

No. 130470

IN THE  
SUPREME COURT OF ILLINOIS

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PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Appellate Court
Respondent - Appellant	)	of Illinois, First Judicial District,
	)	No. 1-22-0372
	)	
v.	)	Original Appeal from the
	)	Circuit Court of Cook County
	)	Case No. 00 CR 1357201
	)	
Abdul Malik Muhammad,	)	(Retired) Hon. Lawrence E. Flood
	)	LeRoy K. Martin, Jr.
Petitioner - Appellee	)	Erica L. Reddick,
	)	Judges Presiding

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BRIEF OF PETITIONER-APPELLEE  
ABDUL MALIK MUHAMMAD

H. Candace Gorman  
Law office of H. Candace Gorman  
1509 W. Berwyn, Suite 207  
Chicago Il. 60640  
312-427-2313  
hcgorman@igc.org  
ARDC number 6184278

*Counsel for Petitioner - Appellee*

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## NATURE OF THE CASE

Muhammad was arrested for the murder of Damone Mims. While held at Chicago police Area 2 during the felony review process, Muhammad was tortured by the notorious Chicago police detectives McDermitt and Fidyk. SUP2 E77-78 ¶¶ 8-41. During the torture detectives fabricated a confession which was then used as a mantra throughout the 2001 trial to convict Muhammad of the murder of Damone Mims. SUP2 E82-83 ¶¶ 48-49; SUP C67-69, 96-97. The trial judge then used the confession to enhance Muhammad's sentence. SUP C67-68, 96-97.

Muhammad filed a TIRC complaint and after an investigation into his case that lasted several years, the TIRC determined (unanimously) that his case should be referred back to the court for a hearing. The TIRC complaint was referred to the criminal court on July 18, 2018. C436-456.

Torturer McDermott was hired as an investigator at the Cook County States Attorney's Office (CCSAO) immediately following his retirement from the Chicago Police Department ("CPD"). Because of his employment at the CCSAO the office undertook a several month investigation into Muhammad's referral to determine whether they had a conflict and should recuse the entire office. After that lengthy investigation the CCSAO recused the entire office because Muhammad's torturer (McDermott) worked as an investigator for that office and he quit his position on the eve of being fired after perjuring himself in a federal trial. Counsel for Muhammad was told that Robert Milan's office was the special prosecutor handling TIRC conflict cases at the time of Muhammad's referral and

was appointed in this case. C214, SUP C43-44 ¶¶ 5-8. In 2020 Milan filed a motion to dismiss the TIRC action, claiming that the confession was not a confession under criminal law and that the state did not use the confession to obtain the conviction. C325. Muhammad's counsel subsequently learned Milan had the exact same conflict as the CCSAO and moved to recuse him. SUP C45-46 ¶¶ 17-20; C404. The motion to recuse was denied and ultimately Milan's motion to dismiss the TIRC referral was granted. C627-653; C1342-1352.

The appellate panel unanimously held that the TIRCs definition of tortured confession was a valid interpretation of the TIRC Act, and a majority of the appellate panel agreed that special prosecutor Milan should be recused from Muhammad's case because of his conflict. *People v. Muhammed*, 2023 IL App (1st) 220372. Specifically, the majority held that in light of all that Milan has disclosed in the record, his staying on as special prosecutor violates Muhammad's right to a prosecutor unencumbered by conflicting loyalties and potentially prejudicial inclinations. *Id. at* ¶ 7.

### ISSUES PRESENTED

1. Whether the Panel was correct in sending Muhammad's Torture Inquiry Review claim back to the trial court for a hearing.
2. Whether the majority of the Panel was correct in rescinding the appointment of the special prosecutor based on his clear bias and conflict.



## STATEMENT OF FACTS

As the Attorney General's (hereinafter "AG") version of the facts is incomplete and misleading therefore Muhammad submits his own statement of facts.

### I. THE MURDER OF DAMONE MIMS

On the evening of May 1, 1999, nineteen-year-old Abdul Malik Muhammad passed out in the back of a car after drinking with his cousin. A gang of young men came upon the scene and attacked Muhammad with baseball bats, glass bottles, fists, and kicks. Muhammad was taken to Jackson Park hospital by ambulance. SUP2 E67<sup>1</sup>. Muhammad's mother, who had frequently sent her son to his grandmother's house outside Seattle, sent her son back to Seattle by plane on or about May 3, 1999 – where he stayed, living and working under his own name, until his arrest in February 2000. SUP2 E77 ¶¶ 1-5.

Damone Mims was shot and killed on the evening of May 4, 1999. According to police reports, Mims was driving westbound on 76<sup>th</sup> Street and stopped at a red light at the corner of 76<sup>th</sup> Street and Stony Island. An unknown individual ran up to Mims's car, shot him several times and then fled on foot. SUP2 E58.

### II. THE ARREST AND TORTURE OF MUHAMMAD

In February 2000, Muhammad was arrested pursuant to the arrest warrant

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<sup>1</sup> Many of the factual allegations herein come from the affidavit Muhammad submitted to TIRC. SUP2 E77 *et seq.*

that was issued on June 9, 1999, five weeks after the murder of Damone Mims. C49. Muhammad spent approximately three months in the Pierce County, Washington jail before he was released to the custody of Chicago police detectives McDermott and Fidyk on the morning of April 27, 2000. The detectives flew back to Chicago with Muhammad. Instead of bringing him to the jail for booking, they took him directly to the Area 2 police station. SUP2 E77 ¶¶ 6-7; C59.

Over the course of the next four days, Muhammad endured torture at the hands of McDermott, Fidyk and other detectives (including other well-known torture detectives: Karl, Pesavento and Ramiriz.)<sup>2</sup> Muhammad repeatedly asked for an attorney to be present, but his request was ignored. At one point a felony review ASA tried to trick Muhammad into believing that she was Muhammad's attorney. Except for one sandwich and one trip to the toilet that first night, Muhammad was provided no other food, water, or access to a toilet. Eventually Muhammad was forced to urinate and defecate in his interrogation room. SUP2 E77-80 ¶¶ 8-22, 25-26.

Several lineups were conducted over the next four days. Attempting to get Muhammad to confess, the detectives told Muhammad that they had two "white" witnesses who would identify him as the killer and that "white" witnesses would be believed. Muhammad refused to confess, and repeatedly asked to speak to an attorney. While Muhammad's repeated requests for an attorney were ignored the

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<sup>2</sup> See, e.g., the TIRC pattern and practice evidence at C449-451.

two "white" eyewitnesses were brought in to view a line up. SUP2 E77 at 79-80 ¶¶ 18, 22-23, 28. The first eyewitness was a man in the car next to Mims when Mims was shot: Bradley Huett. Huett viewed the line-up and selected another individual as the killer. After being told by detective McDermott that he picked the wrong man, McDermott then pointed out Muhammad to Huett. Huett commented to McDermott that the alleged killer looked different and had gained a lot of weight (implying Muhammed was much heavier than the killer.) SUP2 E86, E90-92. Muhammad overheard Huett as he was leaving say "sorry, but that's not him." SUP2 E79 ¶ 23; C448; C453-54.

The second individual to view the line-up was a doctor or other medical professional who was at or near the scene of the murder, across the street from Jackson Park Hospital in Chicago. Muhammad overheard that individual say, "I have to go back to the hospital. I'm sorry." SUP2 E79 ¶ 23. No documents were ever tendered to Muhammad relating to either line-up and the identity of the medical witness is still unknown. However, witness Huett stated in his TIRC interview that medical personnel from the hospital were on the scene very quickly as the shooting was right outside Jackson Park hospital. SUP2 E91.

As noted by the TIRC in its referral, Muhammad has long claimed that he was aware that he was not identified as the Mims perpetrator in the first two or three line-ups conducted by the detectives. C579. He also knew that the torture detectives were relying on those "white" witnesses to frame him and when those witnesses did not identify him the detectives became even angrier. SUP2 E79 ¶¶

22-24. However, there were no police reports or other proof to confirm Muhammed's line-up account, and his attorney refused to believe him that additional line-ups took place.<sup>3</sup> SUP2 E79 ¶ 43. During the torture commission proceedings Mr. Huett was located and confirmed that he attended a line-up and had in fact identified someone other than Muhammad as the perpetrator. According to Mr. Huett, the individual he saw that day was someone much thinner than the stocky Muhammad. SUP2 E91-92.

On April 29<sup>th</sup>, 2000, McDermott and Fidyk continued their work framing Muhammad for the Mims shooting, bringing in other witnesses from the scene (the non-white witnesses.) At this point Muhammad, who knew that the witnesses the detectives were relying on had not identified him, refused to participate in any further line-ups without an attorney. McDermott, Fidyk and the other detectives then physically dragged Muhammad to these later line-ups, while one detective held him in place and another detective stayed with the witnesses. SUP2 E80-81 ¶¶ 31-37. Detective Fidyk confirmed at the trial that he was in the lineup room. SUP2 E175.

Just as there are no formal reports confirming the first two line-ups (or for that matter *any* of the line-ups) there are no actual photos of any of the line-ups, only recreated photos outside the line-up room in the main detective office area at

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<sup>3</sup> As shown in Muhammad's post-conviction petition, his attorney was the textbook example of ineffective counsel. C1176 at pgs. 1221-24.

Area 2. SUP2 E113-14.<sup>4</sup> If photos of the later lineups had been made available, we would be able to see Muhammad being physically held in place by Fidyk.<sup>5</sup>

As mentioned above, there are also no line-up reports confirming line-ups where witnesses reportedly identified Muhammad (Eddie Wilson and Glenn Davis), and no photo packets for photos that were ostensibly used by those two witnesses to identify Muhammad in the week after the shooting (*before Muhammad was even a suspect.*) SUP2 E144, E149-50. Although detective Fidyk testified at the trial that *both* line-up identifications took place only on April 28<sup>th</sup>, the recreated photos counsel for Muhammad received from FOIA confirm that Fidyk lied. SUP2 E173-74; SUP2 E81 ¶ 38. Line-ups were conducted on April 28<sup>th</sup> through the next day *and* into the night of April 29<sup>th</sup>, 2000. C1201; SUP2 E109-14. The recreated photos also show two different sets of individuals in the various photos. SUP2 E113-14.

It was not until subsequent line-ups late in the night of April 29<sup>th</sup> – when Muhammad was violently dragged into the line-ups and held into place – that two family groups, who were present in the general area of the murder, were brought in. One family member from each group identified Muhammad as the man they saw. The two witnesses were a fifteen-year-old boy (Eddie Wilson) and a man in

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<sup>4</sup> Another disturbing point regarding the line-ups is that Detective McDermott lists himself as the photographer for both of these days, showing yet another violation of CPD protocol. SUP2 E109, 111.

<sup>5</sup> In addition, photos from the first line up would show the individual Mr. Huett thought looked like the assailant.

his 30s (Glenn Davis). SUP2 E173-74; SUP2 E80-81 ¶¶ 31-37. We now know from documents tendered from the state's attorney's file that the other family members from both families also viewed the line ups and did not identify Muhammad as the assailant. SUP2 E199-214. Again, there were no line-up reports formally documenting any of these line-ups. C439-40. This failure to document the line-ups violated CPD general and special orders. SUP2 E94-99.

### **III. THE TRIAL**

#### **1. The State's Mantra: The Statement Proved Muhammad's Guilt**

The CCSA felony review file confirms that Muhammad elected his fifth amendment right to remain silent and invoked his right to counsel. SUP2 E208. However, no attorney was brought in to represent Muhammad and after four days of torture and violations of *Brady*, *Giglio* and *Miranda*, the torture detectives fabricated a statement that they claimed Muhammad made under interrogation. According to detective Fidyk's testimony at the trial, Muhammad admitted "that he knew that there was an arrest warrant for him regarding this case and he went to Washington to turn his life around." C453; SUP C85-86, 92; SUP2 E173. That fabricated statement, attributed to Muhammad, became the mantra at every stage of the trial. The State claimed that Muhammad's confession showed "consciousness of guilt." C1350; C453; SUP C79; SUP C85-86; SUP C91; SUP C64-69; SUP C89-92; SUP2 175.

The jury was also instructed on the statement allegedly made by Muhammad. The instruction (IPI Criminal 4th No. 3.06-3.07) said the following:

You have before you evidence that the defendant made a statement relating to the offense charged in the indictment. It is for you to determine what weight should be given to that statement. In determining the weight to be given to a statement, you should consider all of the circumstances under which it was made.  
SUP C67.

Finally, the trial court used the purported statement by Muhammad in aggravation when sentencing Muhammad:

In aggravation, the Court is directed to consider, as it has, the facts of the case. The facts here bespeak again of gang related retaliation as a motive. Nothing to indicate that the victim in this case was somebody who was personally responsible for the retaliation visited upon him. He was shot, unarmed, as he sat in his car waiting for a traffic control light. in essence, executed. The defendant fled from the scene. From the city, from the state, to the far reaches of this country on the west coast, and remained there until brought to justice by the due processes of the law.  
SUP C96-97.

## **2. Muhammad is Found Guilty**

No physical evidence tied Muhammad to the murder. The State's case rested primarily on the following four things:

- The confession of co-defendant Aubree Dungey<sup>6</sup>. (Mr. Dungey has since recanted, and his most recent version of events alleges that he was tortured into confessing to his role in the murder.) SUP2 E129 *et seq.*; SUP2 E183 *et seq.*
- The eyewitness testimony of the two individuals from the scene, Glenn Davis and Eddie Wilson, both of whom were more than one hundred

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<sup>6</sup> Mr. Dungey was tried separately the year prior.

feet from the scene and who viewed the assailant, a man neither had ever seen prior to the incident, for only seconds. SUP2 E143 *et seq.*, E148 *et seq.*

- The confession attributed to Muhammad by detectives, claiming that Muhammad admitted to knowing that there was a warrant for his arrest for the murder of Mr. Mimms and that he fled to Washington to turn his life around. SUP C66-67, 89-93.
- Certain other circumstantial evidence, which bolstered the State's case, but which is now also shown to have been fabricated by the detectives or otherwise compromised. C1197-1212; SUP2 E183 *et seq.*; SUP2 E143 *et seq.*, E148 *et seq.*; SUP2 E193; SUP2 E116 *et seq.*

Abdul Malik Muhammad was convicted of the murder of Damone Mims on November 15, 2001, following the jury trial. C95. On December 12, 2001, Muhammad was sentenced to 50 years in prison. C97. As noted above, the trial judge enhanced Muhammad's sentence based on the confession attributed to Muhammad that he fled the state to avoid prosecution. SUP C96-97; SUP2 E83 ¶ 50.

#### **IV. MUHAMMAD'S TIRC CLAIM AND REFERRAL**

At the time of Mr. Mims murder, Muhammad, who comes from a very dysfunctional family, was 19 years old, could barely read or write, and his only criminal activity prior to the arrest in this case involved marijuana use and one



count of disorderly conduct.<sup>7</sup> SUP2 E29, 34; SUP C59

In 2014 Muhammad submitted a claim of torture to the Illinois Torture and Inquiry Relief Commission (“TIRC”). After a lengthy investigation, on July 18, 2018, the TIRC unanimously found sufficient evidence of torture by Chicago police to merit judicial review and referred Petitioner’s claim to the Court pursuant to 775 ILCS 40/45(c). C436-56. TIRC determined that during Muhammed’s trial detectives testified to statements they claimed Muhammed made during his interrogation (while he was being tortured), and that those statements were used to obtain his conviction. C453. In addition, one of the two main CPD officers who tortured Muhammad was a detective named Michael McDermott. As outlined by the TIRC referral, Detective McDermott has been repeatedly named as a torturer in post-conviction petitions dating back to 1990. C449-51. The other torture detective, David Fidyk, also has a lengthy history of torture complaints. C451.

The TIRC referral also specifically referred the court to the conduct of the CCSAO and asked for a judicial examination of that conduct. “The apparent *Brady* violation in regard to negative lineups also discredits the state in general and warrants judicial examination of police and prosecutorial conduct regarding alleged coercion and torture.” C455.

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<sup>7</sup> Today, Muhammad, who helps with activities at the prison, recently completed his bachelor’s degree at Northwestern University’s first prison graduating class and has received a bachelor’s degree with a major in Social Sciences. Muhammad is now a teaching assistant for Northwestern University at the prison. SUP2 E28-49, <https://sites.northwestern.edu/npep/abdul-malik-Muhammad/>

## V. THE CCSAO RECUSES BASED ON CONFLICT

After the TIRC referral counsel for Muhammad discussed Muhammad's case with attorneys at the CCSAO. The fact that one of the main torture detectives (McDermott) was hired as an investigator by the CCSAO after his retirement from the CPD raised a red flag for that office. The CCSAO spent several months internally reviewing Muhammad's file before ultimately acknowledging to Muhammad's counsel and later to the Court that it determined it had an actual conflict of interest in this case because of McDermott's position at that office. According to the CCSAO the fact that one of the accused torturers of Muhammad, Detective McDermott, was hired as an investigator by the CCSAO shortly after his retirement from the Chicago police department and later resigned the day prior to his termination hearing (following his perjury at a federal trial) required that office to recuse itself. C214; SUP C43 ¶¶ 5-8.

Muhammad's counsel was told that Milan's office acted as special prosecutor in the TIRC cases where the CCSAO was conflicted out. Therefore, after the CCSAO announced its recusal, counsel for Muhammad filed a motion seeking his appointment in this case. C217; SUP C44 ¶ 8. On November 20, 2018, the Court (Presiding Judge Leroy Martin) granted the motion and appointed Milan as special prosecutor to respond to Defendant's TIRC related allegations.<sup>8</sup> The electronic half-sheet entry for that day recites the reason for this order is "witness works for

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<sup>8</sup> The original appointment of Milan as special prosecutor in several discreet *Burge cases* was by the honorable Thomas J. Byrne. C382.

SAO.” C222.<sup>9</sup> Neither Milan nor the CCSAO put the Court or Muhammad’s counsel on notice that Milan was the supervisor of felony review at the time of Muhammad’s arrest, that Milan headed the felony trial division at the time of Muhammad’s trial and that he later as First Assistant was the person to hire (and supervise) torture detective McDermott as an investigator with the CCSAO following McDermott’s retirement from the CPD.

**VI. DISCOVERY REVEALED SUBSTANTIAL ALLEGATIONS AGAINST THE CCSAO AND MILAN’S OWN CONFLICT CAME TO LIGHT**

The case was assigned to the Honorable Judge Flood. Over the course of the next 15 months counsel for Muhammad engaged in third-party discovery. SUP C44 ¶¶ 9-11. Primarily, that discovery was directed at the city of Chicago and included several motions to compel. C300-312. Although attorneys from Milan’s office attended status conferences with Judge Flood, those attorneys were not involved in Muhammad’s discovery disputes with the city. SUP C44 ¶ 9.

The last piece of the preliminary discovery sought by Muhammad was the CCSAO file from the prosecution of Muhammad’s case. After repeated requests for the CCSAO file, the file was ultimately turned over to the special prosecutor’s office who in turn provided the file to Muhammad’s counsel. That file was finally

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<sup>9</sup> Counsel for Muhammad did not realize until much later, when she brought in additional counsel to help with the motion to rescind Milan’s appointment based on his conflict, that there was no order specifically complying with 55 ILCS 5/3-9008 in this case or setting out Milan’s power and authority. Such an order would very likely have allowed for the vetting of Milan for the appointment as special prosecutor in Muhammad’s case. C404 *et seq.*

received by Muhammad's counsel in February 2020. SUP C44 ¶ 10. The accumulated discovery and the CCSAO file confirmed the innocence of Muhammad and strong evidence of malfeasance in Defendant's arrest and trial, including, but not limited to, the following<sup>10</sup>:

- The CPD file provided evidence that the detective who testified at the trial committed perjury. The file also confirmed Muhammad's long-standing complaint that he was held for several days, that multiple line-ups occurred and that he was not identified in several of those line-ups. The file confirmed that CPD general orders relating to line ups were violated and that required documents were either not maintained or were destroyed. C1212-17; SUP2 E58 *et seq.*; SUP2 E94 *et seq.*
- The SAO file confirmed that Muhammad invoked his right to remain silent, requested an attorney, and provided no statement. SUP2 E199, 208.
- The State's Attorney's file indicates that the ASAs who tried the case against Defendant in November of 2001 knew that at least one eyewitness had viewed line-ups that exonerated Defendant. This exculpatory information was not disclosed to Defendant or his attorney. C1218-19; SUP2 E199-217.

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<sup>10</sup> Later, during Muhammad's post-conviction proceedings another *Brady* violation came to light. An eyewitness from the scene, hidden by the CPD, came forward and provided an affidavit. That witness averred that he spoke to the police the night of the shooting, went to Area 2 and provided a statement including a description of the shooter. The witness provided detailed descriptions of the detectives and unequivocally stated that Muhammad, who he knew from the neighborhood but was not on friendly terms with, was not the shooter. However, the witness's identity and statement were never provided to Muhammad during the trial and the witness's identity was only learned by his counsel during the post-conviction proceedings.

(<https://cccportal.cookcountyclerkofcourt.org/app/RegisterOfActions/#/17EFBE734A4D9FFC27178CC26E5BD6A7EDCD859C78828D43ED8F943DD961E1AB/auth/portalembd>)

Case No. 00 CR 1357201, Oct. 16, 2023.

- Documents in the State's Attorney's file confirmed that attorneys from that office also knew there was no documentation in the CPD file formally memorializing *any* of Defendant's line-ups. Those attorneys never disclosed this exculpatory information to the Defendant's attorney. C1219-20; SUP2 E208-217.

In early March 2020, counsel for Muhammad met with Milan to request a new investigation into Muhammad's case. Counsel, still unaware of Milan's position at the CCSAO during Muhammad's arrest and trial, presented a binder to Milan which included much of the evidence uncovered during her investigation, including a section showing the gross misconduct by attorneys at the CCSAO during both felony review and trial. SUP C45 ¶ 13.<sup>11</sup> COVID-19 delayed the next steps, but eventually Milan agreed to interview Muhammad to determine whether he would agree to conduct a new investigation into the case. SUP C45 ¶ 14. The interview took place remotely on June 26, 2020. SUP C45 ¶¶ 14-15. Milan promised to record and present a copy to counsel but never did, claiming that his assistant attorney failed to record the interview. The interview itself was weird and disorganized. Milan did not ask any questions about the misconduct of detectives, or the new evidence amassed. SUP C45 ¶ 14. Shortly thereafter Milan contacted counsel stating that a new investigation was not

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<sup>11</sup> At one point later in the litigation Milan attempted to downplay the contents of the binder and *falsely* stated that the binder material submitted to him regarding the CCSA misconduct was vague and showed no allegations of misconduct by his underlings. C947-48. In response, Muhammad submitted to the court the pages from the binder that addressed the CCSAO misconduct and clearly showed that Milan was again not being truthful, this time about the binder's contents. C1037-41; 1077-1106.

warranted. SUP C45 ¶ 15. Two years after the TIRC referral (and after seven petitions for fees) Milan filed a motion to “terminate” that referral. SUP C45 ¶ 16; C325 *et seq.*<sup>12</sup>

The motion to dismiss, which Milan called a motion “to terminate,” alleged that the confession utilized by the prosecution was not used by the state for Muhammad’s conviction and was not a valid confession under Illinois criminal law. The motion did not cite the provision of the code of civil procedure the motion to dismiss was filed under. Contrary to the standards for a motion to dismiss, the motion raised credibility questions relating to Muhammad and the TIRC arguing front and center, “Muhammad has no credibility.” C328. The motion then attacked the credibility of the TIRC. C335-37. The “facts” that Milan relied on in support of his motion were demonstrably false and went to the heart of his motion to dismiss. In referring to Muhammad’s confession, Milan stated (at C334-335) that “the state did not use the statement to obtain the conviction” and then went on to argue, “[T]hat confession *must be used* by the State to obtain the conviction. That did not happen in this case.” C335.

### **1. The Special Prosecutor’s Conflict**

The false statements and the emotional underpinnings in Milan’s motion led Muhammad’s attorney to ask questions of attorneys that practiced in criminal

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<sup>12</sup> The seventh fee petition was filed shortly after the filing of the motion to terminate. The court filings are incomplete in that they only show the amount of the fee in the first of those seven filings. C356.

law. One attorney suggested that she look into Milan's background at the CCSAO because she thought that at some point Milan might have had a high-ranking job at the SAO. SUP C45 ¶ 17.

That information led counsel for Muhammad to ask more questions and eventually write a letter to Milan. After Milan ignored the letter counsel submitted a FOIA request to the CCSAO. SUP C46 ¶ 17. The response from the CCSAO confirmed what counsel had heard, that Milan had not only been high up in the CCSAO but was bureau chief at the CCSAO in 2000 and 2001. As bureau chief, Milan supervised not only the felony review unit but also the felony trial attorneys. This was at the very time Muhammad had been tortured and framed while held at felony review over four days, tried and convicted. SUP C45-46 ¶¶ 17-20. The FOIA response also confirmed that Milan was later promoted to First Assistant at the CCSAO, becoming the number two person at that office at the time torture detective McDermott was hired as an investigator. As First Assistant, Milan's duties included the supervision of the investigators.<sup>13</sup> Allegations of McDermott's torture of suspects were already well documented at the time Milan hired McDermott as an investigator. C449-51. Later, after Milan had left the CCSAO, McDermott was charged with perjury in a federal trial and resigned his investigator position the day prior to his termination hearing. C449-51.<sup>14</sup>

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<sup>13</sup> <https://www.abfjournal.com/dailynews/former-u-s-attorney-milan-joins-am-disputes-division/>

<sup>14</sup> <https://www.police1.com/legal/articles/cops-story-changes-in-burge-case-S4tRWa6DdNFaRRwR/>

Counsel for Muhammad made several attempts to have Milan's appointment rescinded without success. C510, 404 *et seq.*; C804, 518 *et seq.*; C1111, 910 *et seq.* First, the circuit court (Judge Martin) denied Muhammad's motion to rescind Milan's appointment because she waited two years and *after* Milan filed the motion to dismiss before she filed her motion. Milan accused Muhammad's counsel of prosecutor shopping, and the Judge found the timing of Muhammad's motion disturbing. C394; C627 *et seq.* Counsel for Muhammad filed a motion to reconsider and attached an affidavit concerning both the timing and her knowledge. SUP C4-48. At the time the motion to reconsider was filed and heard, Judge Martin had moved up to the appellate court and Judge Reddick became the acting presiding judge of the criminal court. Judge Reddick had been in that new position for approximately two weeks at the time the motion to reconsider was filed and incorrectly thought that she could not reconsider a ruling from her predecessor. C804; SUP R104-05.

Muhammad tried to seek a recusal once more, after discovering a memo written to Milan while he was felony review supervisor, the year prior to Muhammad's arrest and torture. The memo acknowledged the likely torture of a defendant during felony review. Milan ignored the memo and took no action. C911-36. That motion to recuse was also denied. SUP R108 *et seq.*; C1111. Later, shortly after this appeal was filed, Judge Reddick removed Milan from Muhammad's post-conviction case and on August 4, 2022, this Court denied Milan's motion for Supervisory Order requiring Judge Reddick to reinstate him.



*Milan v. Reddick*, case no. 128682.

## VII. THE TRIAL COURT TERMINATES MUHAMMAD'S TIRC CLAIM

Muhammad filed his response to the motion to “terminate” the TIRC referral on November 16, 2021. SUP C49 *et seq.* The response set out in detail the false statements in Milan’s motion with cites to the trial transcript, showing not only that the confession was used by the state in its opening statement, but that the confession was used continuously throughout the trial as a mantra by the state, to show what the state referred to as Muhammad’s “consciousness of guilt.” SUP C49 *et seq.*; SUP C64-69. Muhammad also showed that although the TIRC raised questions about the credibility of Muhammad, the TIRC raised serious concerns about the conduct of the prosecution and police stating, “The apparent *Brady* violation in regard to negative lineups also discredits the state in general and warrants *judicial examination of police and prosecutorial conduct* regarding alleged coercion and torture.” C579 ¶ c. In other words, TIRC was asking the Court to take a close look at the prosecutor’s office in the prosecution of Muhammad. Milan filed his reply brief to the motion to dismiss, in which he raised new issues, further attacked the credibility of Muhammad and the TIRC and added attacks on Muhammad’s counsel. SUP2 C4 *et seq.* Muhammad was granted leave to file a sur reply addressing the new falsehoods and misstatements in Milan’s reply. C363; C1140 *et seq.*

On March 11, 2020, Judge Flood terminated the TIRC referral without an evidentiary hearing finding that the confession attributed to Muhammad was not

actually a confession under criminal law. C1320, 1342 *et seq.* Muhammad filed a timely appeal.

#### **VIII. THE APPELLATE COURT SENDS THE TIRC CLAIM BACK AND REMOVES THE SPECIAL PROSECUTOR**

Oral argument in this case was heard on September 28, 2023. Despite knowing more than one month prior to the oral argument that this matter was assigned to the First District's Sixth Division, Milan filed a motion almost a month *after* the argument, asking that the panel be recused. Milan attacked the honorable Judge Carl Walker claiming he is biased and further claimed that the entire panel was tainted by Judge Walker's "bias" and therefore should also be removed. Filed October 24, 2023, that motion was denied on December 22<sup>nd</sup>, 2023. On December 22, 2023, the Panel unanimously remanded Muhammad's TIRC claim to the trial court for a hearing and a majority determined that the special prosecutor should be removed from the TIRC claim.

#### **STANDARD OF REVIEW**

The circuit court did not make factual findings since it terminated the proceedings in a motion to dismiss prior to receiving evidence, therefore the standard of review on the termination remains, as the appellate court held, *de novo*. *People v. Tyler*, 2015 IL App (1st) 123470, ¶ 195. In addition, as the appellate court held in relation to the conflict issue there is no factual dispute, (the dispute, if any, is with the application of the facts to the law), and therefore the legal issue of whether an attorney operates under a conflict of interest is also reviewed *de novo*.

*People v. Peterson*, 2017 IL 120331, ¶ 101 (reviewing conflict of interest *de novo* where relevant facts not disputed).

## ARGUMENT

### I. THE APPELLATE COURT WAS CORRECT IN SENDING MUHAMMAD'S TIRC CLAIM BACK FOR A HEARING

#### 1. Introduction

After a lengthy review the TIRC determined that Muhammad met the three prerequisites for referral of his claim to the court: first, he was subject to an interrogation that included four days of torture; second, the torturers claimed a confession resulted from the interrogation; and third, that the confession was utilized to obtain his conviction. Despite the TIRC referral Muhammad has never had a hearing on his torture claim.

Milan has attempted to throw out Muhammad's TIRC claim since learning Muhammad was alleging prosecutorial misconduct. First, the special prosecutor falsely argued that Muhammad's confession was never used in his conviction and anyway, the confession was not a confession under criminal law. C325. Later, the special prosecutor focused on the confession not being a confession under old criminal cases and attacking the broad nature of TIRC's definition of tortured confession. App. Brf., at 24 *et seq.* Now, before this Court, the AG argues that Muhammad's confession does not fall under the TIRC statute because Muhammad claims the torture detectives fabricated the confession while torturing him. This new argument too fails. The TIRC Act was designed as an

“extraordinary” process for conducting "factual" investigations into “claims of torture” in Illinois. 775 ILCS 40/10 (“Purpose of Act”). Based on the Act’s stated purpose, it would be nonsensical for the Commission to consider only a tortured confession by a victim who acknowledges making the confession and nothing less. Muhammad’s interpretation respects the Act’s language, purpose and intent.

As noted above, the AG’s argument in this Court is not the same argument the state made below.<sup>15</sup> This new and circular argument is equally unpersuasive, relying on what can only be described as a purposeful misreading of the Act and this Court’s holding in *People v. Fair*, 2024 IL 128373 at ¶ 79. The AG now argues that the definition of “tortured confession” is not relevant because Muhammad maintains that the confession was fabricated by the torture detectives. Although the AG attempts to frame this argument as “jurisdictional” that is clearly a ploy in its attempt to get around the fact that the argument is waived,<sup>16</sup> as it was not raised for the lower courts’ consideration.<sup>17</sup>

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<sup>15</sup> Although the AG begins its argument by stating that the appellate court was incorrect in reversing the circuit court’s order, the AG’s argument has little to do with the circuit court’s holding. While the AG’s frequent referral to the circuit court is an artful misdirect, the AG’s attempts to shoehorn its argument to the circuit court’s holding is misguided.

<sup>16</sup> Counsel for Muhammad is aware that “waiver and forfeiture are limitations on the parties and not on the court, and a court may overlook forfeiture where necessary to reach a just result or maintain a sound body of precedent.” *Walworth Investments-LG, LLC v. Mu Sigma, Inc.*, 2022 IL 127177. However, the AG’s misreading of that part of the *Fair* decision, which the AG relies on for its new argument, could not be said with a straight face to reach a just result.

<sup>17</sup> Nor was it raised in the state’s Petition for Leave to Appeal which was filed after this Court’s decision in *People v. Fair*, 2024 IL 128373.

The confession was used against Muhammad at every stage of the trial where he was ultimately convicted and yet bearing down on its argument, the AG circles around and argues that even if the TIRC looked at its administrative definition of “tortured confession, his claim still fails in light of the fact that Muhammad has denied ever making the ‘tortured confession.’” AG Brf., at 37-42. According to this new argument, the state is permitted to use the fabricated confession as material evidence of consciousness of guilt in Muhammad’s trial, but TIRC cannot use that same confession to show Muhammad’s case was properly referred to the court. The AG even goes so far as to allege that its new theory corresponds with the case law under TIRC which, as shown below, it does not.

## **2. Muhammad’s Claim Was Properly Referred To The Court**

The TIRC Act defines a ‘claim of torture’ as “a claim on behalf of a living person convicted of a felony in Illinois asserting that he was tortured into confessing to the crime for which the person was convicted, and the tortured confession was used to obtain the conviction and for which there is some credible evidence related to allegations of torture occurring within a county of more than 3,000,000 inhabitants.” 775 ILCS 40/5. Muhammad has properly made out a claim of torture under the act based on the conduct and accusations of the police. The fact that Muhammad denies making the confession does not change the fact that the statement was attributed to him by the torture detectives and used against him at his trial. Even special prosecutor Milan acknowledged in his motion to dismiss the TIRC claim that Muhammad ‘confessed’ but then Milan falsely stated that the

confession was not used to convict Muhammad, “[T]hat confession *must be used* by the State to obtain the conviction. That did not happen in this case.” C335. As shown herein, that confession was the state’s mantra throughout the trial, from opening statements through closing statements and was clearly used to convict Muhammad.

The AG’s new argument also fails because this Court, in *Fair*, after a careful review of the TIRC Act, held unequivocally what the *plain language* of the TIRC Act requires: “Ultimately, we conclude that the plain language of the Act requires the circuit court to determine whether a petitioner has shown by a preponderance of the evidence that (1) torture occurred and (2) resulted in a confession that was (3) used to obtain a conviction [...].” *Id.*, at ¶ 79. Muhammad has also met the plain language of the Act as held by this Court.

To separate its argument from this Court’s plain language in *Fair*, the AG repeatedly misstates and parses this Court’s pronouncement in a clear effort to rewrite what this Court held was the plain language of the Act. In essence, the AG ignored Milan’s admission that Muhammad confessed and then argues that this Court did not really say what it definitively said in *Fair*. AG. Brf., at 30. (“S[ee] *Fair*, 2024 IL 128373, ¶ 79 (to prove claim of torture, petitioner must prove that *he was tortured into confessing* and that the resulting confession was then used to obtain his conviction).” (Emphasis added.) From this rewriting, by adding the words “*he was tortured into confessing*” the AG changed what this Court held, “the

torture occurred “and “resulted in a confession” that was used to obtain the conviction. AG. Brf., at 30-37.

Sixteen years after his conviction, Muhammad’s case was heard by the Torture Commission, which unanimously found that this ‘tortured confession’ fell within the scope of the Torture statute and referred it to the circuit court for an evidentiary hearing pursuant to 775 ILCS 40/5. In its referral, the TIRC specifically looked at the alleged confession and found, “although he did not give a full confession to the shooting, incriminating statements that police testified Muhammad made to them were used to obtain his conviction.” C436.

The TIRC referral also found that there was sufficient evidence of torture to merit judicial review of Muhammad’s claim based upon the findings of fact, analysis, and conclusions as set forth in the referral, even though Muhammad did not provide a “full confession” to the shooting, because “the incriminating statements that police testified Muhammad made to them were used to obtain his conviction.” C437. The TIRC found that the trial testimony offered by torture detective Fidyk brought Muhammad’s claim “squarely within this definition” because the statement was used as proof of consciousness of guilt and used to obtain his conviction. That and the allegations of torture alleged by Muhammad including allegations of being beaten in pursuit of a statement adequately alleged torture under the Act. C453. Finally, the TIRC found that the fact that Muhammad has denied making such statements does not disqualify him under 20 Ill. Adm. 2000.10 as this Court has allowed allegations of a coerced confession to be

considered even when a defendant has also alleged that he did not make the statement. C441 n.109 (citing to *People v Wrice*, 2012 IL 111860 at ¶¶ 53-54).<sup>18</sup>

### 3. The Rational for AG's Flip Flop - Flops

Again, the AG reverses course from Milan's arguments below and argues that even though the state relied on the confession at every point in Muhammad's trial and acknowledged in its motion to dismiss the TIRC referral that the statement attributed to Muhammad was in fact a confession, the fact that Muhammad has claimed that the confession was fabricated somehow moots all of the previous arguments. Rubbish.

In *support* of its notion that fabricated confessions are not grounds for a statutory claim of torture, the AG cites six TIRC cases. AG. Brf., at 35-37. None of these cases are on point and each is easily distinguishable from Muhammad's case. In fact, none of these cases meet the three-prong test of: 1. being tortured; 2. a confession emanating from the torture; and 3. the confession being used to convict the person. Derek Montgomery and Bobby Crooks were not tortured, which is why their claims were denied. *See In re Derek Montgomery*, TIRC Claim No. 2019.656-M, at 2 (Oct. 16, 2019) ("I was not tortured"). *See also In re Bobby Cooks*, TIRC Claim No. 2019.619-C (Aug. 21, 2019) ("I, Bobby Crooks, was not tortured or

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<sup>18</sup> "The use in evidence of a defendant's coerced confession cannot be justified on the ground that the defendant has denied he ever gave the confession ... Evidence of coercion is not rendered irrelevant simply because the defendant has denied confessing. Thus, defendant here is entitled to press his claim that his confession was coerced."); *See, Ashcraft v. Tennessee*, 322 US 143, 152 (1944)."



made any confession”). Similarly, Willie Hampton and Raul Fernandez both alleged torture but the torture was of the witnesses who testified against them and not themselves and no confession was involved. *See, In re Willie Hampton*, TIRC Claim No. 2013.141-H (May 17, 2017) (“Although Mr. Hampton claims his co-defendant...was tortured into making a statement that was crucial to Mr. Hampton’s conviction, he does not allege that he himself made any statements to the police, or that they were used to obtain his conviction”). *See also In re Raul Fernandez*, TIRC Claim No. 2019.618-F (Aug. 21, 2019) (“While coercion of witnesses other than the defendant is often a basis for postconviction review, it is not a basis for jurisdiction that was provided to this commission”). (Internal footnote omitted).

Arnold Dixon and Vincent Buckner’s cases are far more nuanced than the AG insinuates.<sup>19</sup> Both claims were denied because being coerced into providing non-testimonial evidence does not sufficiently grant the TIRC jurisdiction to investigate. *See In re Arnold Dixon*, TIRC Claim No. 2019.598-D (Feb. 22, 2019)(“...the Commission cannot construe Mr. Dixon’s allegation that he was forced to stand in a lineup as any sort of ‘statement’ or ‘confession.’”) *See also, In*

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<sup>19</sup> Buckner’s case, specifically, is ultimately denied because providing DNA is not testimonial and therefore not sufficiently ‘incriminating.’ In support of this conclusion, the Commission relies on *People v. Alvarado*, 268 Ill. App. 459 (4<sup>th</sup> Dist., 1994), which concluded that “a request for a consent to search is not reasonably likely to elicit an incriminating response” and that “because there is no ‘testimonial’ component of a grant or denial of authority to search, a request for a consent to search does not violate a defendant’s fifth amendment [sic] right against self-incrimination.” *Id.* at 466.

*re Vincent Buckner*, TIRC Claim No. 2017.518-B (Dec. 18, 2018) (Mr. Buckner’s allegations concern using torture to violate his Fourth Amendment right against unreasonable search and seizure. He does not allege torture elicited an incriminating statement, vocalization or gesture – the subject matter of the grant of authority given to this Commission by the TIRC Act.”).

None of these cases are even remotely similar to Muhammad’s case where he has clearly alleged torture, a confession stemming from the torture, and the confession being used to convict him.<sup>20</sup>

#### **4. The TIRC Act Would Be Undermined by The AG’s Forced Theory**

This brings us back to the TIRC Act and its jurisdiction. The TIRC was created to address the internationally<sup>21</sup> infamous pattern of police torture that came to light in Chicago in the 1980s and 1990s, when Commander Jon Burge was investigated and fired from the Chicago Police Department and subsequently prosecuted and tried by the Federal Government in 2008-2010.<sup>22</sup> In the TIRC acts’ own words, its purpose is to establish “an extraordinary procedure to investigate

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<sup>20</sup>In fact, TIRC has referred several cases with nontraditional confessions – a confession to a different crime, a nod, false and fabricated statements, and false alibis. See *In re Jesse Hatch*, TIRC Claim No. 2011.026-H (Feb. 19, 2020); *In re Calvin Trice*, TIRC Claim No. 2014.151-T (June 21, 2023); *In re Terrance Johnson*, TIRC Claim No. 2019.641-J (Nov. 16, 2022); and *In re Jaime Hauad*, TIRC Claim No. 2011.025-H (Nov. 15, 2017), respectively.

<sup>21</sup>Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment et al., Communication to United States Concerning Chicago Police Torture, U.N. Doc. AL USA 7/2024 (May 20, 2024).

<sup>22</sup>About Us, Torture Inquiry and Relief Commission, <https://tirc.illinois.gov/about-us.html>.

and determine factual claims of torture.” Courts interpreting statutes are to give effect to the intent of the legislature by keeping in mind the subject a statute addresses and its apparent objective. *In re Marriage of Harnack & Fanady*, 2022 IL App (1<sup>st</sup>) 210143, ¶ 71.

The Torture Act specifically provides that the commission has the duty and power to establish the criteria and screening process for determining cases to be accepted for review, 775 ILCS 40/35 (1), and to prescribe its own rules of procedure, 775 ILCS 40/40 (d). The Torture Act itself has no definition of “confession” or “tortured confession,” and therefore the TIRC’s interpretation of its own authorizing statute is due deference from this Court. Under the authority vested in the TIRC, it has provided the following definition for “tortured confession:”

“Tortured Confession” includes any incriminating statement, vocalization or gesture alleged by police or prosecutors to have been made by a convicted person that the convicted person alleges were a result of (or, if the convicted person denies making the statements, occurred shortly after) interrogation that the convicted person claims included torture. *See*, 775 ILCS 40/5(1).

The administrative definition was properly promulgated through the administrative rulemaking process and did not draw any criticism or revision. *See*, 38 Ill. Reg. 18988 (Sept. 19, 2014) and 41 Ill. Reg. 3941 (Mar. 17, 2017). This definition of “tortured confession” not only fits the purpose of addressing the historic injustice but also recognizes the nuances that take place during torture. Specifically, that definition makes clear that a claimant does not have to admit to each element

of the crime and recognizes that police and prosecutors have alleged confessions, like in Muhammad's case, where no confession was uttered by the defendant.

The AG's arguments ignore that the rules of statutory interpretation are designed to effectuate legislative intent and in doing so, it must first rely on the plain meaning. *People v. Wells*, 2023 IL 12769, ¶ 31. Although the AG gives lip service to the plain meaning of confession, the AG segues quickly to the criminal definition and argues — incorrectly — that 'confession' is somehow a criminal common law term of art which should control in TIRC proceedings.<sup>23</sup> However, this argument misses the point. First, the TIRC proceedings are *civil* in nature, not criminal. Secondly, outside of the criminal legal definition, where coincidentally the term has been expanding to a broader context,<sup>24</sup> the word confession means much more. Confession can have religious or psychological implications, it can be a social act or a professional one, or it can just be a colloquial admission of an unpopular

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<sup>23</sup> The AG also makes an undeveloped argument that even if Muhammad were to claim that he did in fact make the confession attributed to him, it too would fail because it is not a confession under Illinois criminal law and the circuit court *would have* thrown the claim out in that scenario. AG. Brf., at 37. The AG's conjecture is misplaced, and Muhammad relies on the same arguments herein to defeat that argument, i.e. that the criminal law definition does not come into play in a TIRC claim and the inculpatory statement attributed to Muhammad, which the state argued at every phase of his trial showed his consciousness of guilt, was used to convict him and is sufficient to invoke the TIRC's authority.

<sup>24</sup>As Muhammad argued at the appellate level, even looking at the criminal definition, this broader meaning of "confession" has become the norm in modern criminal law, the formalistic distinctions relied on by the Circuit Court have broken down in favor of evaluating all statements according to the same voluntariness standard. It is appropriate statutory construction to consider similar and related enactments. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59–60 (2006). Petitioner's appellate brief 23-29. Petitioner's reply brief at 4-9.

opinion.<sup>25</sup> This plain meaning of ‘confession’ reflects *all* of these contexts.

Similarly, an added requirement that the torture victim must admit to making the confession in order to have a claim under TIRC is absurd and finds no home in the statute. And again, nothing in the legislative record, the purpose of the statute, or the statute itself supports the notion that the torture victim is required to admit that he made the alleged confession. This all underscores the unjust results that hardly needs to be stated – the legislature surely could not have meant to establish an “extraordinary procedure” for addressing the historic pattern of police torture in Chicago but leave unaddressed a broad category of factually-supported claims of torture that in fact formed the basis of convictions: confessions fabricated by the police during the torture. *See, e.g., Collins v. Bd. of Trustees of Firemen's Annuity & Ben. Fund of Chicago*, 155 Ill. 2d 103, 110 (1993). (Statutes must be construed to avoid “absurd, unjust, unreasonable or inconvenient results that the legislature could not have intended.”)

**5. In The Alternative, This Court’s Finding In *Fair* and the AG’s Contrary Argument Confirms That , At A Minimum, Confession’ Is An Ambiguous Term**

At the very least, if this Court were to now hold that the plain language of the Act as set forth in *Fair* was not specifically laid out in the Act, the Court’s pronouncement in *Fair* of the plain language of the Act and the AG’s argument

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<sup>25</sup> To underscore the various definitions of confession, Merriam Webster shows 41 synonyms for the word confession. *Confession*, Merriam-Webster.com, <http://bit.ly/3Z5fjLA>.

that the word confession should conform to a legal definition of that word, confirms that the language in the Act is ambiguous and susceptible to more than one interpretation. *People ex rel. Madigan v. Illinois Commerce Comm'n*, 2015 IL App (1st) 140275, ¶ 27. (“But when statutory language is ambiguous and susceptible to more than one interpretation, both of which are reasonable, it is appropriate to resort to other aids of construction to determine legislative intent.”)

To the extent this Court finds the Act or the Code ambiguous it should continue to interpret the reasonable and appropriate construction of the Act as it did in *Fair*, which coincides with the TIRC’s construction of the Act in its regulations and its application of those regulations. The TIRC, after all, is the agency that administers the Act and the Code, and it participated in crafting the Code’s definition. *See Mitchell v. People*, 2016 IL App (1st) 141109, ¶ 27. Muhammad meets the plain language of the Act, as the TIRC found, and as this Court held in *Fair*, (1) he has presented evidence that he was tortured and (2) the torture resulted in a confession that was (3) used to obtain his conviction. There is no requirement under the TIRC Act that the defendant acknowledge that he made the confession, and this Court should not construe a statute in a manner that would lead to consequences that are absurd, inconvenient, or unjust. *Paciga v. Property Tax Appeal Board*, 322 Ill.App.3d 157, 161, (2001). Further, a court should avoid an interpretation of a statute that would render any portion of it meaningless or void. *Id.* It would be meaningless to have a statute created to cure the illegal effects of police torture, but not protect victims from the effects of that torture including

statements that were falsely claimed to have been made during that torture. Under the AG's reasoning a confession only counts if a person, either through temperament or other reasons, succumbed to the torture and uttered a confession.

## 6. The AG's Ongoing Attack of The TIRC Act

When the Illinois General Assembly drafted<sup>26</sup> and passed the TIRC Act its goal was clear: to establish an 'extraordinary procedure' for torture survivors to seek remediation through the courts. Despite this clarity of purpose, the state's attorneys and the AG have continued to leverage substantive challenges against the TIRC Act by asserting a constricted interpretation of its scope. Last year, the AG attacked the definition of 'torture' in *Fair*, as promulgated by TIRC. The AG's disturbing argument was that withholding food and medication, preventing sleep, and other physical abuse did not rise to the level of 'torture.' This Court rejected that assertion, relying on the TIRC's administrative definition of torture and holding that it aligns with the plain meaning of the term. "We conclude the language used in the Commission's definition, focusing on acts intended to inflict 'severe pain or suffering, whether physical or mental,' aligns well with the dictionary definitions, which similarly focus on the infliction of intense pain,' 'agony,' or 'anguish of body or mind.'" *Fair, supra*, at ¶ 73.<sup>27</sup>

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<sup>26</sup> The statute was promoted by then-senator and lead sponsor, and now Illinois Attorney General, Kwame Raoul.

<sup>27</sup> Unfortunately, the *Fair* decision gives short shrift to the lengthy investigations by the TIRC (in Muhammad the investigation lasted four years) which have spent years winding through the TIRC process. Apparently, under *Fair* no weight is to be given at the circuit court level to the investigation's findings and the pattern

In today's attack, the AG seeks to undermine TIRC referrals by whittling away at what counts as a confession, to include only those individuals who allege they were tortured and who *admit* that they made the confession which was used to convict them. The AG's repeated challenges belie one fatal flaw: it refuses to acknowledge that remedial statutes must be interpreted broadly to effectuate their goal. *Wells, supra*, at ¶ 63. This Court should once again uphold the commission's administrative definition, this time its definition of 'tortured confession.'

### 7. Muhammad's Constitutional Violations Flow From Torture

This Court in *Fair* also confirmed what the Panel held in Muhammad's appeal: that the Court must consider the totality of the circumstances, including the effect of allegations of additional constitutional violations that would not by themselves support a freestanding claim of torture under the Act but in the context of the torture those facts underscore and support the victim of torture. *Fair, supra*, at ¶ 84. The AG argues that Muhammad's constitutional claims could not have flown from, or be otherwise tethered to, the torture inflicted on Muhammad because he was not aware of those violations until the trial. According to the AG:

The *Brady* violation alleged by petitioner — that before petitioner's November 2001 trial the prosecution failed to disclose that certain lineups did not result in identifications of petitioner as the shooter — could not

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and practice of the torturers unless they testify (and are impeached). The torture detectives consistently deny engaging in torture and many of these detectives are retired and avoiding subpoenas or are deceased. Muhammad submits that the un rebutted and unimpeached testimony of the accused should be sufficient for a new trial under the TIRC act if the Act is to be given the support it needs to remedy the injustice of torture by our police. Anything less than that undermines the entire purpose for enacting the TIRC statute.



possibly have affected petitioner's mental state when detectives were interviewing him more than a year earlier in April 2000. AG Brf., at 46.

However, once again the AG is incorrect. The facts in Muhammad's case clearly confirm Muhammad's knowledge of not only how he was being tortured but also how the torture detectives were framing him, by refusing to provide an attorney and ignoring the lineups where he was not identified. The constitutional claims in Muhammad's case are properly a part of the TIRC claim and the AG's own argument, in light of the correct facts, confirms this point.

As the AG acknowledges:

To determine whether the physical and mental suffering inflicted on a petitioner meets this threshold, a court must consider the cumulative effect of all the abuses and pressures brought to bear on him, including those that individually do not constitute torture. In some cases, these pressures may arise from misconduct that could also be raised as a separate claim in a postconviction petition. For example, refusing to honor a petitioner's invocation of his right to remain silent or have counsel present (in violation of the Fifth Amendment) or failing to admonish him that he has those rights (in violation of *Miranda*) may subject a petitioner to mental strain and therefore must be considered alongside any other abuse to determine whether the totality of the suffering inflicted for the purpose of extracting a confession was sufficiently extreme to constitute torture. *Fair*, 2024 IL 128373, ¶ 88.

AG Brf., at 45-46.

So, the AG got this part of the *Fair* case law correct. However, what the AG apparently did not understand is that Muhammad not only knew that he was being denied an attorney (as per the state's hypothetical) despite his repeated requests for an attorney over four days while being tortured, but he also knew that the "white witnesses" that the torture detectives were relying on did not identify

him in the lineups. As the AG acknowledges, knowing these facts in real time “*may subject a petitioner to mental strain and therefore must be considered alongside any other abuse to determine whether the totality of the suffering inflicted for the purpose of extracting a confession was sufficiently extreme to constitute torture.*” AG Brf., at 46.

As Muhammad averred in his affidavit, the fact that those “white witnesses” failed to identify him was not only a fact that he knew at the time it was happening, but he also knew how that failure made the torture detectives angrier, and the torture got worse: “McDermott was even angrier now and Fidyk no longer played the nice cop.” “McDermott was angry, pushed me against the wall and held my head to the side with his forearm. Several of my teeth had been cracked when I was beaten with the baseball bat the year before and the way McDermott held me caused one of my cracked teeth to dig into my lip. My lip got swollen and was bleeding. While I was held like that McDermott punched me in my side two times.” SUP2 E76 ¶¶ 24-25. And when Muhammad tried to tell his attorney about those additional line-ups his attorney called him a liar, because there was no paperwork showing those line-ups. SUP2 E ¶ 43.

Not only were these events occurring in real time, these facts made the torture worse and also resulted in the torture detectives hiding the identity of the witnesses who did not identify Muhammad. In addition, knowing that the witnesses that the torture detectives were relying on did not identify him caused Muhammad to refuse to participate in additional lineups which then caused the torture detectives to physically drag Muhammad into those additional lineups

where he was held in place by torture detective Fidyk. This also made it quite easy for the witnesses who claimed to see Muhammad for a few seconds from a great distance, to identify him in a line up a year after the murder. SUP2 E76 ¶¶ 32-33.

## II. THE PANEL'S MAJORITY OPINION DISQUALIFYING THE SPECIAL PROSECUTOR WAS CORRECT AND NECESSARY

### 1. Introduction

Although used in the context of a judicial recusal the adage is no less true here, "justice should not only be done, but should manifestly and undoubtedly *be seen to be done.*" *Rex v. Sussex Justices (1924) 1 K.B. 256, 259 (emphasis added).* As the appellate majority recognized "Milan contends no actual conflict of interest bars his review of Muhammad's case, ignoring that as Supervisor of the Felony Review Unit in the Cook County's State's Attorney's Office, *he initiated* the criminal prosecution of Muhammad years ago. Milan also ignores that at his appointment in this case, he stood mute, failing to disclose his relationship with Detective McDermott and violating due process and the rules of professional conduct. His actual conflict calls for the appointment of a new special prosecutor." *People v Muhammad, 2023 IL App (1st) 220372 at ¶ 80.* (Muhammad would also add the fact that Milan's underlings helped to frame him is an additional cause.) Indeed, even the amicus brief in support of Milan by the McHenry County State's Attorney's office (hereinafter "McHenry Amicus") candidly points out, "At the outset, it is important to concede that the majority may well have a point. It is certainly peculiar that of all the lawyers in Illinois, the Cook County Court slated as special

prosecutor a lawyer who, at the time in question, was overseeing the clearly suspect investigatory-prosecutorial complex in which this case is situated.” Brief for Amici Curiae McHenry County State’s Attorney, *People v. Muhammed*, 2023 IL App (1st) 220372 at pg. 3.

Both amicus briefs in support of Milan’s position share a common thread of concern, that the test put forth by the appellate court could be used against elected state’s attorneys, though Milan himself has not voiced any such concern. Muhammad submits that the concern by the amici is unwarranted. The appellate decision was clearly focused on the role of an appointed special prosecutor who showed not only an actual conflict but clear and actual bias, which violated the due process rights of Muhammad. Given that special prosecutors are appointed to avoid these conflicts, it is incongruous to appoint a special prosecutor with that same conflict. In the case of elected prosecutors, they face accountability by the electorate when they or their subordinates abuse the office. However, there are far fewer measures in place to ensure accountability when it comes to special prosecutors. Without a rule in place to ensure that individuals are properly vetted so that they do not get appointed if they have the same actual conflicts that caused the elected office to recuse itself (or for that matter other disqualifying conflicts) these problems will persist.

Again, we must start with the premise that the whole purpose for appointing a special prosecutor is to maintain a level of fairness when the elected prosecutor has to step down because of an actual conflict. The appointment of a

special prosecutor “may be necessary in order to maintain the public’s confidence in the impartiality and integrity of our criminal justice system.” *People v. Lang*, 346 Ill. App. 3d 677, 683 (3d Dist. 2004). In this case the CCSAO conducted an in-depth months-long investigation into Muhammad’s case and decided the entire office should be recused. The history and extent of torturer McDermott’s role in this case, his subsequent hire as an investigator by that office and McDermott’s resignation on the eve of his termination by that office, (after being caught engaging in perjury at a federal trial) created an actual conflict for the entire office.

The CCSAO recusal not only made sense but was justified by the fact that McDermott would be one of the principal witnesses for the prosecution in Muhammad’s torture case (along with the ASAs involved in the constitutional violations related to the torture). The CCSAO clearly understood that it could not credibly present McDermott as a witness for the prosecution at Muhammad’s TIRC hearing given his history in the case and with the office.<sup>28</sup> The irony of course, is that the case got handed off to the man who, as first assistant, hired McDermott at the CCSAO and was also the supervisor of the accused ASAs.

## **2. Milan’s Own Expert Recognized His Potential For a Conflict**

After Muhammad’s counsel learned of Milan’s background and filed the

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<sup>28</sup> Although the McHenry amicus suggests that the appointment of Milan is no different than the appointment of the CCSAO it clearly misses the point. Although the hiring of Milan is clearly a curiosity, as the amici alludes to, it would never have been appropriate for the CCSAO to handle Muhammad’s torture case for the same reason that Milan’s appointment in Muhammad’s case is a miscarriage of justice. *McHenry amicus at pg. 10.*

first motion to recuse, Milan submitted the same ethics opinion that he tendered to support his *Burge* appointments<sup>29</sup> a few years earlier. C397, C796-803. That affidavit, by a respected ethics expert, opined not only on a very different subject than what was before the court in Muhammad's case, but also confirmed on its face, that no independent examination was done to scrutinize Muhammad's file (as was done in those cases that the expert originally opined on).<sup>30</sup> Specifically, Milan's expert was opining on the order by Judge Biebel recusing the entire CCSAO from the *Burge* cases and whether that order precluded Milan from acting as a special prosecutor in certain *Burge*-related cases.

The opinion from Milan's expert underscores how she understood the potential for an actual conflict of interest on the part of Milan in that discreet group of *Burge* cases being assigned to him, given his history at the CCSAO. As described below, Milan and his expert examined each file that was being assigned to him to ensure there was no potential for a conflict.<sup>31</sup> In her opinion Milan's expert confirmed that Milan had *no involvement* with any of those cases he was being assigned. Specifically, Milan's expert stated, "there is no evidence that you otherwise directed subordinates involved in the cases with respect to any material matter of clear weighty importance." C801.

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<sup>29</sup> "*Burge cases*" refer to cases involving torture of defendants under former CPD commander Jon Burge.

<sup>30</sup> The affidavit was dated long before Muhammad's case had even been referred to the court.

<sup>31</sup> The cases, all from the late 80's and early 90s, are listed in Judge Byrnes order assigning those cases to Milan. C382.

Unfortunately, at some point, that examination of potential cases being assigned to Milan went off the rails and neither Milan nor his expert examined the Muhammad case for a conflict. In Muhammad's case, Milan not only was responsible for the hiring of Muhammad's torturer, but his subordinates were involved in material matters of *clear weighty importance*, including the prosecution and conviction of Muhammad. Obviously, Muhammad's file would not have survived that scrutiny and Milan's conflict would have become obvious had Milan (or his expert) conducted a similar inquiry into Muhammad's file as they had with those *Burge* cases.

It is also important to keep in mind not only that Muhammad's case is not a *Burge* case or a *Burge* related case, but also that there was no *court order* recusing the CCSAO in Muhammad's case. The situation herein, as described above, involved the CCSAO conducting an independent review of the Muhammad file over several months and announcing to Muhammad's counsel and the court that the entire CCSAO was recusing because of its conflict. Again, the reason for the recusal, according to the CCSAO, was because Muhammad's torturer, McDermott, had been employed by that office as an investigator and was forced to resign, in lieu of firing, after perjuring himself in a federal trial. In point of fact, the CCSAO did a comprehensive review of Muhammad's file however, Milan neglected to do any review of that file.

Because of the difference in circumstances, Muhammad's expert, Professor Kent submitted an affidavit with his ethics opinion. According to Professor Kent,

“Stewart's opinion focuses on Rule 1.11(a) of the Illinois Rules of Professional Conduct, but that Rule is not the right way to frame the ethical issues posed by Milan's involvement in the Muhammad case.” See, C1061, ¶¶ 10-12. According to Professor Kent, the proper rule to examine in this situation is Rule 1.7. Comment 8 to that rule states that "a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests." And Comment 10 provides that "[t]he lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice." C1061, ¶¶ 13-31.

According to Professor Kent, and applied to our context, Milan has a conflict under Rule 1.7(a)(2). Milan's personal interest in defending the probity of his own past conduct in, for example, supervising or failing to supervise his CCSAO subordinates, may cause him to deviate from the duty to impartially do justice to both the People's interests and Muhammad. C1056 ¶ 23. This is especially pertinent here considering the specific request by the TIRC in Muhammads referral. The TIRC was seeing a judicial examination of the *prosecutorial misconduct in Muhammad's case* at the very time Milan headed both the felony trial lawyers and the lawyers at felony review. Importantly, because of Milan's role as special prosecutor, that conflict cannot be waived. C1056 ¶¶ 33-34.



Muhammad has sought Milan's recusal from the moment he learned that the special prosecutor shared the same conflict that resulted in the entire CCSAO office recusing itself. Muhammad understood that he could never get a fair trial with a prosecutor who supervised the attorneys who helped to frame him for the murder of Mr. Mims. Muhammad also knew that he could never get a fair trial with a prosecutor who had hired and supervised his torturer. By failing to conduct a review of the Muhammad file prior to accepting the appointment Milan failed the very test his expert put forth in reviewing the initial cases referred to him as a special prosecutor.

### **3. Milan's Motion To Dismiss The TIRC Claim**

To be clear, Milan's motion to dismiss Muhammad's TIRC referral was procedural in nature, required no discovery, and if Milan thought there was merit to the motion, could have been filed immediately after the TIRC referral, which was filed with the court in 2018. Yet, it was not. Milan filed the motion in 2020, after Muhammad's counsel presented to Milan the litany of documents confirming not only Muhammad's innocence but also the plethora of *Brady* and other constitutional violations, surrounding Muhammad's arrest and trial. After several months of prodding by Muhammad's counsel, Milan finally agreed to conduct an interview of Muhammad to determine whether he would initiate a new investigation. That interview of Muhammad was the tip of the iceberg showing Muhammad's counsel that something was amiss with Milan. Shortly after the interview the motion to dismiss was filed by Milan. The motion itself was an

emotional attack on both Muhammad and the TIRC, never identifying its statutory authority and replete with false facts.<sup>32</sup>

In hindsight, it must have been embarrassing for Milan when he received that binder from Muhammad's counsel chock full of evidence showing not only the shoddy (and dishonest) work done by his subordinates, both at felony review and at trial, but also the detailed torture of Muhammad *and* trial witnesses by the retired CPD detective Michael McDermott. McDermott, a man with a history of accusations of torture and taking the fifth well before Milan hired him as an investigator at the CCSAO. The binder<sup>33</sup> confirmed the depth of the torture problem under Milan's watch. The binder also substantiated the reasons for the request by the TIRC (in its referral of Muhammad's case) asking that the court- or some entity- take a closer look into what was going on at the states' attorney's office during Muhammad's case.

As argued herein, the contents of Milan's motion to dismiss are essential to

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<sup>32</sup> A motion to dismiss requires that the Court take the facts alleged as true and construed liberally in Muhammad's favor, unless positively rebutted by the trial record. "Credibility findings and determinations as to the reliability of the supporting evidence" are reserved for the evidentiary hearing. *People v. Robinson*, 2020 IL 123849, ¶ 61.

<sup>33</sup> At one point in the litigation below Milan attempted to downplay the contents of the binder and *falsely* stated that the binder material submitted to him regarding the CCSA misconduct was vague and showed no allegations of misconduct by his underlings. C947-48. In response, Muhammad submitted to the court the pages from the binder that addressed the CCSAO misconduct and clearly showed that Milan was again not being truthful, this time about the binder's contents. C1037-41, 1076-1106. The binder also included most of the documents and affidavits later attached to Muhammad's post-conviction petition. Sup2 E27-226.

understand, not because there was anything daunting about the motion, but because it was drafted so poorly that it caused Muhammad's counsel to question Milan's actions and ultimately learn of his conflict.<sup>34</sup> As stated above, in his motion to dismiss Muhammad's TIRC claim, Milan made false factual assertions and attacked the credibility of both Muhammad and the TIRC. Milan stated front and center, "Muhammad has no credibility." The motion followed along those lines as Milan went from attacking Muhammad to attacking the TIRC. C325, 328-29. Coupled with those failings was the fact that Milan was relying on "facts" that went to the heart of the motion and were demonstrably false. In referring to the confession Milan said, "the state did not use the statement to obtain the conviction" and "[T]hat confession *must be used* by the State to obtain the conviction. That did not happen in this case."<sup>35</sup> Those statements were verifiably false. Milan's credibility attacks and false facts made it clear that something else was going on and raised the concern of Muhammad's counsel as to the motivation behind Milan's motion to dismiss.

In Muhammad's response to the motion (SUP C49), Muhammad corrected

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<sup>34</sup> Throughout this case Milan has repeatedly argued that the recusal motion filed by Muhammad's attorney showed a hapless attorney who was attempting to do "prosecutor shopping" following Milan's filing of the motion to dismiss. C394; C943; gov.app.brf. at 50. As shown herein, that was far from the truth.

<sup>35</sup> Later, as the litigation continued, Milan expanded his attacks to include Muhammad's counsel, attempting to belittle and bully the attorney. Finally, Milan was removed from the post-conviction matter by Judge Reddick and as mentioned above, his attempt to seek redress from this Court in a motion for supervisory order. That motion was denied by this Court on August 4, 2022. *Milan v. Reddick*, case no. 128682.

the false statements by Milan in detail, with cites to the transcript, showing not only that the confession was used by the state in its opening statement, but that the confession was used continuously throughout the trial as a mantra by the state, to show what the state referred to as Muhammad's "consciousness of guilt." SUP C64-69. As to the question of credibility, Muhammad pointed out that although credibility is not an issue in a motion to dismiss, the TIRC raised serious concerns about the conduct of the police and prosecution stating, "The apparent *Brady* violation in regard to negative lineups also discredits the state in general and warrants *judicial examination of police and prosecutorial conduct* regarding alleged coercion and torture." In other words, the TIRC was asking the Court to take a close look not only at the CPD but at the prosecutor's office, in the prosecution of Muhammad at the very time Milan was overseeing Muhammad's prosecution. This concern by the TIRC clearly unhinged Milan.

By the time Milan filed his reply to his own motion to dismiss he had lost all focus of his original motion. Milan added new issues and attacked Muhammad's post-conviction evidence, which he again misstated. SUP2 C4-25. As in the original motion, Milan fixated on the credibility of Muhammad. However, in response to the TIRCs serious concerns about the prosecutorial and police misconduct, Milan added new attacks on the TIRC. SUP2 C4-11. Milan admitted (without acknowledging his error) that the state did in fact use Muhammad's confession in its opening statement and throughout the trial. However, Milan resorted to the same bullying and ridicule to explain away his

earlier false statements and instead griped that the credibility of Muhammad was such that the state's actions were acceptable.

If there was ever any doubt that Milan would never provide a fair prosecution in Muhammad's TIRC referral, this oral admission from Milan in a court proceeding confirms that fact:

*"I get to the point where there is just too much evidence against him. All right. There is no way that I can continue the investigation and bill the County for an investigation that I know is going nowhere. And I make (sic) a determination to proceed against Muhammad." C635*

However, instead of billing the county for an investigation into Muhammad's innocence Milan has billed the county enormous sums in an attempt to hide his own malfeasance and those of his underlings, and to keep Muhammad, an innocent man, in prison. Again, as pointed out in the McHenry amicus: "For Milan, he has fortuitously been hired into steady work, the Burge-related legal cottage industry, and is free to pursue his own vision of what is best so long as he does not unduly antagonize the court." *McHenry amicus at pg. 7*. Indeed, Milan has been paid large sums of money by the taxpayers as a special prosecutor. As opposed to elected prosecutors, Milan has had absolutely no accountability to the taxpayers. Milan has been allowed to hire his own staff of assistant special prosecutors (including appellate attorneys), hire experts, spend unlimited sums of money on costs, and to pursue a course of action as he sees fit, with no singular judicial authority, in what can only be described as a parallel Cook County state's

attorney office.<sup>36</sup> In Muhammad's case alone, six different assistant special prosecutors hired by Milan attended court hearings, drafted documents and handled the appeal. Most disturbingly (to Muhammad), Milan was allowed to expand his special prosecutor practice into at least one non-*Burge* case, (Muhammad's) in violation of 55 ILCS 5/3-9008 without any coordinated oversight or vetting.

Despite a trial record that has been shown to be replete with errors and misconduct, Milan has failed to even acknowledge the plethora of new evidence amassed in Muhammad's case. Milan's conduct suggests to a reasonable member of the public that he is hardened against Muhammad and has evidenced a commitment that clearly reflects that he is unable to view the case impartially. An observer reasonably could conclude that Milan has no intention or ability to put aside his negative view of Muhammad's case.

#### **4. Milan's Removal Was Required**

It is the duty of the court when appointing a special prosecutor to ensure that such judicial discretion is, "exercised to promote the underlying policy of a just, fair, and impartial hearing." *See People v. Lanigan*, 353 Ill. App. 3d 422, 430 (1st Dist. 2004) (citation omitted). These concepts of impartiality and integrity have been turned on their head in this case. The entire reason for the appointment of a special prosecutor is thwarted if the special prosecutor has, as here, the same

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<sup>36</sup> Once appointed by the presiding judge it became the responsibility of each individual judge to monitor his costs and actions.

conflict as the elected prosecutor they are called to replace. No one could conclude that replacing the CCSAO with Milan would maintain the public's confidence in the impartiality and integrity of our criminal justice system.

As this Court has held, prosecutorial misconduct that effectively deprives a defendant of their due process right to a fair trial warrants reversal of the conviction. *People v. Blue*, 189 Ill. 2d 99, 138 (2000). In Muhammad's case the prosecutorial violations along with the torture and constitutional violations confirms that Muhammad did not receive a fair trial.<sup>37</sup> Unfortunately, the decision as to whether Muhammad would get a new trial was put in the hands of the person who hired his torturer and whose underlings helped to frame him.

As an objective matter, our U.S. Supreme Court has held, recusal is required where "the probability of actual bias on the part of the judge or decisionmaker<sup>38</sup> is too high to be constitutionally tolerable," *Caperton v. A.T. Massey Coal* citing, *Withrow v. Larkin*, 421 U. S. 35, 47 (1975) (*emphasis added*). It is also imperative to keep in mind that "the Due Process Clause has been implemented by objective

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<sup>37</sup> Muhammad's post-conviction petition also raises other issues including serious allegations of ineffective assistance of counsel. C1176.

<sup>38</sup> Milan is clearly a decisionmaker in this matter. As the majority held, *People v. Muhammad*, at ¶ 94, the undisputed facts show Milan exercised a quasi-judicial power as supervisor of the Felony Review Unit in the Cook County's State's Attorney's Office that charged Muhammad with first-degree murder. The nature of these proceedings shows Milan seeking to exercise that power again, holding over Muhammad the powers to dismiss the case, re-prosecute him, and terminate the proceedings. See, 775 ILCS 40/50 (a),(b) (successful petitions may lead to "re-arraignment, retrial, custody, pretrial release, or discharge" and directing state's attorney or designee to represent state). The exercise of these powers confirms that Milan is a decisionmaker in this case.

standards that do not require proof of actual bias." See *Tumey*, 273 U.S., at 532; *Mayberry*, 400 U.S., at 465–466; *Lavoie*, 475 U.S., at 825. In defining these standards the U.S. Supreme Court has asked whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow*, 421 U.S., at 47.

Such a risk has presented itself in this case. As stated above, Milan has admitted in court proceedings that he has prejudged Muhammad's case. What Milan actually admitted is worth repeating: "*There is no way that I can continue the investigation and bill the County for an investigation that I know is going nowhere. And I make (sic) a determination to proceed against Muhammad.*" C635. At least six of Milan's underlings (including McDermott) are implicated in the misconduct uncovered after Muhammad's arrest based on their actions and knowledge of what had occurred during the felony review process, specifically the framing of Muhammad at trial and his torture during the investigation. Milan has demonstrated that he is not able to step back and look at the actions of the people he hired, trained and supervised and agree that they violated Muhammad's right to a fair trial.<sup>39</sup>

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<sup>39</sup> In point of fact, when Judge Flood dismissed the TIRC matter, Milan attempted to stop Muhammad from filing his post-conviction petition even though it was based on substantial new evidence of innocence. Judge Flood was then forced to explain to Milan that since the petition was based on allegations of actual innocence Muhammad had the right to file the petition. C 1352-1357.



## 5. Special Prosecutors Must Be Vetted For Conflicts And Bias

Two years after Muhammad was tortured and framed in a murder conviction (and not so coincidentally also under Milan's watch as bureau chief at the CCSAO) this Court acknowledged that courts were "seeing [prosecutorial misconduct] with an 'alarming' frequency, which 'cause[d] legitimate public concerns regarding the fairness and integrity' of criminal trials." *People v. Johnson*, 208 Ill. 2d 53, 88, 803 N.E.2d 405, 425 (2003), as modified on denial of reh'g (Jan. 26, 2004) (quoting *People v. Moss*, 205 Ill.2d 139, 189, 275 Ill. Dec. 444, 792 N.E.2d 1217 (2001)). Muhammad's case is unfortunately one of those cases which now has caused legitimate public concern regarding the fairness and integrity of our criminal system.

At the heart of the analysis of the right to a trial by a disinterested prosecution lies the Constitution. As Justice Blackmun stated decades ago, "the practice—federal or state—of appointing an interested party's counsel to prosecute [for criminal contempt] is a violation of due process." *Young v. US Ex Rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814–15 (1987) (Blackmun, J., concurring). The Constitution "requires a disinterested prosecutor with the unique responsibility to serve the public, rather than a private client, and to seek justice that is unfettered." *Id.* at 815.

The CCSAO understood Muhammad's right to a fair trial and stepped aside after a lengthy investigation. Unfortunately for Muhammad, that office was replaced by someone who was not properly vetted for that same (or apparently

any) conflict. As the majority held below, Milan was clearly protecting his original decision to prosecute Muhammad by keeping himself in the position of being able to both judge himself and protect his subordinates. No person is allowed to be a judge in his own case and Milan was in the unusual position of having to judge himself and those who were his subordinates. *People v. Muhammad*, at ¶ 5.

As noted above, evidence of Milan's conflict and bias only started to become apparent during his interview of Muhammad (which he promised to tape and provide a copy to Muhammad's counsel but then failed to do, claiming that *somehow* his underling, who was present during the zoom interview, failed to record the interview.) Then Milan filed the motion to dismiss in which he misstated crucial facts, and improperly (in a motion to dismiss) attacked the credibility of Muhammad and the TIRC. However, as noted in footnote 9, counsel for Muhammad did not realize until she brought in additional counsel to help with the first motion to rescind Milan's appointment that there was no order specifically complying with 55 ILCS 5/3-9008 in this case or setting out Milan's power and authority. It is very likely that the procedure called for in the appointment statute alerted Milan's ethics expert to the potential for a conflict and caused her to ensure a review was done of each file that was being turned over to Milan. If that procedure of reviewing each file before the appointment of a special prosecutor had continued to be followed, Milan's expansion into this particular non-*Burge* case would likely have led to the early discovery of Milan's conflict.

In addition, Milan's role as special prosecutor in this case also would have

allowed him to act as both advocate and witness. *Id.* at ¶ 102; *See, People v. Blue*, 189 Ill. 2d 99, 136 (2000) (describing “advocate-witness rule,” which bars attorneys from playing dual roles as advocate and witness in same proceeding). Milan’s dual participation as the supervisor of the individuals that violated Muhammad’s right to a fair trial and his role as special prosecutor is inconsistent with the search for truth and guts the reliability of the circuit court’s ultimate decision. Milan was using his power as special prosecutor to bury the conduct of his earlier position at the CCSAO and his subordinates, both by seeking dismissal of Muhammad’s case and casting ridicule on Muhammad’s case and counsel throughout this litigation.

The fact remains, Milan sought to halt, as the special prosecutor, any inquiry into Muhammad’s case even though all the reasons the CCSAO withdrew applied in every respect to him. This made Milan an “interested party” in Muhammad’s case and underscored the need for his removal. The resulting error in allowing him to stay on is both “fundamental and pervasive.” (quoting *Young*, 481 U.S. at 809-10 (plurality opinion)). The undisputed facts of Milan’s prior involvement triggered the court’s duty to remove him because it would be impossible for Muhammad to have a fair trial. *Hux*, 38 Ill. 2d at 225; *see Lang*, 346 Ill. App. 3d at 682. No court should ever tolerate the “risk of actual bias” that Milan’s personal participation threatened, or else the scales of justice tip perilously, breeding resentment and distrust in the criminal system as a whole. *See Williams*, 579 U.S. at 8.

This Court should clarify that the involvement of a conflicted special

prosecutor violates the duty of due process and results in structural error. Such a ruling will encourage and empower the courts to meaningfully scrutinize the ethical obligations of people to be appointed in those situations where the elected prosecutor has determined s/he has a conflict.

### III. CONCLUSION

For the reasons stated herein, Muhammad respectfully asks this Court to send his TIRC Claim back for a hearing *post haste* and order the presiding judge of the criminal court to appoint a new and unconflicted special prosecutor to ensure the fairness and integrity of our criminal system and the due process rights of Muhammad.

Respectfully Submitted,

/s/ H. Candace Gorman

H. Candace Gorman  
Law office of H. Candace Gorman  
1509 W. Berwyn, Suite 207  
Chicago Il. 60640  
312-427-2313  
hcgorman@igc.org  
ARDC number 6184278

*Counsel for Petitioner - Appellee*

**CERTIFICATE OF COMPLIANCE**

I certify that this brief conforms to the requirements of Rules 341 (a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 14,771 words.

/s/ H. Candace Gorman

H. CANDACE GORMAN  
*Counsel for Petitioner - Appellee*

**CERTIFICATE OF FILING AND SERVICE**

I certify that on December 13, 2024, I electronically filed the foregoing Response Brief with the Clerk of the Court for the Illinois Supreme Court, by using the Odyssey eFileIL system.

I further certify that the other participants in the appeal, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

Joshua M. Schneider - [eserve.criminalappeals@ilag.gov](mailto:eserve.criminalappeals@ilag.gov)

David Neumeister - [David.Neumeister@ilag.gov](mailto:David.Neumeister@ilag.gov)

Patrick D. Kenneally - [PKKenneally@mchenrycountyil.gov](mailto:PKKenneally@mchenrycountyil.gov)

Lisa Anne Hoffman - [sao.appeal@dupagecounty.gov](mailto:sao.appeal@dupagecounty.gov)

Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

/s/ H. Candace Gorman

H. Candace Gorman  
Law office of H. Candace Gorman  
1509 W. Berwyn, Suite 207  
Chicago Il. 60640  
312-427-2313  
hcgorman@igc.org  
ARDC number 6184278

*Counsel for Petitioner - Appellee*