposed on him only because of the massive cover-up, collectively engineered by all the City defendants named in this case—a cover-up now known as the Burge torture scandal. His knowledge, in other words, did nothing to level the playing field and enable him to

gain meaningful access to the courts. At the very least, whether the defendants' fraud induced Mr. Cannon to accept the terms dictated in the 1988 Stipulation is a question of fact that must be resolved by a jury.

Second, the 1988 Stipulation is void as a matter of Illinois law. To put it plainly, it is unconscionable to allow the defendants to create grossly unequal bargaining positions by engaging in an extended course of unlawful fraud, and then hold Mr. Cannon to the choices he made while laboring under their ill-gotten advantage.

Third, even if the 1988 Stipulation were valid, it cannot encompass claims that were not contemplated by the parties at the time it was entered. When the parties resolved Mr. Cannon's Fourth Amendment excessive force claim in 1988, they did not intend also to bar his Fourteenth Amendment wrongful conviction or his state law malicious prosecution claims. Those claims did not exist in 1988. Indeed, they did not arise until 2004, when his conviction was set aside and all charges against him were dismissed. And even if the defendants now argue that it was precisely their intention to bar claims that had not yet arisen, their argument does no more than create a question of fact. Under Illinois law, the intended scope of a release is a question of fact for the jury. Even if Mr. Cannon is not entitled to relief as a matter of law, he is at least entitled to a remand so the jury may resolve this dispute.

Fourth and finally, the lower court erred when it refused to allow Mr. Cannon to amend his complaint to add a RICO claim.

ARGUMENT

I. DEFENDANTS MAY NOT HIDE BEHIND THE 1988 SETTLEMENT BECAUSE THEY SECURED IT BY ENGAGING IN A COVER-UP THAT DEPRIVED MR. CANNON OF HIS ABILITY TO SEEK MEANINGFUL REDRESS.

In *Bell v. City of Milwaukee*, the Court held that a party who secures agreement to a settlement by engaging in a cover-up that deprives his opponent of the ability to seek meaningful redress may not benefit from his fraud. 746 F.2d 1205 (7th Cir. 1984). Just as in *Bell*, the defendants in this case engaged in a massive fraud and cover-up that deprived Mr. Cannon of his ability to seek meaningful redress. Because "no man may take advantage of his own wrongdoing," the Court must not allow the defendants to benefit from their fraud. *Bomba v. W. L. Belvidere, Inc.*, 579 F. 2d 1067, 1070 (7th Cir. 1978). Under a straightforward application of *Bell*, the 1988 settlement does not bar additional litigation and the judgment of the lower court should be reversed. At a minimum, the Court should remand the matter so the trier of fact can decide whether the lies and deceit practiced and repeated by Byrne, Dignan, and Grunhard, as aided by the other City defendants, waives strict compliance with the Stipulation, since that has long been recognized as a question of fact that cannot be resolved on summary judgment.

A. *Bell v. City of Milwaukee* applied the established principle that fraud voids a settlement.

In 1958, Milwaukee police officer Thomas Grady shot and killed an African-American man named Daniel Bell. While Louis Krause, another Milwaukee officer, looked on, Grady planted a knife in Bell's hand. *Bell*, 746 F. 2d. at 1215. Both officers then conspired with other Milwaukee officials to spread the false story to the media and

conceal the truth. *Id*. at 1221-22. Dolphus Bell was Daniel Bell's father. In 1959, he filed an administrative claim with the City of Milwaukee for the wrongful death of his son, which the City denied. The next year, he sued Grady and the City of Milwaukee in state court. On both occasions, the defendants denied liability by resting on the lie that Daniel Bell had threatened Officer Grady with a knife. *Id.* at 1223. After a mistrial in this civil suit, Bell's case was reassigned to a different judge, who urged the parties to settle. In 1961, Dolphus Bell settled his case for $1,800. *Id*.

Twenty years later, Officer Krause revealed that he and Officer Grady had lied, admitting for the first time that they had covered up the true circumstances of Daniel Bell's death. *Id.* Bell's relatives and estate brought suit under 42 U.S.C. § 1983 against the City of Milwaukee, the Milwaukee Police Department, and Officers Krause and Grady, alleging, *inter alia*, that the cover-up had deprived them of access to the courts. *Id.* at 1224. In response, the defendants argued that the 1961 settlement foreclosed all litigation. They insisted that, notwithstanding the cover-up, there had been no fraud under Wisconsin law that could overcome the preclusive effect of the settlement. *Id.* at 1226.

The district court disagreed. "The record," the court observed, "is replete with allegations of fraud, concealment and a broad-based cover-up on the part of the defendants." Because a party must not benefit from its fraud, the district court held that the prior settlement did not bar the subsequent litigation. *Bell v. City of Milwaukee*, 514 F. Supp. 1363, 1368-69 (E.D. WI 1981); *see also Bell v. City of Milwaukee*, 536 F. Supp. 462, 466 (E.D. Wis. 1982) (rejecting defendants' post-trial motions) ("This is not a case in which

the defendant simply lied and thereby made the plaintiff's proof of his case difficult. Rather, this is a case of a massive conspiracy by high ranking Milwaukee officials to prevent the disclosure of the true facts of the shooting of Daniel Bell."). This Court affirmed, holding that the defendants could not benefit from their decades-long deceit because their cover-up had deprived Dolphus Bell of the ability to seek meaningful redress. *Bell*, 746 F. 2d at 1227-28 ("the Bell family, with their beliefs alone, were deprived of a fair opportunity to seek redress by virtue of defendants' fraudulent concealment of facts crucial to the fair disposition of the dispute.")

Bell has become a fixture of the law of judgments. The Restatement (Second) of Judgments, for instance, has recognized that a party may not benefit from settlements secured by a fraud that impairs an opponent's ability to seek a meaningful legal remedy. "To immunize such a judgment from attack is to compound the injustice of its result on the merits with the injustice of the means by which it was reached." Restatement (Second) of Judgments § 70 (1982). Tellingly, the Restatement cites *Bell* for this principle. This Court has likewise reaffirmed *Bell*, explaining the result in much these terms. In *Vasquez v. Hernandez*, 60 F. 3d 325 (7th Cir. 1995), for instance, this Court identified the linchpin of *Bell* as an unwillingness to allow the City of Milwaukee to benefit from its protracted cover-up. *Id.* at 329. The lower courts have read *Bell* the same way. *See*, *e.g.*, *Patterson v. Burge*, 328 F. Supp. 2d 878, 897 (N.D. Ill. 2004) (*Bell* stands for the proposition that a party may not avail itself of a settlement secured by a cover-up that renders opponent's judicial remedies inadequate).

B. Because the defendants engaged in a decades-long cover-up that deprived Mr. Cannon of a fair opportunity to secure meaningful redress, a straightforward application of *Bell* bars them from reliance on the 1988 settlement.

On November 2, 1983, defendants Byrne, Dignan, and Grunhard took Mr. Cannon to an isolated area on the South Side of Chicago and tortured him. As recounted at length in the Statement of Facts, they repeatedly pressed an electric cattle prod to his testicles. They allowed him to believe they had loaded a shotgun, rammed it into his mouth, and pulled the trigger, repeating this mock execution three times. They tried to lift him off the ground by the handcuffs that secured his hands behind his back. At another location, they drove the cattle prod into his mouth. They beat him with a police flashlight. Eventually, Mr. Cannon succumbed and falsely confessed to participating in the murder of Darrin Ross.

Mr. Cannon has now spent nearly three decades trying, as Dolphus Bell tried for his son, "to expose the truth and seek redress." *Bell*, 746 F. 2d at 1222. Almost as soon as the torture ended, he prevailed upon his wife to file a complaint with the Office of Professional Standards. But the defendants lied to the OPS investigators and denied all wrongdoing. The complaint was dismissed as "not sustained." On the basis of his false confession, Illinois charged Mr. Cannon with murder. His attorney moved to suppress the confession. This time, the defendants perjured themselves, denying all wrongdoing under oath. The motion to suppress was denied, the coerced confession was admitted at trial as the only substantive evidence against him, and Mr. Cannon was wrongly convicted of murder and sentenced to spend the rest of his life in prison. In 1986, he

filed a *pro se* lawsuit. Court-appointed counsel deposed the officers who had tortured him. Once again, they perjured themselves by denying that they laid a hand on Mr. Cannon and claiming to have no knowledge of torture or its implements.

In 1988, Mr. Cannon's court-appointed counsel surveyed the factual landscape and correctly assessed that in a credibility contest between highly decorated Chicago police officers and Mr. Cannon, who had been convicted of the underlying murder, the odds were stacked heavily against Mr. Cannon. Compounding the odds, Mr. Cannon had sued the officers whose investigation had put him in prison, and his conviction would no doubt also be used to further discredit his claims. Under these circumstances, counsel recommended that Mr. Cannon accept the nuisance offer tendered by the City of Chicago. Just like Dolphus Bell, Mr. Cannon reluctantly acceded to the reality as it then appeared and ended his litigation.

What neither Mr. Cannon nor his lawyer knew or reasonably could have learned is that the defendants who tortured him were key players in what is now almost universally accepted as one of the most shameful episodes in the long history of the Chicago Police Department. They did not know and could not have reasonably learned that scores of African-Americans had been tortured by "Burge's Asskickers," of whom these defendants were charter members. They did not know and could not have reasonably learned that more than 100 other victims had been tortured in much the same way as Mr. Cannon: the electric shock, the mock executions, the assaults on the genitalia, the racial slurs, the beatings—these were the tools of the torturer's trade at Area 2. They did not know and could not have reasonably learned that this torture and

abuse had been ratified at the highest levels of the Chicago Police Department and that Burge and the officers under his command tortured African-Americans men "with impunity." R. 391, Plaintiff's Statement of Additional Facts ¶ 16.

As the Statement of Facts makes abundantly clear, Mr. Cannon and his counsel did not know and could not have reasonably learned of this scandal for the same reason that the state and federal judiciary and the public could not learn of it—*viz.*, because the co-conspirators had gone to such elaborate lengths to conceal it. Routinely, they abetted their torture by committing perjury, destroying evidence, intimidating witnesses, and filing false reports. Their cover-up successfully concealed the scandal for almost two decades. The judiciary and public now understand that the Burge affair was not simply about the abuse of a single African-American man beaten in a remote corner of Chicago's south side. It was about a pattern and practice of torture made possible by years of fraud and concealment. Just as in *Bell*, "the record before the Court is replete with allegations of fraud, concealment and a broad-based cover-up on the part of the defendants," and no less than in *Bell*, the 1988 settlement cannot be allowed to stand.[4]

C. The lower court misapplied *Bell.*

The lower court purported to distinguish *Bell* on two grounds. First, the court reasoned that Mr. Cannon knew he had been tortured and was therefore free to pursue his lawsuit against the defendants, notwithstanding their fraud. A. 66, 09/19/11, Mem.

[4] The Court in *Bell* applied Wisconsin law, but the test for fraud is the same in Illinois and Wisconsin. *Compare Doe v. Dilling*, 228 Ill. 2d 324, 342-43 (2008) *with Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32, 270 Wis. 2d 146, 157 (2004); *see also* 19A Ill. Law and Prac. Fraud § 6; 2A Wis. Prac., Methods of Practice § 83:12 (5th ed.).

Op. & Order at 8 ("Cannon had first-hand knowledge of his torture and abuse underlying his Fourth Amendment excessive force claim at the time he filed his 1986 federal lawsuit.") Second, the court held that the defendants in the 1986 litigation took no affirmative steps to deceive Mr. Cannon apart from their participation in the cover-up, and therefore did not commit fraud under Illinois law. *Id.* at 69 ("Cannon does not argue that Defendant Officers committed affirmative acts or made representations to conceal information intended to induce him into settling his 1986 civil rights action."). The decision of the lower court reveals a fundamental misunderstanding of *Bell* and its progeny.

1. Mr. Cannon's Knowledge of His Own Torture is a Red-Herring.

The lower court seized upon the fact that Mr. Cannon indisputably knew he had been tortured. Nothing prevented him, therefore, from presenting his claim to the jury and allowing it to rise or fall on the facts. This reasoning, however, misconceives both the facts and law. The whole point of Mr. Cannon's complaint is that, *because of* the defendants' deceit, Mr. Cannon could not let his case rise or fall on the facts, as "the facts" had been irrevocably altered to Mr. Cannon's detriment. Though Mr. Cannon knew he had been tortured, he also knew he had been wrongly convicted. Yet because of the defendants' deceit, he was forced to litigate from the position of having been convicted of the underlying murder. The defendants' fraud and cover-up, in other words, created false facts. Just as the defendants in *Bell* created the false fact that Daniel Bell had threatened Officer Grady with a knife, the defendants in this case created the

false fact that Mr. Cannon had participated in the murder of Darrin Ross and had voluntarily and truthfully confessed to the crime.

In a case that would have called upon the jury to weigh Mr. Cannon's credibility against that of the defendants', the evidence of Mr. Cannon's conviction would have played an obvious and overwhelming role. Though it hardly seems necessary to point out, the fact of the conviction would have been admissible under Fed. R. Evid. 609 (prior conviction) and almost certainly would have been admissible to show alleged bias or motive to lie. *See*, *e.g.*, *United States v. Abel*, 469 U.S. 45, 50-51 (1984); *United States v. Manske*, 186 F. 3d 770, 777 (7th Cir. 1999) ("[Proof of bias] is the quintessentially appropriate topic for cross-examination." (quotation omitted)). Additionally, it could have been further used to argue that he had voluntarily confessed because he was guilty rather than because he was tortured. The defendants' fraud is thus precisely what created the material disadvantage that led Mr. Cannon and his counsel to assess the case so unfavorably and induced Mr. Cannon to accept the settlement. Just as in *Bell*, therefore, the defendants "deprived [Mr. Cannon] of a fair opportunity to seek redress by virtue of [their] fraudulent concealment of facts crucial to the fair disposition of the dispute."

The net of the lower court's holding, therefore, is that a party may fraudulently—indeed, unlawfully—place his opponent at a material disadvantage and then hold him to the choices he makes while laboring under this handicap, even after the fraud comes to light. No case supports this radical proposition. The court relied on *Thompson v. Boggs*, 33 F. 3d 847 (7th Cir. 1994), but that case is readily distinguishable. In *Thompson*, it

was uncontested that the plaintiff accelerated and sped away from a squad car, sped through at least three stop signs, and reached speeds in excess of sixty miles per hour along the city's streets before crashing his motorcycle. He alleged the police used excessive force in his subsequent arrest but denied as much in their reports of the incident, which he claimed deprived him of access to the courts. On appeal, the Seventh Circuit held that Thompson's allegations bore no resemblance to those in *Bell* because he "had firsthand knowledge of all the facts and circumstances surrounding his arrest" and therefore "was not deprived of adequate, effective, or meaningful access to the courts." *Id.* at 852-53.

Thompson is irrelevant to this litigation, for several reasons. First, and most obviously, *Thompson* did not involve the potentially preclusive effect of a prior settlement. Instead, *Thompson* stands for the uncontroversial proposition that a mere factual disagreement by the parties does not deprive a litigant of his access to the courts. It is a holding on the merits of a due process claim, and has nothing to do with the showing needed to overcome a prior settlement. Second, the gravamen of *Bell* is that a party may not hide behind a settlement secured by fraud. In both *Bell* and this case, the fraud altered the true facts and created false facts which unfairly made it materially more difficult for Bell and Cannon to prevail, and in that way induced them to accept a settlement that did not reflect the truth.

By contrast, nothing in the officers' behavior in *Thompson* altered the true facts or created false facts, nor did the defendants in *Thompson* place the plaintiff at a litigation disadvantage, nor did Thompson argue otherwise. Unlike in either this case or *Bell*,

therefore, there was no fraud or misrepresentation that could have induced Thompson to assess his case unfairly. Instead, there was a simple factual dispute, no different than the dispute that lies at the core of all litigation. At most, therefore, *Thompson*, was "a case in which the defendant simply lied and thereby made the plaintiff's proof of his case difficult." *Bell* and this case, by contrast, involve "a massive conspiracy by high ranking … officials to prevent the disclosure of the true facts. …" *Bell v. City of Milwaukee*, 536 F. Supp. 462, 466 (E.D. Wis. 1982).

2. The defendants in this case made the equivalent misrepresentations as the defendants in *Bell*. If the lower court is right, *Bell* is wrong.

The lower court also found that the defendants made no misrepresentations that induced Mr. Cannon to accept the settlement. But the defendants in this case took precisely the same affirmative steps as the defendants in *Bell*. They engaged in a decades-long cover-up that altered the true facts and deprived an aggrieved plaintiff of meaningful redress. Nothing in *Bell* supports the lower court's holding. Indeed, if the lower court's understanding were correct, *Bell* would have been decided differently.

The defendants in *Bell* fraudulently manufactured false facts and concealed true ones. They planted evidence, drafted false police reports, deceived the courts and public, and lied under oath. Yet the defendants in *Bell* made no affirmative misrepresentations over and above the misrepresentations they had made in the course of the cover-up itself; when Dolphus Bell filed his administrative complaint and lawsuit, the defendants simply denied all wrongdoing and did nothing more to induce Mr. Bell to settle his case. *Bell*, 746 F. 2d 1223 ("The defendants resisted the action on the

basis of Grady's false self-defense representations made during the investigation. Defendants' answer states, *inter alia*, that Bell exclaimed he was a 'holdup man,' Bell lunged at Grady with a knife, and that the shooting was in self-defense.") Nonetheless, the Court held that the defendants could not interpose the 1961 settlement to bar the litigation because the lengthy cover-up had deprived the Bell family "of a fair opportunity to seek redress." *Id.* at 1228.

In precisely the same fashion, Byrne, Dignan and Grunhard fraudulently manufactured false facts (*viz.*, Mr. Cannon's confession) and concealed true ones (*viz.*, their systematic torture of Mr. Cannon and other African-American suspects). They drafted false police reports, deceived the courts and public, concealed the implements of their torture, and lied under oath, yet when Mr. Cannon filed his 1986 lawsuit, the defendants simply denied all wrongdoing.[5] Just as in *Bell*, however, no additional misrepresentation is needed. Nothing in this Court's decision in *Bell*, or any other case, stands for the proposition that under circumstances like these, some *additional* misrepresentation is required in order to prevent the defendants from relying on their own wrongdoing. When a party secures a settlement by engaging in an extended deceit that deprives an opponent of the ability to secure meaningful redress, it is not necessary to show yet another lie atop the many that preceded the ill-gotten settlement before being confident that a fraud has taken place. Just as in *Bell*, the fraud and cover-up

[5] It should be noted that the defendants' deceit was expressly incorporated into the 1988 Stipulation itself. *See* Statement of Facts, *supra*, p. 3.

voids the settlement. The lower court erred when it imposed a requirement beyond that demanded by the Court in *Bell.*

D. Regardless of Mr. Cannon's Knowledge of His Own Torture, the Defendants' Conspiracy Prevented Him from Learning the Evidence of a *Monell* Policy and Practice Claim.

Finally, even if Mr. Cannon's knowledge of his own torture were somehow relevant (and it is not), he surely could not have known facts that would have allowed him to allege and prove a direct claim against the City of Chicago. *See Monell v. Dep't of Soc. Services of City of New York*, 436 U.S. 658, 694 (1978). It was axiomatic in 1988, as it is today, that direct municipal liability under *Monell* can only be imposed for injuries inflicted pursuant to official policy, practice, or custom. This direct liability can be established by a widespread pattern of misconduct known to the municipal policymakers, or by the involvement of those policymakers in the misconduct itself. *See, e.g., McCormick v. City of Chicago,* 230 F.3d 319, 324 (7th Cir. 2000); *Vodak v. City of Chicago*, 639 F.3d 738, 747 (7th Cir. 2011). The fraud and cover-up by policymaking City officials, many of whom were later named as defendants in this case, robbed Mr. Cannon of the facts to allege and prove this claim in his 1986 suit.

At the time of the settlement, all Mr. Cannon "knew" was that the individual officers who attacked him may have also been accused of abusing other suspects. The sum total of his knowledge came from a newspaper article that has since been lost, but which led Mr. Cannon to believe he was not their first victim. R. 363-16, Defendants' Statement of Facts, Exhibit P (3/2/87 letter from Cannon to Lanphier). Because of the City's fraud, however, Mr. Cannon did not know, nor could he have known, *inter alia*,

about the evidence already in existence that linked Byrne, Dignan, and Grunhard to a wide-ranging practice and custom of torture and abuse masterminded by Burge with the knowledge and active participation of several policymaking City officials.

Yet the defendants and their co-conspirators knew full well of this evidence. For example, Brzeczek knew (but failed to disclose for 20 years), that Andrew Wilson had been tortured with electric shock; that he (Brzeczek) had communicated that fact to future Chicago Mayor Richard M. Daley; that several of Brzeczek's command personnel had contemporaneously covered up their knowledge of this torture; and that he and Daley had both decided not to investigate further. R. 391, Plaintiff's Statement of Additional Facts ¶ 170 (f-h). Also unknown to Mr. Cannon, Leroy Martin, who was Commander of Area 2 when Mr. Cannon was tortured and later became Police Superintendent, along with other command personnel, had participated in the "systematic" torture at Area 2 by "actively participating in same or failing to take any action to bring it to an end." *Id.* at ¶ 144. They also knew, but failed to disclose, that as early as 1984 and 1985, OPS Director David Fogel had specifically advised Police Superintendent Fred Rice that Chicago police detectives had used cattle prods and other electric shock devices on arrestees, including Mr. Cannon. R. 391-4, Plaintiff's Statement of Additional Facts, Exhibit 10 (Declaration of G. Flint Taylor) ¶ 14-17, 22, 25-28, 30-31, 44-45. For its part, the OPS dismissed as "not sustained" a series of torture complaints, including Mr. Cannon's, that would later, after re-investigation, be found to be meritorious. R. 391, Plaintiff's Statement of Additional Facts ¶ 19-21, 156.

This, of course, was only a fraction of what would come to light after Mr. Cannon's settlement. But even before 1988, the City and its policymakers had already begun to suppress the expanding body of evidence showing a pattern and practice of police torture. Just as in *Bell,* the concealed evidence establishes a "massive conspiracy by high ranking ... officials to prevent the disclosure of the true facts" that "prevented the proper functioning of the judicial system." A. 14, 2/2/06 Mem. Op. & Order (quoting *Bell v. City of Milwaukee*, 536 F. Supp. 462, 465-66 (E.D. Wis. 1982)). Regardless of whatever Mr. Cannon may have known about his own torture, and may have "believed" about other acts of misconduct by Byrne, Dignan, and Grunhard, this conspiracy foreclosed him from bringing a powerful *Monell* claim, with Burge at the vortex.[6]

[6] The lower court faulted Mr. Cannon for failing to ask the defendants questions at their 1987 depositions that, if answered truthfully, may have opened a window into the *Monell* claim. A. 69-70, 9/19/11 Mem. Op. & Order. This clearly misstates the law. As the Court recognized in *Bell*, when presented with a massive cover-up, the burden is on the defendants to show that such questions would have been answered. *See Bell*, 746 F. 2d at 1228 ("defendants have not established that had Dolphus Bell and his attorney sought discovery, they would have obtained sufficient documentary and testimonial evidence to overcome the inquest finding of justifiable homicide, a finding facilitated by perjured testimony..."). By 1987, the defendants in this case, as well as the other Burge co-conspirators, had already lied repeatedly in this and scores of other cases. They would continue to lie for many years afterwards. Any intimation that the entire Burge scandal would have come to light if Mr. Cannon had only asked one more time is laughable. Defendants have never remotely suggested this to be true. Notably, the Illinois Supreme Court likewise dismissed the suggestion that a lawyer representing Burge torture victim Aaron Patterson could have discovered the systematic torture at Area 2 prior to the revelations made in the anonymous police letters in 1989. *People v. Patterson*, 192 Ill. 2d 93, 108-09 (2000).

E. At a Minimum, Whether the Defendants Can Rely on the Stipulation is a Question of Fact that Cannot Be Resolved by Summary Judgment

Because this case cannot be meaningfully distinguished from *Bell*, the 1988 Stipulation is void. To the extent the issue remains in doubt, however, that doubt raises questions of fact that cannot be resolved on summary judgment. The Stipulation is a contract governed by Illinois law. But the law in Illinois is well settled that "[w]hether a party's course of conduct waives strict compliance with a contractual provision and results in forfeiture is generally a question of fact; such a question is unsuitable for disposition by way of summary judgment." *Giannetti v. Anguili*, 263 Ill. App. 3d 305, 635 N.E.2d 1083, 1090 (3d Dist. 1994); *Coventry Health Care Workers Compensation, Inc. v. Medicor Managed Care, LLC*, 2012 U.S. Dist. LEXIS 31665 (N.D. Ill. Mar. 9, 2012).

Likewise, whether the defendants made material misrepresentations that induced Mr. Cannon to act is a question of fact, not law. *See*, *e.g.*, *Napcor Corp. v. JP Morgan Chase Bank, NA*, 406 Ill. App. 3d 146, 938 N.E. 2d 1181 (2d Dist. 2010). Defendants' misrepresentations were material if they concerned the type of information upon which a reasonable person would be expected to rely in making a decision of the sort Mr. Cannon made. *Id.* It should go without saying that the defendants' misrepresentations were material under this standard, but should the defendants suggest otherwise, their argument is for the jury. *Cf. also*, *Brown v. Broadway Perryville Lumber Co.*, 156 Ill. App. 3d 16, 508 N.E. 2d, 1170, 1175 (2nd Dist. 1987) ("Whether plaintiff has adequately proved these elements [of fraud] is a question of fact for the trier of fact.").

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Fortunately for the administration of justice, cases like *Bell* do not come along very often. It was, as this Court wrote in its opening line, an "extraordinary case." 746 F. 2d at 1214. But for the same reason, it is also fortunate that a decision like *Bell* is on the books, since it allows the Court to do justice as the facts and law demand. It allows the Court to prevent parties from claiming the benefit of an ill-gotten settlement secured only through a massive fraud and cover-up. It allows the Court to make good on the principle "that no man may take advantage of his own wrongdoing," a principle "so deeply rooted in and integral to our jurisprudence that it should be implied in the interstices of every federal cause of action," unless Congress clearly intended otherwise. *Bomba*, 579 F. 2d at 1070. No less than the defendants in *Bell*, the defendants in this case must not be allowed to "compound the injustice" of their fraud by hiding behind the 1988 settlement. Restatement (Second) of Judgments § 70 (1982).

II. THE 1988 SETTLEMENT IS UNCONSCIONABLE BECAUSE IT IS THE PRODUCT OF UNEQUAL BARGAINING POSITIONS SECURED BY THE DEFENDANTS' FRAUD

Quite apart from *Bell*, the defendants cannot benefit from the 1988 settlement. In a word, it would be unconscionable to allow the defendants to secure grossly disproportionate bargaining positions by fraud, perjury, and deceit, then to hold Mr. Cannon to the terms of the contract even after their wrongdoing comes to light. Whether the outcome is cast in procedural or substantive terms, such a result has no place in the law.

"A contract is unconscionable where it is improvident, oppressive or totally one-sided. Relevant factors include gross disparity in bargaining positions of the parties together with terms unreasonably favorable to the stronger party." *Reuben H. Donnelley Corp. v. Krasny Supply Co., Inc.*, 227 Ill. App. 3d 414, 420, 592 N.E.2d 8, 12 (1991) (internal citations omitted); *see also Razor v. Hyundai Motor Am.*, 222 Ill. 2d 75, 100, 854 N.E.2d 607, 622 (2006). In this case, the defendants' fraud alone dictated the result of the negotiation. Mr. Cannon negotiated under the impossible burden of a conviction for murder; defendants negotiated from the artificially elevated status of blameless public servants. We now know that all of this was a sham that had been orchestrated by the defendants. It is now established that Mr. Cannon was a wrongfully convicted torture victim and the defendants were thugs who, as charter members of "Burge's Asskickers," systematically tortured scores of African-American men "with impunity." The immediate result of the defendants' fraud, therefore, was "gross disparity in bargaining positions," which led to terms that were "unreasonably favorable" to the defendants.

Nor is this an occasion where the Court is left to speculate how events would have unfolded were it not for the defendants' fraud. On the contrary, we can predict what would have happened with great confidence. The City of Chicago has now paid over $29 million dollars in damages to African-American men who, like Mr. Cannon, were the victims of "Burge's Asskickers," and has paid more than $1.5 million dollars to defend against Mr. Cannon's claims. R. 391, Plaintiff's Statement of Additional Facts ¶ 175, 187; *see also* Byrne, John and Mills, Steve, "Daley Won't Face Deposition in Burge

Torture Case," *Chicago Tribune*, July 23, 2012. Indeed, some of these men, who served considerably less time than Mr. Cannon, have collected multi-million dollar settlements.[7] The Court knows, therefore, the terms that would have resulted but for the defendants' unlawful deceit.[8] In the court below, the defendants said they were confident Mr. Cannon wishes he had not settled for the few dollars tossed to him in 1988, as though this case were about nothing more than buyer's remorse. In fact, however, what Mr. Cannon wishes is what every litigant quite properly demands of the courts—*viz.*, that the merits of his case would be judged without an artificial handicap illegally secured and unlawfully imposed by the defendants' fraud.

It is still his wish.

III. EVEN IF THE 1988 SETTLEMENT WERE VALID, IT DOES NOT FORECLOSE MR. CANNON'S WRONGFUL CONVICTION AND MALICIOUS PROSECUTION CLAIMS.

Because the defendants fraudulently induced Mr. Cannon to settle his 1986 excessive force claims by creating false facts and concealing true ones, the settlement is void. But even if it were valid, it cannot prevent litigation of Mr. Cannon's wrongful

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[7] In January of 2008, the City approved a $19.8 million dollar joint settlement for four such Burge torture victims who had been wrongfully convicted. R. 391, Plaintiff's Statement of Additional Facts ¶ 175.

[8] The court below pointed out that Mr. Cannon had purportedly only asked for $15,000 in damages in his original complaint. Not only is this irrelevant, but it also draws an improper inference in favor of the defendants. Mr. Cannon's inartfully drawn *pro se* prayer is more fairly construed as seeking $15,000 for his property damage, with unspecified additional damages for the mental and physical pain suffered as a result of the torture. R. 363-10, Defendants' Statement of Facts, Exhibit J (Plaintiff's 1986 Complaint).

conviction and malicious prosecution claims since they were beyond the parties' contemplation at the time of the settlement. At the very least, there is a question of fact as to the parties' intent, which must be resolved by the jury. The lower court erred when it held otherwise, and for that reason as well the judgment below should be reversed.

In its opinion on the defendants' motion to dismiss, the lower court found that the 1988 settlement released the City and its agents from all claims arising from Mr. Cannon's torture. In the court's view, this included the causes of action Mr. Cannon brought in the current case, including his federal wrongful conviction claim under the Fourteenth Amendment and his malicious prosecution claim under state law. A. 10-12, 2/2/06 Mem. Op. & Order at 11-13. But the 1988 settlement resolved a lawsuit that focused entirely on the use of excessive force under the Fourth Amendment. There is, at the very least, a genuine issue of material fact as to whether the settlement covers the wrongful conviction and malicious prosecution claims—both of which had not accrued and did not exist until Mr. Cannon's criminal case had been dismissed in 2004.

The relevant legal landscape is well settled. Illinois law regarding releases included in settlement agreements focuses on the intention of the parties. "The intention of the parties controls the scope and effect of the release, and this intent is discerned from the language used and the circumstances of the transaction." *Fuller Family Holdings, LLC v. N. Trust Co.*, 371 Ill. App. 3d 605, 614 (1st Dist. 2007). "Releases are strictly construed against the benefiting party and must spell out the intention of the parties with great particularity." *Fuller Family Holdings*, 371 Ill. App. 3d at 614 (citing

Scott & Fetzer Co. v. Montgomery Ward & Co., 112 Ill. 2d 378, 395 (1986)). "It is clear that a contractual release cannot be construed to include claims not within the contemplation of the parties, and it will not be extended to cover claims that may arise in the future." *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 286 (2003). Elaborating on these principles, the Illinois Appellate Court noted that:

> [i]n many cases, a release makes clear on its face what claims were within the contemplation of the parties at the time the release was given. In other instances, the release provides very general language that does not indicate with any clear definition what claims were within the contemplation of the parties. In such cases, the courts will restrict the release to the thing or things intended to be released and will refuse to interpret generalities so as to defeat a valid claim not then in the minds of the parties.

Thornwood, Inc. v. Jenner & Block, 344 Ill. App. 3d 15, 21 (1st Dist. 2003) (internal quotations omitted). Accordingly, "[w]here a releasing party was unaware of other claims, Illinois law restricts the release to the particular claims that are explicitly covered by the agreement." *Fuller Family Holdings*, 371 Ill. App. 3d at 614.

The trier of fact may examine extrinsic evidence when "it is not clear on the face of the release agreement whether the parties intended to limit the release" in a particular way. *Farm Credit Bank of St. Louis v. Whitlock*, 144 Ill.2d 440, 448 (1991); *see also Carona v. Illinois Cent. Gulf R. Co.*, 203 Ill. App. 3d 947, 951 (5th Dist. 1990) (considering plaintiff's deposition to determine the intent of the plaintiff in signing the release). Even when a settlement agreement is unambiguous on its face, courts have examined the circumstances of the release when the parties' intentions are in doubt: "[N]o form of words, no matter how all encompassing, will foreclose scrutiny of a release or prevent a

reviewing court from inquiring into surrounding circumstances to ascertain whether it was fairly made and accurately reflected the intention of the parties." *Ainsworth Corp. v. Cenco, Inc.*, 107 Ill. App. 3d 435, 439 (1st Dist. 1982) (reversing trial court's finding that settlement agreement was unambiguous after finding question of fact as to whether defendants made fraudulent representations to the plaintiff in the course of negotiations).

The 1986 excessive force suit was initiated as a *pro se* prisoner's suit for brutality against three individual defendants. It describes Mr. Cannon's torture in six handwritten paragraphs and asks for damages for that and the property damage that preceded it—and no more. Indeed, the 1986 complaint does not even mention the confession that resulted from the torture. The present suit, by contrast, details how the torture led Mr. Cannon to confess falsely to a crime he did not commit. R. 322, Amended Complaint ¶ 28, 31-32. It describes in detail Mr. Cannon's odyssey through the criminal justice system: his conviction, appeals, and ultimately the dismissal of all charges against him. *Id.* ¶ 39-60. It lays out the massive conspiracy that has now come to light—a conspiracy to fabricate and suppress evidence, and to conceal the widespread torture of African-American men at Area 2. *Id.* ¶ 33-66. And it describes how Mr. Cannon is merely one of scores of African-American men who were victimized as part of this same pattern and practice. *Id.*

Significantly, the present complaint notes that Mr. Cannon's conviction was not overturned and his case dismissed until April 2004, leading to the filing of this case in April 2005. *Id.* ¶60. The present suit includes claims based upon Mr. Cannon's wrongful

conviction for the Ross murder. *Id.*, Count I (wrongful conviction) and Count VIII (malicious prosecution). Furthermore, the record is clear that neither Mr. Cannon nor Paul Lanphier, his court-appointed lawyer in the 1986 lawsuit, imagined that the 1988 Stipulation would bar a later suit seeking damages for Plaintiff's wrongful conviction and incarceration if, at some future date, Mr. Cannon's conviction were overturned and he was released from custody. R. 391, Plaintiff's Statement of Additional Facts ¶ 18.

On this record, the release in the 1988 Stipulation cannot be construed to cover Plaintiff's § 1983 wrongful conviction due process claim or his state law malicious prosecution claim. Indeed, the factual predicate for these claims did not even exist in 1988, since it is axiomatic that a damages claim predicated upon the wrongfulness of a state conviction is "not cognizable" under § 1983 or Illinois law unless and until the conviction has been set aside in a manner favorable to the Plaintiff. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994) (§ 1983 claim); *Newsome v. McCabe*, 256 F.3d 747, 750 (7th Cir. 2001) (same); *Swick v. Liautaud*, 169 Ill. 2d 504, 512 (1996) (state law malicious prosecution claim). These claims could not have been brought until the criminal charges against Mr. Cannon were dismissed in 2004, and they certainly were not contemplated by the parties at the time the release was given.

When a later claim is brought by a plaintiff against the same defendant, the previous release does not preclude the later claim if it arises from "a separate and distinct" incident. *Carona*, 203 Ill. App. 3d at 951-52. As the First Circuit made clear in *Landrigan v. City of Warwick*, 628 F. 2d 736 (1st Cir. 1980), excessive force—the claim in the 1986 case—and the cover-up of the use of excessive force—on which the wrongful

conviction and malicious prosecution claims in this case hinge—are separate and distinct incidents. In *Landrigan*, the plaintiff originally sued a defendant police officer in state court for use of excessive force. After winning his state claim, the plaintiff brought a federal suit against the defendant police officer as well as other police officers and the City of Warwick for conspiracy to cover up the use of excessive force. Rejecting the defendant officers' argument that *res judicata* barred the conspiracy claim, the court stated, "[t]he excessive use of force and the subsequent cover-up are separate and distinct wrongs resting on different factual bases." *Id*. at 741. Likewise here, the defendants' use of torture and the subsequent cover-up of that torture constitute separate and distinct incidents. Since Defendants cannot reasonably argue that the parties intended the release to cover the wrongful conviction and malicious prosecution claims, the question of whether the Stipulation covers those claims should be decided in Mr. Cannon's favor as a matter of law.

Alternatively, the lower court should have denied summary judgment because the determination of whether the parties intended the release to cover potential wrongful conviction and malicious prosecution claims presents a genuine issue of material fact for the jury to decide. *Ainsworth Corp.*, 107 Ill. App. 3d at 441 ("where the parties seek to draw inferences on a question of intent, a summary judgment disposition is particularly inappropriate.") In *Janowiak v. Tiesi*, 402 Ill. App. 3d 997, 1014 (2010), for instance, the court dealt with a release that purported to waive "any and all liability relating to [the defendant's] acts or failure to act as trustee" without specifying claims of the type the plaintiff had brought. *Id.* In reversing the lower court's grant of

summary judgment, the court stated that "the release is governed by the parties' intent" and concluded that because "plaintiff clearly allege[d] that it was not his intent to release such claims," a genuine issue of material fact existed as to whether the plaintiff intended to release the types of claims at issue. *Id.*

Likewise, in *Kelleher v. Eaglerider, Inc.*, 2010 U.S. Dist. LEXIS 115279, *9-18 (N.D. Ill. Oct. 28, 2010) the court considered a release of "any and all claims . . . that may have accrued or may accrue in the future" and a release of claims "regardless of whether such claims now exist or hereafter arise or are known or unknown." *Id.* In denying summary judgment, the court applied Illinois law, considered conflicting evidence of whether the parties intended the releases to cover the claims at issue, and determined it was a genuine issue of fact for the jury to decide. *Id.*

In the same way, there is a genuine issue of material fact as to whether Mr. Cannon's § 1983 wrongful conviction and state law malicious prosecution claims are precluded by the 1988 Stipulation which should be decided by a jury.

IV. PLAINTIFF'S ALLEGATIONS OF INJURY TO BUSINESS OR PROPERTY ARE SUFFICIENT TO CONFER STANDING UNDER THE CIVIL RICO STATUTE.

In the court below, Mr. Cannon moved to amend his complaint, seeking to add, *inter alia,* a count under the civil RICO statute, 28 U.S.C. §1961 *et. seq.* Mr. Cannon alleged that the defendants and their co-conspirators, including proposed defendants Richard M. Daley and Jane Byrne, engaged in a pattern of racketeering activity, which included, but was not limited to, the torture and abuse of more than 100 African-

American suspects. He also alleged that the defendants committed more than 200 predicate acts, including "the wholesale obstruction of State and Federal Courts by use of tortured and coerced evidence, as well as wholesale perjury," and that these acts "were and are violations of the criminal laws of the United States and the State of Illinois." R. 175, Proposed Amended Complaint, ¶ 130, 159.

Mr. Cannon also alleged that the defendants' racketeering "proximately caused and continues to cause" him to suffer injury to his business and property, including his loss of employment while in the penitentiary. *Id.* Finally, Mr. Cannon alleged that the defendants, as a direct result of their racketeering, obtained income in the form of continued employment, promotions, benefits, pensions and retirement benefits, and legal fees. R. 175, Proposed Amended Complaint, ¶ 130, 160-162.

The lower court denied leave to amend. Relying on this Court's decision in *Evans v. City of Chicago*, 434 F.3d 916, 924-25 (7th Cir. 2006), the court held that Mr. Cannon did not have standing because his loss of employment as a result of his wrongful conviction did not qualify as injury to his business or property within the meaning of the civil RICO statute.

Mr. Cannon urges the Court to revisit the question decided in *Evans* in light of the extended pattern of racketeering activity by numerous public servants that underpins his proposed amendment, and to follow those courts which have granted plaintiffs standing to bring a RICO claim under analogous, but far less egregious, circumstances. *See*, *e.g.*, *Diaz v. Gates*, 420 F.3d 897 (9th Cir. 2005) (injury to "business or property" includes loss of employment of the sort alleged by Mr. Cannon); *Guerrero v.*

Gates, 442 F.3d 697, 707-08 (9th Cir. 2006) (same); *Libertad v. Welch*, 53 F.3d 428 (1st Cir.1995) (evidence to business or property includes lost wages and physical harm); *Nat'l Asbestos Workers Med. Fund v. Phillip Morris, Inc.*, 74 F. Supp. 2d 221, 229 (E.D. N.Y. 1999) ("[t]he most natural reading of the language in RICO supports the conclusion that pecuniary losses resulting from racketeering and causing personal injuries should be compensable under the statute"); *Rice v. Janovich*, 109 Wash.2d 48, 742 P.2d 1230, 1237-38 (1987) (the lost wages of a janitor who was assaulted and beaten while at work are a compensable injury under RICO).

CONCLUSION

For the foregoing reasons, the judgment of the lower court should be reversed and the case remanded for further proceedings.

Dated: August 8, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Locke Bowman, hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 13,295 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Locke Bowman
Locke Bowman

CERTIFICATE OF SERVICE

The undersigned, counsel for Plaintiff-Appellant, hereby certifies that on August 8, 2012, a true and correct copy of the foregoing Appellant's Brief was served electronically on all counsel via the CM/ECF system.

/s/ Locke Bowman
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