No. 130470

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court
	)	of Illinois, First Judicial District,
Respondent-Appellant,	)	No. 1-22-0372
	)	
	)	There on Appeal from the
	)	Circuit Court of Cook County,
v.	)	Illinois, No. 00 CR 13572
	)	
	)	The Honorable
ABDUL MALIK MUHAMMAD,	)	Lawrence Flood,
	)	Leroy K. Martin, Jr., and
Petitioner-Appellee.	)	Erica Reddick, Judges Presiding.

BRIEF OF RESPONDENT-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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NATURE OF THE ACTION

In 2001, petitioner was convicted of first degree murder and sentenced to 50 years in prison. C97; SUP3 R146, 174.[1] In 2014, petitioner submitted a claim to the Illinois Torture Inquiry and Relief Commission (TIRC or the Commission) under the TIRC Act (the Act), 775 ILCS 40/1 *et seq*. C436. The Commission referred the claim to the circuit court, C456, which granted petitioner's motion for the appointment of a special prosecutor, C222, and Robert Milan assumed the People's representation, *see* C325. Two years later, the circuit court denied petitioner's first motion to rescind Milan's appointment as special prosecutor, A79, struck his motion to reconsider the order denying that motion, A106, denied his second motion to rescind Milan's appointment, A115, and dismissed the torture case on the ground that petitioner had failed to state a claim of torture under the Act, A149, 155-60. The appellate court reversed the circuit court's judgment terminating the proceedings, holding that petitioner had stated a claim of torture under the Act. A24, ¶ 67. The appellate court also held that the circuit court erred by declining to rescind Milan's appointment, holding that Milan had an actual

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[1] Citations to the common law record appear as "C__"; to the report of proceedings as "R__"; to the supplemental common law record and report of proceedings contained in the first supplement to the record as "SUP C__" and "SUP R__"; to the supplemental common law record and supplemental exhibits contained in the second supplement to the record as "SUP2 C__" and "SUP2 E__"; to the supplemental common law record and supplemental report of proceedings contained in the third supplement to the record as "SUP3 C__" and "SUP3 R__"; to the impounded record as "CI__"; and to the separate appendix as "A__."

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conflict of interest. A39, ¶ 113. The appellate court remanded for further proceedings on petitioner's claim of torture (as well as his claim of a *Brady* violation) and for the appointment of a new special prosecutor. A42, ¶ 125. The People appeal the appellate court's judgment. A question is raised on the pleadings: whether petitioner stated a claim of torture under the Act.

ISSUES PRESENTED FOR REVIEW

1. Whether the circuit court properly dismissed petitioner's referred torture case because his allegations that he was tortured but never confessed failed to state a claim of torture under the Act — that is, a claim that he was "tortured into confessing to the crime for which [he] was convicted and that tortured confession used to obtain the conviction." 775 ILCS 40/5(1).

2. Whether, even if further proceedings were warranted, the appellate court erred by ordering that a new special prosecutor be appointed because petitioner provided no basis to find that Milan had an actual conflict of interest due to previous involvement in petitioner's criminal prosecution, given that there was no evidence of involvement, and his prior involvement would not constitute a conflict in any event.

JURISDICTION

On May 29, 2024, this Court allowed the People's petition for leave to appeal. Accordingly, this Court has jurisdiction under Supreme Court Rules 315 and 612(b).

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STATUTES INVOLVED

Section 5(1) of the Illinois Torture Inquiry and Relief Commission Act, 775 ILCS 40/1 *et seq.*, provides:

> § 5. Definitions. As used in this Act:
>
> (1) "Claim of torture" means 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(1).

Section 3-9008(a-10) of the Counties Code provides:

> § 3-9008. Appointment of attorney to perform duties.
>
> * * *
>
> (a-10) The court on its own motion, or an interested person in a cause, proceeding, or other matter arising under the State's Attorney's duties, civil or criminal, may file a petition alleging that the State's Attorney has an actual conflict of interest in the cause, proceeding, or other matter. The court shall consider the petition, any documents filed in response, and if necessary, grant a hearing to determine whether the State's Attorney has an actual conflict of interest in the cause, proceeding, or other matter. If the court finds that the petitioner has proven by sufficient facts and evidence that the State's Attorney has an actual conflict of interest in a specific case, the court may appoint some competent attorney to prosecute or defend the cause, proceeding, or other matter.

55 ILCS 5/3-9008(a-10).

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STATEMENT OF FACTS

I. Petitioner Is Tried and Convicted of Murder.

The evidence at trial showed that on May 4, 1999, Damone Mims was fatally shot while waiting in a car at a stoplight. Mims was shot five times, R333-35, 339, and six .45-caliber cartridge cases, all fired from the same gun, were recovered from scene, R235-36, 244, 347.

Mims's roommate, Adrian Herman, testified that earlier that day, he and Mims had been hanging out with fellow members of the Black Disciples street gang at a park. R255-57. They had exchanged looks with a group of Vice Lords, which included petitioner and Aubree Dungey, but there were "no problems" between the Black Disciples and Vice Lords at the time, and the Vice Lords eventually left without incident (although after the Vice Lords left the park, Dungey drove past with petitioner in the passenger seat and the two made gang signs at Herman and Mims). R258-65.

Mims left sometime later, and Herman remained at the park until about 8:30 p.m., when he called home to ask his girlfriend to pick him up. R265-66. While waiting for her, he heard gunshots. R266-67. He called home again, and his girlfriend told him that Mims had left in her car to pick him up and should be there any minute. *Id.* After a passerby mentioned that there had been a shooting at a nearby intersection, Herman went to the intersection, where he saw his girlfriend's car crashed on the median with Mims's body slumped over inside. R266-68.

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Two eyewitnesses, Glenn Davis and Edward Wilson, testified that petitioner was the shooter. R197, 219-20. Davis and his wife had been stopped at the intersection when petitioner jumped out of a car to their left, swore (with a stutter, Davis noticed, R198), and fired six shots into the driver's side of a white car that was also stopped at the intersection. R194-95, 215. Wilson, who was standing on the corner with his mother and sister waiting to cross the street, saw petitioner fire six shots into the driver's side of the white car. R218-225, 227-30. Petitioner fled on foot as the white car, with its driver slumped over, rolled into the intersection and came to a stop against a light pole. R198-99, 221.

Davis and Wilson both spoke with the responding officers. R199-200, 221. About a week later, detectives visited them at their homes and showed them photo arrays, from which they both identified petitioner. R200-01, 221-22. And, in April 2000, they both identified petitioner from lineups at Area 2 headquarters. R201-02, 222-23.

Dungey testified that he had given petitioner a ride when the two left the park earlier on the day of the shooting. R279-81. Petitioner had been covered in stitches and bruises from a previous altercation. R281. Petitioner's uncle, Seth Richardson, testified that the stitches were the result of a prior beating about which petitioner was still angry. R359-60, 362-63, 366.

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Dungey next saw petitioner at around 8:00 that night, when Dungey again gave petitioner a ride. R282. They stopped at a restaurant to pick up dinner and ran into Terry Taylor in the restaurant parking lot. R282-83. They then followed Taylor to his apartment, where Taylor retrieved a handgun from a bag and gave it to petitioner. R284-88; *see also* R382-90 (Taylor's testimony about providing a .45-caliber gun); R375-78 (Taylor's roommate's testimony about petitioner and Dungey arriving at the apartment and Taylor retrieving the bag containing a gun).

After petitioner got the gun from Taylor, Dungey was driving petitioner to Richardson's house when petitioner directed him to make a U-turn to follow a car that had just passed them going the other way. R289-91. Dungey made the turn and pulled up behind some cars that were stopped at a red light. R290-92. Petitioner jumped out of the car and ran down the street with the gun in his hand. R293. As Dungey pulled into an alley, he heard gunshots. R294. Dungey was subsequently arrested for Mims's murder. R303.

Chicago Police Detective David Fidyk of the Area 2 Violent Crimes Division testified that he and his partner, Detective Michael McDermott, interviewed Dungey in early June 1999 about Mims's murder. SUP3 R9, 14-16. Fidyk was already investigating an aggravated battery committed against petitioner on May 1, 1999 — a few days before the murder — by several men whom petitioner had identified as Black Disciples. SUP3 R12-

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13. After Fidyk and McDermott interviewed Dungey, Dungey was charged as an accomplice in Mims's murder, SUP3 R14-16, and a warrant was issued for petitioner's arrest, SUP3 R17-18. But the detectives were unable to find petitioner in Chicago. SUP3 R19.

In April 2000, the detectives were contacted by the FBI Fugitive Task Force. SUP3 R19. Fidyk and McDermott flew to Seattle, where they collected petitioner, then returned with him to the Area 2 station on the evening of April 27, 2000. SUP3 R19-20.

There, the detectives administered *Miranda* warnings to petitioner, who said that he understood his rights and agreed to talk to them "[b]riefly." SUP3 R21-22. Petitioner told the detectives that "he was a Vice Lord"; "[h]e denied any knowledge of the aggravated battery case report, [in] which he was the victim"; and he said that "he had no actual knowledge of the murder." SUP3 R23; *see* SUP3 R28 (petitioner said that he "didn't know anything about the murder"). Petitioner said that "he decided to move to Washington to turn his life around," SUP3 R32, and that "he knew a warrant was out for his arrest," SUP3 R28. Fidyk noticed during the interview that petitioner spoke with a stutter. SUP3 R27.

After the prosecution rested, the defense called petitioner's grandmother, Flora Walker, who lived in Washington. SUP3 R42-44, 48. Walker testified that petitioner came to stay with her on May 3, 1999, because he had been beaten up. SUP3 R46-49. Petitioner did not testify,

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SUP3 R70-71, and in closing he argued an alibi defense — that he was in Washington at the time of the shooting — based on his statement to police and his grandmother's testimony, SUP3 R93-94.

The jury found petitioner guilty, SUP3 R146, and petitioner moved for a new trial on the grounds that the evidence was insufficient and the trial court erred by not instructing the jury on second degree murder, SUP3 C4. Petitioner did not claim that his statement to police was either involuntary or fabricated. *See id.* The trial court denied the motion, SUP3 R155-56, and sentenced petitioner to 50 years in prison, SUP3 R174.

II. Petitioner Unsuccessfully Pursues Postconviction Relief with No Mention of Police Coercion.

In 2006, petitioner filed a postconviction petition alleging, among other things, that trial counsel was ineffective for not calling witnesses who viewed lineups but did not identify petitioner as the shooter. C149-50; *see* C164-65, 174. Petitioner did not allege that police had threatened him or abused him in any way to coerce a statement. *See* C138-75.

The circuit court summarily dismissed the petition at the first stage of proceedings, R668; C188, and the appellate court affirmed, C208.

III. Petitioner Files a Claim of Torture with the Torture Inquiry and Relief Commission, Which Refers the Claim of Torture and a *Brady* Claim to the Circuit Court for Review.

In 2014, petitioner submitted a claim of torture to the Commission, alleging that he was interrogated for four days at Area 2 in a room without a bed, toilet, food, or water; Detective McDermott threatened that he "kn[ew]

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how to get [petitioner] to talk without leaving a mark" and that "a jury would be more likely to believe white witnesses than a black defendant"; and an unidentified officer "forcefully held [petitioner] by the arms during two of four lineups." C436. Petitioner maintained that, despite the alleged abuse, "he did not make the statements police attributed to him" and in fact "made no statements at all." C446.

When the Commission eventually interviewed petitioner in 2017, his allegations of abuse "expanded," C437, as he alleged for the first time that McDermott had hit him repeatedly over the head with a thick case file; struck his ears whenever he put his head down; called him names; fed him only once in four days; and denied him the use of a restroom until petitioner defecated in his shirt, which he then hid inside the ceiling of the interview room, C447. Petitioner further alleged that "[a] large, unidentified detective kicked [him] in the legs during the night to keep him awake." *Id.* When asked why he never reported this abuse before, petitioner said he "d[id]n't know" — he suggested that he might have omitted it in his haste to respond to the Commission's requests for details — but offered that he had not mentioned the detail about defecating in his shirt out of embarrassment. *Id.*

The Commission "ha[d] serious reservations about [petitioner's] credibility," noting that "the allegations [he] made about coercive tactics ha[d] grown in scope and severity over time, and allegations of physical abuse arose only in his recent TIRC interview." C437; *see* C454 (finding petitioner's

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credibility "severely challenged by the fact that he never raised any allegations of physical abuse prior to his interview with Commission staff," never moved to suppress, and never mentioned any coercion in his post-conviction petition). C454. The Commission found "unconvincing" petitioner's suggestion that he omitted any allegation of physical abuse from his initial claim due to "rushing," especially given that he also omitted such allegations from his postconviction petition, and noted that although petitioner "had previous experience in how to report abuse to OPS,"[2] he "did not do so in this instance." C455.

Yet the Commission found petitioner's allegations that he had participated in lineups from which he was not identified as the shooter, and that those lineups were not disclosed to counsel, to be corroborated by other evidence. C453. The Commission reasoned that "the state's apparent failure to turn over favorable material [wa]s an inadvertent oversight at best, and a deliberate *Brady* violation at worst," which "reflect[ed] negatively on the state's conduct in regards to sharing favorable information about lineups and invit[ed] skepticism in regards to its conduct in other areas like coercion and torture." C454.

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[2] OPS refers to the Chicago Police Department's Office of Professional Standards, *see People v. King*, 192 Ill. 2d 189, 198 (2000), which until September 2007 was the body responsible for investigating complaints against officers, *see Estate of Loury by Hudson v. City of Chicago*, No. 16 C 4452, 2021 WL 1020990, at *3 (N.D. Ill. Mar. 17, 2021) (describing organizations tasked with investigating complaints against officers).

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The Commission concluded that "[d]espite [its] severe reservations about [petitioner's] credibility in regards to his claims of physical abuse, there [wa]s enough evidence of misconduct (deliberate or inadvertent) on the part of the state in this case" — that is, the evidence of a possible *Brady* violation — "to warrant further review of torture allegations by a court." C455; *id.* ("The apparent *Brady* violation in regards to negative lineups also discredits the state in general and warrants judicial examination of police and prosecutorial conduct regarding alleged coercion and torture."). Accordingly, the Commission referred petitioner's claim of torture to the Cook County Circuit Court for review. C456. Although the Commission recognized that the Act defines a claim of torture as a claim that a person "'was tortured into confessing to the crime for which the person was convicted and the tortured confession was used to obtain the conviction'" and petitioner alleged that he was tortured but was *not* tortured into making any statements, C452 (quoting 775 ILCS 40/5(1)), the Commission nonetheless found that petitioner had stated a claim under the Act because the regulatory definition of "tortured confession" included statements that a person denies making but that police alleged were made "'shortly after'" the interrogation that the person "'claims included torture.'" C452 (quoting 20 Ill. Admin. Code § 2000.10).

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IV. Petitioner Seeks the Appointment of a Special Prosecutor on the Ground That the Cook County State's Attorney's Office Has a Conflict, and the Court Appoints Robert Milan.

In September 2018, the case was assigned to a judge in the Cook County Circuit Court. C213. Two months later, petitioner moved to appoint a special prosecutor on the ground that the CCSAO had a conflict because "one of the individuals accused of torture" — Detective McDermott — "had worked as an investigator for the CCSAO." C217. At that time, Kim Foxx served as State's Attorney. *See* https://www.cookcountystatesattorney.org/about/kimberly-foxx (last visited Oct. 23, 2024) (noting Foxx took office on December 1, 2016).

Petitioner served his motion on Robert Milan at the Office of the Special State's Attorney. C216. Petitioner's counsel had been told that Milan's office, which had represented the People in opposition to petitioner's counsel in another torture case referred by the Commission, would be the special prosecutor, "as they were the office that was handling those cases at that time." SUP C44 (affidavit of petitioner's counsel).

Specifically, Milan was the most recent special prosecutor appointed to represent the People in cases alleging abuse by Chicago Police Commander Jon Burge and the detectives under his supervision at Area 2. A special prosecutor was first appointed in 2002 to investigate Burge in response to allegations of torture and other misconduct. A172-74.[3] The Cook County

[3] The Court may take judicial notice of the Cook County Circuit Court's orders, *see Koshinki v. Trame*, 2017 IL App (5th) 150398, ¶ 10 ("the circuit

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State's Attorney at the time, Richard Devine, had personally represented Burge while in private practice, and the circuit court held that Devine therefore had a "*per se* conflict" that required the appointment of a special prosecutor to investigate Devine's former client. *Id.*

Subsequently, the circuit court acknowledged that Devine's conflict could potentially affect his assistants' representation of the People in postconviction cases where petitioners alleged misconduct by Burge and the detectives under his supervision because if the cases proceeded to evidentiary hearings and "require[d] Burge's testimony," then "the State's Attorney might have to refute those allegations by defending Burge's conduct." A188-89. The court recognized that whether the CCSAO as a whole had a conflict in any particular case turned on "[t]he facts of each case," A187, but sought to "avoid having the ancillary issue of conflict litigated in each [petitioner's] post-conviction proceedings," A189. Accordingly, in the interest of judicial economy, the court directed the Attorney General to litigate the postconviction cases alleging Burge-related abuse, since the Attorney General "[wa]s personally free of any history of involvement in [the petitioners'] cases

court's orders are proper materials for judicial notice"), which are included in the People's separate appendix for the Court's convenience, *see* A167-212. The orders are also available at the same domain to which petitioner directed the circuit court below. *See* https://peopleslawoffice.com/cook-county-states-attorneys-office-disqualified-again-from-burge-torture-cases/ (last visited Oct. 23, 2024); C1048 (petitioner directing circuit court to peopleslawoffice.com for copy of April 9, 2003 order in *In re Appointment of Special Prosecutor*, No. 2001 Misc. 4 (Cook Cnty. Cir. Ct.)).

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and w[ould] not be subject to any conflict of interest concerns." A189-90. The court denied the petitioners' request to appoint a special prosecutor in their cases. A202.[4]

The Attorney General litigated the Burge-related postconviction cases until 2009. *See* A211-12. In December 2008, Anita Alvarez succeeded Devine as State's Attorney, and the Attorney General moved to reassign newly filed postconviction cases alleging misconduct by Burge and his subordinates on the grounds that the Attorney General's involvement was no longer either practical or necessary: the Attorney General lacked the resources to litigate the new cases, and the CCSAO no longer labored under a disabling conflict because Alvarez had never represented Burge and therefore had no *per se* conflict with respect to any Burge-related cases initiated after Devine's departure. A206-07, 209-10. As the Attorney General explained, the fact that the cases accused some present and former CCSAO employees of "concealing and participating in police torture during the Burge era," A207, did not distinguish them from other postconviction cases involving

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[4] The court also denied the petitioners' request to transfer their cases to judges sitting outside of Cook County on the ground that many Cook County judges previously worked for the CCSAO. A202; *see* A190. The court held that recusal would be necessary if a judge "either acted as counsel in the matter which is the subject of the post-conviction petition or who is likely to be a material witness in that post-conviction proceeding," A194, but that "a judge is not required to recuse himself simply because the judge was an Assistant State's Attorney [(ASA)] during the time in which one of his colleagues prosecuted the defendant," even if the judge had held a supervisory position at the CCSAO, A195-96.

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accusations of misconduct by CCSAO employees, such as coercing confessions or committing *Brady* or *Napue* violations, all of which the CCSAO routinely litigated itself, A209. The CCSAO did not dispute that it had no conflict with respect to Burge-related cases initiated after Devine's departure, *id.*, but took the position that the cases should remain with the Attorney General for logistical reasons, suggesting that "there [we]re benefits to having the same office defend all of the Burge-related petitions," A208; *see* 55 ILCS 5/3-9008(a-15) (State's Attorney who cannot be forced from a case may still recuse herself for any reason she "deems appropriate").

The circuit court resolved the parties' concerns by appointing a special prosecutor to defend the postconviction petitions. A211. The court did not find that the CCSAO had any conflict with respect to Burge-related cases filed after Devine's departure from the office. *See id.*

The special prosecutor appointed in 2009 represented the People in Burge-related cases until April 2017, when Milan was appointed to succeed him as special prosecutor in such cases. C382-83. The order appointing Milan as special prosecutor identified him as "a former Assistant U.S. Attorney for the Northern District of Illinois and former First Assistant State's Attorney for Cook County." C383.

Petitioner's allegations of abuse by detectives in 2000 were not Burge-related — Burge was fired in 1993, C1061 — but the CCSAO "stated that [it] ha[d] a conflict proceeding with [petitioner's] case" because Detective

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McDermott "had worked as an investigator for the CCSAO," C217, and the circuit court granted petitioner's motion to appoint a special prosecutor on that basis, C222. Accordingly, Milan assumed the People's representation in petitioner's case. *See* C325.

V. Two Years Later, Milan Moves to Dismiss the Case Referred by the Commission and Petitioner Repeatedly Moves to Rescind Milan's Appointment as Special Prosecutor on the Ground That Milan Has a Conflict.

After Milan assumed the People's representation in petitioner's case, his office and petitioner's counsel engaged in discovery for more than a year, then petitioner's counsel met with Milan to seek to persuade him to conduct a new investigation into petitioner's case. SUP C44-45; SUP R115-16. Counsel presented Milan with a binder of materials, Milan interviewed petitioner, and a few weeks later, Milan informed counsel that he had decided against conducting a new investigation. SUP C45. Milan had concluded that the evidence of petitioner's guilt was overwhelming, SUP R115-16, and in August 2020, he moved to dismiss the case as improperly referred by the Commission because petitioner failed to state a claim of torture under the Act, C325-38.

In response, petitioner moved to rescind Milan's appointment as special prosecutor. C404. First, petitioner argued that the appointment was "unperfected" because the circuit court did not strictly comply with 55 ILCS 5/3-9008(c) when it granted petitioner's motion for the appointment of a special prosecutor. C404, 413-14. Second, petitioner argued that Milan had a conflict of interest because he had worked at the CCSAO as the supervisor of

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the felony review unit when petitioner was interviewed and charged in 2000 and later became the First Assistant State's Attorney before leaving the CCSAO in 2008. C404, 414-18.

Petitioner argued that Milan had an actual conflict as a former supervisor of the felony review unit because "[o]ne frequent fact pattern in cases arising out of tortured confessions is the involvement of the felony review attorney in producing the coerced and fabricated confession, as well as covering-up and suppressing the torture." C414-15 (internal quotation marks omitted). But petitioner did not allege that *his* case presented this fact pattern; he did not allege that any ASA under Milan's supervision participated in his alleged torture by Detectives McDermott and Fidyk, alleging only that ASAs had committed a *Brady* violation by not disclosing lineups from which petitioner was not identified as the shooter. *See* C410-11. Nor did petitioner present any evidence that Milan had any personal involvement with his prosecution, alleging only that Milan took statements from defendants in two unrelated murder prosecutions. C408-09.

Petitioner further argued that Milan had a *per se* conflict as a former CCSAO employee because he had worked at the CCSAO under State's Attorney Devine. C415. And petitioner argued that Milan had an "apparent" conflict of interest because he had been a supervisor at the CCSAO and "the shameful legacy of torture by the Burge team continues to cast a pall on the

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Chicago Police Department and the Cook County State's Attorney's Office." C416-18.

In response, Milan noted that petitioner had moved for the appointment of a special prosecutor knowing that Milan had been the special prosecutor in Burge-related cases since 2017 and then worked with him for two years after his appointment. C393-94. In response to petitioner's suggestions that Milan had some involvement his criminal prosecution, Milan confirmed that he "did not personally prosecute [petitioner]," "made no decision on the case," and did not "ha[ve] any involvement in the case whatsoever." C398.

In reply, petitioner did not dispute Milan's denial of any involvement in petitioner's case, instead renewing his argument that Milan was conflicted because petitioner alleged a *Brady* violation by ASAs in the felony review unit, and Milan had been the supervisor of that unit. C506-07.

At the hearing on petitioner's motion to rescind Milan's appointment, petitioner argued only that the appointment was invalid because the circuit court had not strictly complied with section 3-9008, in that its order did not specify the special prosecutor's powers and did not specifically name Milan as special prosecutor. A81-82, 96-97. Milan again responded to petitioner's arguments regarding statutory noncompliance by noting that petitioner had worked with him on the case for the past two years without objection. A86-89. Milan also assured the court that he "never consulted about [petitioner's]

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case back in 1999 or 2000," "never interviewed witnesses," "had no role in charging [petitioner]" or "tr[ying] this case," and "never heard of [petitioner] . . . until [he] was appointed on [petitioner's] case two years ago." A91. Milan offered to submit an affidavit to that effect if the court wanted one. *Id.* Petitioner did not dispute Milan's denials of any involvement in petitioner's criminal case or insist that Milan repeat them in an affidavit. *See* A95-97, 102-04.

The court denied the motion to rescind. A79, 102. The court "f[ou]nd it troubling" that petitioner waited two years after Milan's appointment before challenging it as statutorily noncompliant, but found that the court had properly appointed a special prosecutor and, in doing so, had intended that special prosecutor to be Milan. A97-101, 104-05. Petitioner moved to reconsider after the case was transferred to a new judge, SUP C4-11, but the new judge struck the motion on the ground that it raised the same arguments as the motion denied by her predecessor, A110-12.

A few months later, petitioner filed a new motion to rescind the appointment, alleging that "new evidence makes clear that [Milan] will be a necessary witness" at an evidentiary hearing on petitioner's claim that McDermott tortured him at Area 2. C911. Petitioner's new evidence was a March 29, 1999 memo from an ASA to Milan (then the supervisor of the felony review unit) reporting that the ASA had gone to Area 4 (not Area 2) to take a statement from a suspect (not petitioner) about a murder (not Mims's),

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and that the suspect appeared to have been injured and accused unidentified men of kicking him. C915-17. Based on this memo, petitioner claimed that he needed Milan's testimony "concerning his role (if any) in responding to the [Area 4 suspect's] incident and any other incidents of this kind." C917. Specifically, petitioner claimed that he needed to ask Milan questions such as "[w]hat investigation was conducted as to how [the other suspect] was beaten while being held at Area 4," whether "any medical aid [was] offered to [the other suspect] prior to his being reinterrogated," and whether "any photos [were] taken of [the other suspect's] injuries by the CCSAO." C920-22.

The circuit court denied the motion, finding that petitioner had failed to show that Milan had an actual conflict of interest. A145. The court explained that petitioner had to show that Milan was directly involved in petitioner's prosecution in some way, and that petitioner had failed to make this showing. A133-38.

After denying petitioner's motion, the court reminded him that he should bring the issue to the court's attention again "should there be a showing of [Milan's] actual or direct participation" in his prosecution. A145. Petitioner did not bring the issue to the court's attention again.

VI. The Circuit Court Dismisses the Case Referred by the Commission, But Grants Petitioner Leave to File a Successive Postconviction Petition.

After the circuit court denied petitioner's second motion to rescind Milan's appointment, petitioner responded to the motion to dismiss his torture case. SUP C49-76. In both his response and subsequent sur-reply,

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petitioner reaffirmed that he gave no statement to police as a result of the alleged torture. *See* SUP C50 (asserting that detectives "fabricated a false confession that they attributed to [petitioner]"); C1141-42 (rejecting "the inaccurate premise that [petitioner] actually made the statement that was fabricated by the detectives"); C1144 n.4 (asserting that petitioner "asserted his right to remain silent and no such statement denying the attack that sent him to Washington was ever made by him"). Petitioner also sought leave to file an amended successive postconviction petition,[5] in which he further denied making any statements to police. *See* C1184 (asserting that detectives "fabricated a confession by [petitioner] after he exercised his rights under *Miranda*"); C1189 (asserting that petitioner "refused to confess"); C1193 (asserting that petitioner "refused to make a statement, or to confess," but that, "[n]ot deterred by [petitioner's] silence[,] the detectives fabricated a confession by [petitioner]"); C1205 (asserting that documentary evidence "confirms that [petitioner] invoked his right to silence and made no statement").

The court granted the motion and terminated the proceedings on the statutory claim of torture referred by the Commission. A160. The court

[5] Although petitioner's response to the motion incorporated by reference a postconviction petition that he purportedly filed after the referral of his torture claim to the circuit court, SUP C50, that petition does not appear in the record on appeal. But petitioner submitted his amended postconviction petition in January 2022, C1176, two months before the circuit court ruled on Milan's motion to terminate the proceedings on the torture claim, *see* R716-17.

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explained that under the Act, a "claim of torture" is a claim "asserting that [the petitioner] was tortured into confessing to a crime for which [he] was convicted and the tortured confession was used to obtain the conviction." A155; *see* 775 ILCS 40/5(1). The court found that the statement attributed to petitioner by Detective Fidyk — that petitioner was a member of the Vice Lords, had no knowledge of either Mims's murder or the battery believed to be the motive for that murder, was aware of the warrant for his arrest, and went to Washington — was not a confession to murdering Mims. A156. The court explained that the statement was not a confession because it did not contain any acknowledgment of guilt, either explicitly, by admitting guilt, or implicitly, by providing details of the murder. A156-57. Petitioner's statements about being aware of the warrant and going to Washington might be incriminating, but they were merely admissions, not confessions. A157. The court further found that the Commission lacked authority to refer petitioner's *Brady* claim for an evidentiary hearing. A159-60 (citing 775 ILCS 40/45(d)).

Turning to petitioner's successive postconviction proceedings, the circuit court granted him leave to file an amended successive postconviction petition, A162-63, which raised the *Brady* claim that the court had just dismissed as noncognizable in the torture case, *see* A162; C1218-20 (arguing that "[t]he CCSAO office was complicit in framing [petitioner]"), 1225-28. The petition also claimed, based on the same torture alleged in the torture

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case, that petitioner's "due process right to be free from torture and the fruits of torture were violated," C1225, although he continued to maintain that he never made any statement as a result of the alleged torture, *see* C1184, 1189, 1205.

VII. Petitioner Appeals, Then Moves to Terminate Milan's Appointment as Special Prosecutor in Petitioner's Ongoing Successive Postconviction Proceedings on the Ground That the Cook County State's Attorney's Office Has No Conflict.

Petitioner appealed from the orders dismissing his torture case and denying his motions to rescind Milan's appointment as special prosecutor. A77-78. A few days later, he moved the circuit court to terminate Milan's appointment as special prosecutor in the successive postconviction proceedings on the ground that the appointment was "not necessary, as his appointment does not resolve any conflict the [CC]SAO has in this matter." C1324.

Petitioner argued that his postconviction claims that Chicago detectives tortured him and Cook County ASAs committed misconduct in his case were "properly before the CCSAO," C1324, because the current State's Attorney, Kim Foxx, who was also State's Attorney in 2018 when petitioner moved for the appointment of a special prosecutor on the basis that the CCSAO was conflicted, "ha[d] no connection to a case conflicting out a previous holder of the office," C1325 (internal quotation marks omitted). Petitioner further explained that he preferred to have the CCSAO litigate his postconviction petition instead of Milan because "allowing [petitioner's] post-

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conviction petition to remain with the CCSAO would give [him] the opportunity to have the conviction integrity unit review his file," which he would not have if the case remained assigned to a special prosecutor. C1324. Petitioner's motion was granted on April 1, 2022, and the CCSAO has represented the People in petitioner's successive postconviction proceedings ever since.

VIII. The Appellate Court Reverses and Remands for Further Proceedings on the Referred Claims and Appointment of a New Special Prosecutor.

The appellate court unanimously reversed the circuit court's order dismissing petitioner's torture case and remanded for an evidentiary hearing on both petitioner's claim of torture and his *Brady* claim. A2-3, ¶ 6. The appellate court held that the circuit court's only role when reviewing a case referred by the Commission was to "determine whether the outcome of the original suppression hearing would likely have been different if the officers who denied torturing the defendant had been subject to impeachment based on newly discovered evidence that those officers engaged in a pattern of abusive tactics in other cases." A13, ¶ 36. The appellate court reasoned that because a suppression hearing could result in the suppression of any involuntary statement, a "confession" under the Act "cannot be limited to a confession as an acknowledgment of guilt," as the term usually means under Illinois law, A22, ¶¶ 62-63 (recognizing that "a 'confession' is an acknowledgment of guilt and applies to all instances other than the limited circumstances of permitting a pretrial hearing on a motion to suppress a

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confession under [735 ILCS 5/114-11]"). The appellate court further held that petitioner could raise his *Brady* claim under the Act because it was "closely tethered to the merits of [petitioner's] torture claim." A27-28, ¶ 77.

With respect to petitioner's request that Milan be replaced with a different special prosecutor when the reinstated torture case was remanded for further proceedings on those claims, A45, ¶ 132, the court was divided regarding whether Milan had a conflict of interest requiring such replacement, A3, ¶¶ 7-8. The majority held that Milan had an "actual conflict of interest." A39, ¶ 113. The majority reviewed the conflict issue de novo because it asserted that "no factual dispute exist[ed]" regarding Milan's involvement in petitioner's case while he was the supervisor of felony review with the CCSAO. A28, ¶¶ 80-81. The majority did not address Milan's repeated denials before the circuit court that he had any involvement in petitioner's case, asserting that "as supervisor of the felony review unit in the [CCSAO], *he initiated* the criminal prosecution of [petitioner] years ago." A28, ¶ 80 (emphasis in original). The majority then repeatedly asserted that Milan had "admitted" his involvement in petitioner's prosecution. *See* A41, ¶ 122 ("find[ing] critical Milan's admitted involvement in [petitioner's] prosecution and relation with McDermott"); *see also* A39, ¶ 115 (accusing dissent of "excus[ing] Milan's admitted participation in [petitioner's] prosecution as supervisor"); A41, ¶ 120 (describing issue as whether Milan

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had actual conflict, "given his admitted involvement in [petitioner's] prosecution").

The majority concluded that, in his role as prosecutor, Milan was a "quasi-judicial" officer who "exercised a quasi-judicial power as supervisor of the felony review unit in the [CCSAO] that charged [petitioner] with first degree murder," and that his appointment as special prosecutor in the torture case gave him "the improper ability" to "judge the validity of his original decision to prosecute" and "to 'judge' himself and his subordinates." A32-33, ¶¶ 93-94. The majority held that due process dictates that a prosecutor be disqualified if a case calls on him to "sit[ ] in judgment of a prosecution in which he or she made a critical decision." A33, ¶ 95. Based on its conclusion that Milan had engaged in misconduct by representing the People in petitioner's torture case, the majority ordered that its opinion be provided to the Illinois Attorney Registration and Disciplinary Commission. A42, ¶ 126.

The dissenting justice would have reviewed petitioner's claim that Milan's appointment should have been rescinded for an abuse of discretion, A47, ¶ 136 (Tailor, J., concurring in part and dissenting in part), and would have found no abuse of discretion because petitioner failed to prove that Milan had an actual conflict of interest, A62, ¶ 149; A75, ¶ 174. Milan had denied any involvement in petitioner's prosecution, A48, ¶ 137, and the record contained no evidence that Milan made the decision to charge petitioner or had any relationship with McDermott, A62-63, ¶ 149. Moreover,

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petitioner "ha[d] not alleged at any time that any [ASAs] working in the felony review unit were present for, played a role in, or were aware of his alleged torture," and "ha[d] not come forth with any evidence showing Milan participated in, or knew of, [petitioner's] alleged tortured confession." *Id.* Finally, the dissenting justice disagreed with the majority's characterization of prosecutors as effectively judges, noting that "Illinois caselaw is replete with instances of [ASAs] representing the People in postconviction cases where petitioners allege that [ASAs] and police officers violated their constitutional rights by obtained tortured and involuntary confessions or engaging in other misconduct, including specifically not turning over *Brady* material," and that, under the majority's rationale, "a public prosecutor would be disqualified from representing the People in such proceedings because they would be called upon to judge themselves." A71, ¶ 165. Here, "[petitioner's] bid to have Milan removed was not prompted by any conflict of interest but a desire for a more favorable prosecutor." A75, ¶ 173.

STANDARDS OF REVIEW

Whether the circuit court properly dismissed petitioner's torture case for failure to state a claim of torture under the Act is a question that this Court reviews de novo, for the inquiry turns on this Court's construction of the Act and the legal sufficiency of petitioner's assertions under the Act. *See project44, Inc. v. FourKites, Inc.*, 2024 IL 129227, ¶ 18; *People v. Fair*, 2024 IL 128373, ¶ 61.

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The question of what bases are available to remove a prosecutor under 55 ILCS 5/3-9008 also presents a question of statutory construction that the Court reviews de novo, *see Fair*, 2024 IL 128373, ¶ 61, but whether the circuit court properly denied petitioner's motions to rescind Milan's appointment under section 3-9008 is a question that this Court reviews for abuse of discretion, *see People v. Sears*, 49 Ill. 2d 14, 29 (1971) ("Whether, and under what circumstances, a special State's Attorney is to be appointed rests within the sound discretion of the court."); *In re the Appointment of Special Prosecutor*, 2019 IL App (1st) 173173, ¶ 20 (circuit court's decisions regarding appointment of special prosecutor reviewed for abuse of discretion); 55 ILCS 5/3-9008(a-10) (circuit court "may appoint" special prosecutor upon showing that State's Attorney has "an actual conflict of interest").

ARGUMENT

The appellate court erred in reversing the circuit court's order dismissing petitioner's torture case because petitioner failed to state a claim of torture under the Act. Rather than assert that he was "tortured into confessing to the crime for which [he] was convicted," as the Act requires, 775 ILCS 40/5(1), petitioner asserted that he was tortured but never confessed. Moreover, the statement attributed to petitioner (which he denied making) was not a confession to the crime for which he was convicted — that is, it was not a confession to murdering Damone Mims. Therefore, petitioner failed to

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state a claim of torture and the circuit court properly dismissed his torture case on that basis.

The appellate majority further erred by reversing the circuit court's orders denying petitioner's motions to rescind Milan's appointment as special prosecutor because petitioner failed to prove that Milan had an "actual conflict of interest," as required under 55 ILCS 5/3-9008(a-10). The basis for the majority's holding — that Milan could not faithfully represent the People in defending against the petitioner's collateral challenge because he was allegedly involved in petitioner's original prosecution — cannot serve as the basis for an actual conflict of interest, for a prosecutor who represents the People in a prosecution is free to continue representing the People in a subsequent collateral proceeding. Moreover, even if a prosecutor could not represent the People in both a prosecution and a collateral proceeding, petitioner failed to present any evidence that Milan was involved in his original prosecution. Therefore, petitioner failed to prove that Milan had an actual conflict of interest due to such involvement, and the circuit court correctly denied his motions to rescind Milan's appointment.

I. The Circuit Court Correctly Dismissed Petitioner's Torture Case Because He Failed to State a Claim of Torture Under the TIRC Act.

The circuit court correctly dismissed petitioner's torture case because petitioner did not allege a claim of torture under the Act. The Act provides "an extraordinary procedure to investigate and determine factual claims of torture," 775 ILCS 40/10, which it defines as claims "asserting that [the

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petitioner] was tortured into confessing to the crime for which [he] was convicted and the tortured confession was used to obtain the conviction," 775 ILCS 40/5(1); *see 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). Accordingly, when the Commission is determining whether to refer a claim to the circuit court for adjudication, the Commission's first step is to confirm that the claim "meets the definition of a claim of torture." 2 Ill. Admin. Code § 3500.340(a)(2). "To fall within the Commission's authority to act, or 'jurisdiction,' the claim must be that an officer coerced a confession that was used against the defendant to obtain his conviction." *See* TIRC, Mission Statement, https://tirc.illinois.gov/about-us.html (last visited Oct. 23, 2024) (citing 775 ILCS 40/5(1)). If the Commission refers a claim that does not allege the elements of a claim of torture, then the Commission has exceeded its statutory authority, and the circuit court may dismiss the claim as improperly referred. *See Mitchell v. People*, 2016 IL App (1st) 141109, ¶ 19 (Commission's decision to refer claim that it "lacks the statutory power" to refer "is treated the same as a decision by an agency which lacks personal or subject matter jurisdiction — the decisions are void" (citing *Bus. & Prof'l People for the Pub. Interest v. Ill. Commerce Comm'n*, 136 Ill. 2d 192, 243-44 (1989)).

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Here, petitioner did not allege a cognizable claim of torture. He did not assert that he "was tortured into confessing to the crime for which [he] was convicted." 775 ILCS 40/5(1). And his allegations of a *Brady* violation — that the prosecution failed to disclose that petitioner participated in lineups that did not result in identifications — not only failed to state a claim that he was tortured into confessing to Mims's murder, but were irrelevant to such a claim. Therefore, the Commission lacked authority to refer petitioner's case, and the circuit court properly dismissed the referred claims.

A. Petitioner failed to allege a cognizable claim of torture because he did not assert that he was tortured into confessing to Mims's murder.

To state a claim under the Act, petitioner had to assert (among other things) that he "was tortured into confessing to the crime for which [he] was convicted," 775 ILCS 40/5(1) — that is, he had to assert that he was tortured into confessing to Mims's murder. To determine whether petitioner satisfied this requirement by asserting that he was tortured but did *not* confess to Mims's murder, the Court must construe section 5(1) of the Act. In doing so, the Court's "primary objective . . . is to ascertain and give effect to the intent of the legislature," of which "[t]he most reliable indicator . . . is the language of the statute, given its plain and ordinary meaning." *Fair*, 2024 IL 128373, ¶ 61.

The Act's requirement that a claim of torture assert that the person "was tortured into confessing to the crime for which the person was convicted" has three components. First, the claim must assert that the

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person "was tortured." Second, the claim must assert that the person was tortured "into confessing." And third, the claim must assert that the person was tortured into confessing "to the crime for which the person was convicted."

This Court construed the first and second components in *Fair*. It held that "torture" means (as it does in common usage) "'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for the purpose of obtaining from that person a confession to a crime.'" *Fair*, 2024 IL 128373, ¶¶ 72-73, 96 (quoting 20 Ill. Admin. Code. § 2000.10)). Accordingly, to satisfy the first component by asserting that a person "was tortured," a claim must assert that the person was subjected to severe suffering for the purpose of obtaining a confession. *See id.* ¶¶ 73, 96; *Webster's Third New International Dictionary* 2414 (2002) (defining verb "torture" as "to extract or obtain by torture," as in "*tortured* a confession from the prisoner" (emphasis in original)). And, this Court further held, to satisfy the second component (that the person was tortured "into confessing"), a claim must assert that the severe suffering to which the person was subjected for the purpose of obtaining a confession was successful — that the alleged torture caused the person to confess. *See Fair*, 2024 IL 128373, ¶ 79 (to prove claim of torture, person must show that torture "resulted in a confession"); *see also Webster's Third New International Dictionary* 1184 (defining "into" as "a

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function word indicating a state or condition assumed, brought into being (as by force), or allowed to come about").

Although *Fair* did not address the third component — that the person was tortured into "confessing to the crime for which the person was convicted" — the language of section 5(1) is clear. To assert that the person was tortured into "confessing to the crime for which the person was convicted," a claim must assert that the person was tortured into admitting that the person committed the crime for which the person was convicted. *Black's Law Dictionary* 316 (8th ed. 2004) (defining "to confess" as "[t]o admit (an allegation) as true; to make a confession"); *id.* at 317 (defining "confession" as "[a] criminal suspect's oral or written acknowledgment of guilt, often including details about the crime"); *see also Webster's Third New International Dictionary* 475 (defining "confession" as "a statement of guilt or obligation pertaining to oneself" and "an acknowledgment of guilt by a party accused of an offense, (1) made before a judge or court in due course of legal proceedings or (2) made before an officer or other person"); *American Heritage Dictionary of the English Language* 385 (5th ed. 2018) (defining "confession" as "[a] statement made acknowledging guilt of an offense").

Thus, by its plain language, the Act's requirement that a claim assert that the person "was tortured into confessing to the crime for which the person was convicted" requires assertions that the person was tortured until, as a result of the torture, the person admitted to committing the crime for

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which the person was ultimately convicted. Here, that means that petitioner had to assert that he was tortured into confessing to Mims's murder.

The circuit court correctly dismissed petitioner's claim of torture as improperly referred because, rather than assert that he was tortured into confessing to Mims's murder, petitioner consistently *denied* that he was tortured into confessing, maintaining instead that he was tortured but never gave any statement in response. Moreover, the statement that the detectives attributed to petitioner (and that petitioner asserts was a fabrication) is not a confession to the crime for which petitioner was convicted.

1. Petitioner denied that he made any statement as a result of the alleged torture.

If a person is tortured but does not make any statement as a result of that torture, then the person was not tortured into confessing. *See Fair*, 2024 IL 128373, ¶ 79 (petitioner must prove that torture "resulted in a confession"). Thus, petitioner did not, by asserting that he was tortured but did not confess to murdering Mims, assert that he was tortured into confessing, as required under the Act.

Petitioner consistently maintained before both the Commission and the circuit court that he never gave any statement at all in response to the alleged torture. He told the Commission that he did not make the statement attributed to him by police. *See* C446 (petitioner asserted to Commission that, despite the alleged abuse, "he did not make the statements police attributed to him" and in fact "made no statements at all"); C453

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(Commission acknowledging that petitioner "denied making" statements attributed to him by police). And he remained adamant before the circuit court that he made no statement. *See* SUP C50 (asserting that detectives "fabricated a false confession that they attributed to [petitioner]"); C1141-42 (rejecting "the inaccurate premise that [petitioner] actually made the statement that was fabricated by the detectives"); C1144 n.4 (maintaining that petitioner "asserted his right to remain silent and no such statement . . . was ever made by him"); *see also* C1184 (asserting in postconviction petition that detectives "fabricated a confession by [petitioner] after he exercised his rights under *Miranda*"); C1189 (asserting in postconviction petition that petitioner "refused to confess"); C1193 (asserting in postconviction petition that petitioner "refused to make a statement, or to confess," and that, "[n]ot deterred by [petitioner's] silence[,] the detectives fabricated a confession by [petitioner]"); C1205 (asserting that evidence "confirms that [petitioner] invoked his right to silence and made no statement").

To be sure, an allegation that a person was convicted based on the prosecution's knowing presentation of a fabricated confession at trial states a due process claim. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959). But it does not state a statutory claim of torture. *See In re Derek Montgomery*, TIRC Claim No. 2019.656-M, at 2 (Oct. 16, 2019)[6] ("The fabrication of a

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[6] Links to all TIRC decisions cited in this brief are provided in the separate appendix.

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statement from a defendant, while a severe violation of Due Process if true, does not constitute torture[.]").

Similarly, allegations that a person was physically abused but did not confess may provide a basis for damages in a civil rights action, *see* 42 U.S.C. § 1983, but provide no basis for relief under the Act, *see Fair*, 2024 IL 128373, ¶ 82 ("In creating the Act, the legislature chose to address the serious problem of Chicago police torturing suspects into confessing, not acts of physical abuse by the police in general."); *see also In re Vincent Buckner*, TIRC Claim No. 2017.518-B, at 3-4 (Dec. 18, 2018) ("[The Act] is not a catch-all statute granting [the Commission] permission to review all criminal convictions where torture is alleged" but is limited to claims that "the state employ[ed] torture to secure a confession."). Accordingly, the Commission has long recognized that a petitioner fails to state a claim of torture under the Act unless he asserts that he confessed as a result of the alleged torture. *See In re Bobby Cooks*, TIRC Claim No. 2019.619-C, at 2 (Aug. 21, 2019) (summarily dismissing claim because claimant "claim[ed] that while he was tortured, he did not make any statement in response to that torture" and "the plain language of the TIRC Act limits th[e] Commission's jurisdiction to those instances in which a defendant claims that he was tortured into giving a statement against himself"); *In re Raul Fernandez*, TIRC Claim No. 2019.618-F, at 2-3 (Aug. 21, 2019) (summarily dismissing claim where claimant alleged that he was tortured but "emphatically assert[ed] that he

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did not make any statement in response to that torture" because claims of torture are limited to "instances in which a defendant claims that he was tortured into giving a statement against himself"); *In re Arnold Dixon*, TIRC Claim No. 2019.598-D, at 2-3 (Feb. 22, 2019) (summarily dismissing claim because claimant "d[id] allege his own mistreatment by police, but d[id] not allege such mistreatment led him to make a statement against himself"); *In re Willie Hampton*, TIRC Claim No. 2013.141-H, at 3 (May 17, 2017) (summarily dismissing claim where claimant alleged he was tortured but "d[id] not allege his torture resulted in any statements to authorities").

Therefore, the Commission had no authority to refer petitioner's claim that he was tortured but did not provide a statement to police as a result, and the circuit court correctly dismissed the case as improperly referred.

2. The statement attributed to petitioner was not a confession.

Moreover, because petitioner's statement was not a confession, the circuit court would have correctly dismissed petitioner's claim as improperly referred even if he had changed course and asserted that he *did* make the statement attributed to him by police. The assertions in that statement — that he was a member of the Vice Lords, knew nothing about the murder, knew there was a warrant for his arrest, and at some point went to Washington for a fresh start — were neither individually nor cumulatively a confession to murdering Mims.

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For a person to have "confess[ed] to the crime for which the person was convicted," 775 ILCS 40/5(1), the person must have admitted to committing that crime. That is the common understanding of what it means to confess to a crime. *See supra* p. 33. A person who denies any knowledge of a crime has not confessed to that crime in common parlance. *See In re Lorenzo Hall*, TIRC Claim No. 2013.195-H, at 3-4 (Oct. 21, 2020) (summarily dismissing claim where claimant "did not provide an inculpatory statement to the police that would constitute a confession" because his statements "were exculpatory in nature as they denied any knowledge of the crime"). Similarly, a person who admits to incriminating facts, such as that the person left the state after the crime, has not confessed under the common definition because the person has not actually admitted guilt.

Illinois law has long drawn the same distinction between confessions and admissions. Under Illinois law, "[a] confession must acknowledge all the elements of a crime and be a confession of guilt," *People v. Floyd*, 103 Ill. 2d 541, 548 (1984), unlike an admission, which is "any statement or conduct from which guilt of the crime may be inferred but from which guilt does not necessarily follow," *People v. Georgev*, 38 Ill. 2d 165, 175-76 (1967) (internal quotation marks omitted). Illinois law has recognized this distinction for more than a century. *See*, *e.g.*, *People v. Stanton*, 16 Ill. 2d 459, 466 (1959) (recognizing "distinction between a statement which is only an admission and one which constitutes a confession of guilt to the crime charged"); *People v.*

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Manske, 399 Ill. 176, 185 (1948) (recognizing "well-defined distinction" between confessions and admissions, whereby "[a]n acknowledgment of facts which may tend to establish guilt is not a confession but only an incriminating admission" (internal quotation marks omitted)); *People v. Kircher*, 309 Ill. 500, 507 (1923) (confession is "an acknowledgment of guilt, and not of incriminating facts," for "[a]n acknowledgment of facts merely tending to establish guilt is not a confession, but only an incriminating admission" (internal citations omitted)). Thus, petitioner's statements that he knew nothing about Mims's murder but knew about the warrant for his arrest and went to Washington for a fresh start were no more a confession under Illinois law than they were under the common definition of the term. *See People v. Harvey*, 2024 IL 129357, ¶ 24 (defendant "did not 'confess' to police that he committed the offense of [unlawful use of a weapon]" — "[t]hat is, he did not make an extrajudicial statement admitting to all of the elements of that crime" — where he "admitted to only *one* element of the . . . offense" (citing *Georgev*, 38 Ill. 2d at 175) (emphasis in original)); *Floyd*, 103 Ill. 2d at 545, 548 (defendant's statements that he held drowning victim's head underwater but "didn't mean to hold it under too long" were not confession to first degree murder because, although "indeed incriminating, they [we]re not inconsistent with his contention that the death of the deceased was accidental").

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Because the plain language of the Act is clear and unambiguous under both common usage and common law, the appellate court erred when it deferred to the regulatory definition. A23, ¶ 64l A24, ¶ 67; *see Boaden v. Dep't of Law Enf't*, 171 Ill. 2d 230, 239 (1996) (where "the statute is not ambiguous," courts do not "defer to the [agency's] interpretation"). To the extent that the administrative definition of "tortured confession"[7] as used in the Act broadens section 5(1) to include claims that a person was tortured but did not confess to the crime for which the person was convicted, it "must be held invalid," for "a regulation cannot narrow or broaden the scope" of a statute as evident from its plain language. *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶ 61; *see Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 366 (2009) ("If, however, an administrative regulation is inconsistent with the statute under which it was adopted, the regulation will be held invalid."). Because section 5(1) plainly excludes claims that a person was tortured but did not admit to committing the crime for which he was convicted, any regulatory definition that would allow such claims carries no weight. *Boaden*, 171 Ill. 2d at 239 ("the erroneous construction of a statute by an administrative agency is not binding on this court," for the Court's "deference

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[7] "'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." 20 Ill. Admin. Code. § 2000.10 (citing 775 ILCS 40/5(1)).

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to administrative experience will not serve to license a governmental agency to expand the operation of a statute" (citing *Northern Trust Co. v. Bernandi*, 115 Ill. 2d 354, 365 (1987)).

Although the appellate court acknowledged the well-established distinction between confessions and admissions, A17-18, ¶ 51 (collecting cases), and further acknowledged that the distinction applies "to all instances other than the limited circumstances of permitting a pretrial hearing on a motion to suppress a confession under [735 ILCS 5/11-114]," A22, ¶ 62, the appellate court nonetheless found section 5(1)'s use of "confession" to be ambiguous, A23, ¶ 64. Based on that purported ambiguity, the appellate court turned to the regulatory definition to construe "confession" as meaning any statement "containing admissions or incriminating information," A23-24, ¶¶ 64-65. But none of the three grounds on which the appellate court relied to find the necessary ambiguity — one based on the text of section 5(1) (informed by the regulatory definition), one based on the nature of proceedings under the Act, and one based on the use of "confession" in an entirely different statute and the Illinois Pattern Jury Instructions (IPI) — withstand scrutiny.

First, the appellate court asserted that the term "confession" means something broader in section 5(1) than it does everywhere else because it is modified by the word "tortured." A21, ¶ 61. But there is no basis to construe the legislature's use of an adjective to limit the scope of "confession" to

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"tortured" confessions as broadening the scope of the term. To the contrary, when read in context, the use of "tortured" to modify "confession" only confirms that the term is limited to traditional confessions and excludes admissions. Section 5(1) defines a claim of torture under the Act as a claim asserting both that the person "was tortured into confessing to the crime for which the person was convicted" and that "the tortured confession was used to obtain the conviction." 775 ILCS 40/5(1). So there can be no "tortured confession" unless the person has "confess[ed] to the crime for which the person was convicted," for a person's "tortured confession" is the product of the person having been "tortured into confessing to the crime for which the person was convicted." In other words, if the person who was tortured into making a statement did not "confess[ ] to the crime" — that is, if the person did not actually admit guilt, *see supra* pp. 33, 38-39 — then the statement made as a result of torture is not a "tortured confession."

The appellate court's second reason for its expansive construction of "confession" rested on its misunderstanding of the nature of proceedings under the Act. The appellate court believed that the circuit court's role when reviewing a claim of torture under the Act was to determine only "whether the outcome of the suppression hearing would likely have been different given the new pattern and practice evidence." A22, ¶ 62 (citing *People v. Anderson*, 2023 IL App (1st) 200462, ¶ 154). Because a suppression hearing might result in the suppression of any statement, not just a traditional

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confession, the appellate court reasoned that section 5(1)'s use of "confession" must mean any statement. *Id.* But this Court has since rejected the appellate court's view of the circuit court's role under the Act, *see Fair*, 2024 IL 128373, ¶ 79; vacated the decision in *People v. Anderson* (which the appellate court relied on for its position), *see People v. Anderson*, 232 N.E. 3d 3 (Ill. Mar. 27, 2024) (vacating and remanding for reconsideration in light of *Fair*); and expressly overruled *People v. Wilson*, the case upon which *Anderson* relied, *Fair*, 2024 IL 128373, ¶ 79 (overruling *People v. Wilson*, 2019 IL App (1st) 181486). Thus, it is now settled that the circuit court's role is *not* merely to evaluate whether new evidence of coercion would likely result in the suppression of any statement, *id.*, and so the nature of the court's role in proceedings under the Act does not dictate that "confession" be construed as including any statement.

Finally, the appellate court suggested that the distinction between confessions and admissions may no longer exist because 720 ILCS 5/12-7 criminalizes attempting to coerce a "confession, statement or information regarding any offense" from a person by force or threat of force, A24, ¶ 66, and because the IPI no longer draw the distinction between confessions and admissions, A21-22, ¶ 61. But section 12-7's prohibition against coercing either a "confession" or a "statement or information regarding any offense" demonstrates that the General Assembly recognized that a confession remains distinct from other, non-confession statements relating to an offense.

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And the change to the IPI was made *because* the distinction between confessions and admissions remains so significant.

The pattern instructions once directed trial courts to give different instructions regarding the jury's consideration of a defendant's statement depending on whether the statement was a confession or an admission. *See People v. James*, 2017 IL App (1st) 143391, ¶¶ 121-23; *see also* IPI, Criminal, Nos. 3.06 & 3.07 (1st ed. 1961). The two instructions were subsequently "consolidated into one, IPI Criminal 3.06-3.07, which used the general term 'statement' in place of the more specific terms 'confession' and admission.'" *James*, 2017 IL App (1st) 143391, ¶ 126; *see* IPI, Criminal, No. 3.06-3.07 (2d ed. 1981). The reason for this change was not that the terms "confession" and "admission" no longer carried different meanings, but that the difference between their meanings was so significant that "the wrong instruction could prove highly prejudicial, because a judge's characterization of a statement as a confession may discourage a jury from making a close analysis of what [the] defendant actually said." *James*, 2017 IL App (1st) 143391, ¶ 125 (internal quotation marks omitted). After all, if the judge instructed the jury that the defendant had confessed, the jury would understandably assume that the defendant had admitted to committing the offense. The IPI's adoption of a more neutral term — "statement" — to avoid the risk of prejudicing a defendant by mischaracterizing his admission as a confession therefore defeats rather than supports the appellate court's suggestion that the terms

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"confession" and "admission" are no longer distinct, such that the Act's use of "confession" means both confessions and admissions.

B. Petitioner's *Brady* claim was not a cognizable claim of torture.

The appellate court further erred by holding that petitioner's *Brady* claim could "be raised under the Act" because it was "closely tethered to the merits of [his] torture claim." A27-28, ¶ 77. The circuit court's role under the Act is to determine whether the petitioner is entitled to relief on a claim of torture under the Act, "not to assess the voluntariness of statements or other constitutional claims that can be raised in a postconviction petition." *Fair*, 2024 IL 128373, ¶ 79. If petitioner wishes to pursue a *Brady* claim, he must do so through a postconviction petition, for such claim is beyond the scope of the circuit court's review of the claim of torture referred by the Commission. *See id.* And, indeed, petitioner is currently litigating a successive postconviction petition raising that very claim. *See* C1219, 1227.

Nor was petitioner's *Brady* claim otherwise relevant to determining whether, under the totality of the circumstances, he was subjected to a degree of suffering "sufficiently extreme to qualify as torture under the Act." *Fair*, 2024 IL 128373, ¶ 88. 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. *Id.* In some cases, these pressures may arise from misconduct that could also be raised as

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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. *See id.*

But what the prosecution does or does not disclose to the defense sometime after a petitioner confesses has no bearing on the petitioner's mental state during the interrogation. *See Moran v. Burbine*, 475 U.S. 412, 422 (1986) ("Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right."). 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 possibly have affected petitioner's mental state when detectives were interviewing him more than a year earlier in April 2000. Therefore, the circuit court correctly declined to consider petitioner's *Brady* claim because that claim was irrelevant to a claim that petitioner was tortured into confessing to Mims's murder.

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In sum, the circuit court properly dismissed petitioner's case as improperly referred by the Commission because petitioner failed to assert that he was tortured into confessing to Mims's murder, as required to state a claim of torture under the Act.

II. The Circuit Court Correctly Denied Petitioner's Motions to Rescind Milan's Appointment as Special Prosecutor Because Petitioner Failed to Prove That Milan Had an Actual Conflict of Interest.

The circuit court correctly denied petitioner's motions to rescind Milan's appointment as special prosecutor based on a conflict of interest under section 3-9008(a-10) because petitioner failed to prove that Milan had a disqualifying conflict of interest. Section 3-9008(a-10) governs the removal of a State's Attorney and appointment of a special prosecutor — or removal of a special prosecutor and appointment of a new special prosecutor — due to a conflict of interest. It provides that a circuit court may remove a prosecutor from a case and appoint a new prosecutor "[i]f the court finds that the petitioner has proven by sufficient facts and evidence that the [prosecutor] has an *actual* conflict of interest in a specific case." 55 ILCS 5/3-9008(a-10) (emphasis added). Accordingly, petitioner faces a "very high burden" to disqualify a State's Attorney under section 3-9008(a-10). *In re Appointment of Special Prosecutor*, 2019 IL App (1st) 173173, ¶ 49.

Although section 3-9008 does not define "actual conflict of interest," the term has a well-defined meaning at common law, which meaning presumably applies here. *See Advincula v. United Blood Svcs.*, 176 Ill. 2d 1,

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17 (1996) ("A term of well-known legal significance can be presumed to have that meaning in a statute."); *Lutkauskas v. Ricker*, 2013 IL App (1st) 121112, ¶ 29 ("words and phrases having well-defined meanings in the common law are interpreted to have the same meanings when used in statutes dealing with the same or similar subject matter as that with which they were associated at common law" (internal quotation marks omitted)). The common law defines "actual conflict of interest" as a conflict of interest that "adversely affected [the attorney's] performance" on behalf of the client. *People v. Yost*, 2021 IL 126187, ¶ 38.

Therefore, to prove that Milan had an actual conflict of interest, petitioner had to prove both that Milan had an interest in petitioner's torture case that conflicted with the People's interest in the case and that there was "a specific deficiency in [Milan's] strategy, tactics, or decision making that is attributable to the alleged conflict." *Id.* To bear this burden, petitioner had to provide "more than mere suspicion or speculation," *McCall v. Devine*, 334 Ill. App. 3d 192, 205 (1st Dist. 2002); he had to provide "facts and evidence," 55 ILCS 5/3-9008(a-10).

The circuit court properly denied petitioner's motions to rescind Milan's appointment as special prosecutor and replace him with a new special prosecutor because petitioner failed to prove that Milan had any conflict of interest, much less a conflict that actually impaired his representation of the People's interests. First, the alleged conflict — that

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Milan's interest in defending petitioner's conviction against the collateral challenge conflicted with the People's interest in doing so because Milan had represented the People in the original prosecution — is not a conflict at all. And second, even if a prosecutor could not represent the People in both a prosecution and subsequent collateral proceedings alleging misconduct during that prosecution, petitioner failed to prove that Milan was involved in his original prosecution such that he could not represent the People in petitioner's collateral proceedings.

A. A prosecutor may represent the People in both a criminal prosecution and a subsequent collateral proceeding involving allegations of prosecutorial misconduct.

A prosecutor does not have a conflict of interest when he represents the People in a criminal prosecution and then represents the People again in the subsequent collateral proceedings alleging misconduct on the part of law enforcement. Not only are the People the party represented in both proceedings, but their interests are consistent across the two proceedings. When the People charge a defendant with a crime, the People's interest is in obtaining a conviction after a fair trial. *See Michigan v. Tucker*, 417 U.S. 433, 450 (1974) (recognizing "society's interest in the effective prosecution of criminals"); *Kennedy v. Washington*, 986 F.2d 1129, 1131 (7th Cir. 1993) (recognizing "the government's interest in convicting the guilty"); *see also People v. Ray*, 126 Ill. App. 3d 656, 664 (1st Dist. 1984) ("The State's interest in criminal prosecution is not that it must win at all costs, but to assure that justice is done," which includes the duty to "employ legitimate techniques to

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secure a just conviction") (citing *Viereck v. United States*, 318 U.S. 236, 248 (1943)). If a defendant whom the People believe was properly convicted of a crime raises a collateral challenge to that conviction, then the People's interest in the collateral proceedings is in defending the conviction and preserving the finality of the judgment. *See People v. Szabo*, 186 Ill. 2d 19, 23 (1998) (recognizing "society's interest in the finality of criminal convictions"). Thus, there is no conflict between the People's interests in a prosecution and in the subsequent collateral proceedings, and Milan's alleged involvement in petitioner's prosecution could not have prevented him from faithfully representing the People in the later collateral proceedings on petitioner's claim of torture.

The appellate majority's holding that a prosecutor who represented the People in a criminal prosecution may not continue to represent the People in later collateral proceedings because he would "possess the improper ability to 'judge' himself and his subordinates," *see* A32-33, ¶ 94, rests on the misapprehension that when a prosecutor defends a conviction against allegations of error, the prosecutor acts as a judge rather than an advocate. The majority relied on *Imbler v. Pachtman*, 424 U.S. 409, 423 n.20 (1976), for the proposition that prosecutors are "quasi-judicial" officers because they exercise prosecutorial discretion in deciding whether to initiate a prosecution. A32, ¶ 93. The majority then turned to *Williams v. Pennsylvania*, 579 U.S. 1 (2016), A33, ¶ 95, which held that *a judge* may not rule on a defendant's

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collateral challenge to his conviction when the judge, in an earlier career as a prosecutor, "had a direct, personal role in the defendant's prosecution," *Willaims*, 579 U.S. at 10-11. Based on the belief that prosecutors' exercise of prosecutorial discretion effectively makes them judges, the majority concluded that, just as a judge may not rule on a collateral challenge in case that he or she prosecuted, a prosecutor may not defend against a collateral challenge in a case that he or she prosecuted. A33, ¶ 96. But the majority misread *Imbler* and improperly extended *Williams* beyond the context of judicial bias.

Imbler does not stand for the proposition that prosecutors are effectively judges because they exercise prosecutorial discretion. *Imbler* concerned the scope of the common-law immunity enjoyed by prosecutors for actions within the scope of their prosecutorial duties, which "courts sometimes have described . . . as a form of 'quasi-judicial' immunity," 424 U.S. at 420, because it "is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties," *id.* at 422-23; *see People ex rel. Schreiner v. Courtney*, 380 Ill. 171, 179 (1942) (describing State's Attorneys as "a quasi-judicial officer[s]" in that "they are exempt from liability for error or mistake of judgment in the exercise of their duty in the absence of corrupt or malicious motives"). *Imbler* explained that judges, prosecutors, and grand jurors all "exercise a discretionary judgment on the basis of evidence presented to

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them," and that "[it] is the functional comparability of their judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as 'quasi-judicial' officers, and their immunities being termed 'quasi-judicial' as well." *Id.* at 423 n.20. *Imbler* did not suggest that a prosecutor is a "quasi-judicial" officer in any broader sense.

Indeed, the power that the majority below believed makes the prosecutor a "quasi-judicial" officer for all purposes — the prosecutorial discretion to charge — is an exclusively executive power. *See People ex rel. Daley v. Moran*, 94 Ill. 2d 41, 45 (1983) ("It is a familiar and firmly established principle that the State's Attorney, as a member of the executive branch of government, is vested with exclusive discretion in the initiation and management of a criminal prosecution."). If a prosecutor were a judge, then the prosecutor would be barred from exercising prosecutorial discretion in the first place. *See id.* at 46 (judge's attempt to initiate prosecution was "an impermissible exercise by the judicial branch of powers belonging exclusively to the executive"). Therefore, the fact that a prosecutor exercised prosecutorial discretion in a prosecution is not a basis to disqualify the prosecutor from representing the People in a subsequent collateral proceeding.

Nor is a defendant's allegation that a prosecutor (or one of the prosecutor's colleagues or subordinates) engaged in some form of misconduct a basis to disqualify a prosecutor from representing the People in a collateral

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proceeding. *See* A32-33, ¶ 94; A38, ¶ 110. As the dissent recognized, A70-71, ¶¶ 164-65 (Tailor, J., concurring in part and dissenting in part), under the majority's rule, a postconviction petitioner could force the removal of the State's Attorney from his case simply by alleging a *Brady* violation, a *Napue* violation, or some other form of prosecutorial misconduct. Although the majority dismissed this concern as "far-fetched," A41-42, ¶ 123, it offered no limiting principle to prevent it from coming to pass, instead confirming its view that "section 3-9008 dictates disqualification of prosecutors alleged to have committed misconduct against petitioners," A42, ¶ 123.

Prosecutors routinely respond to allegations of prosecutorial misconduct raised at trial and in collateral proceedings. The majority's rule that defendants may remove prosecutors simply by alleging misconduct would improperly relieve defendants of the "very high burden" that they bear to disqualify a State's Attorney under section 3-9008(a-10). *In re Appointment of Special Prosecutor*, 2019 IL App (1st) 173173, ¶ 49. The resulting regular removal of State's Attorneys would also regularly disenfranchise the citizens who elected them. *See id.* ("To disqualify the state's attorney is to disenfranchise the electorate who voted for her."). There is no indication that the legislature intended section 3-9008(a-10) to dramatically limit the scope of State's Attorneys' constitutional and statutory authority in this way.

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Finally, the majority was incorrect in holding that a prosecutor must be disqualified from a case "regardless of whether [the prosecutor] was personally involved in [the case]" simply because the prosecutor, as an employee of the prosecuting agency, has an interest in the agency's "reputation" and therefore "has a personal interest that constitutes a conflict." A37-38, ¶ 109. The majority did not explain how a prosecutor's interest in defending a conviction (and thereby supposedly protecting the prosecuting agency's reputation) conflicts with the People's interest in defending the conviction (and thereby preserving the finality of a judgment obtained after a presumptively fair trial). Moreover, this Court has rejected the majority's position that government attorneys are necessarily more committed to their agencies' reputations than to their client's interests. *See People v. Banks*, 121 Ill. 2d 36, 43 (1987) (rejecting argument that "a public defender's loyalty toward the reputation of his office is of such magnitude that a *per se* conflict of interest rule should apply whenever an assistant public defender asserts the incompetency of another assistant," and noting possible reputational benefits from "an office aggressively pursu[ing] allegations made against some of its members").

The bare fact that Milan worked for the CCSAO when petitioner was charged in 2000 did not prove that, nearly 20 years later, he had an actual conflict of interest that prevented him from faithfully representing the People in their defense against petitioner's claim of torture. Nor would Milan's

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actual participation in petitioner's prosecution in 2000, if shown, have proved that he could not faithfully represent the People in defending against petitioner's claim. Therefore, the circuit court properly denied petitioner's motions to rescind Milan's appointment as special prosecutor on the ground that he had worked for the CCSAO and was allegedly involved in petitioner's prosecution.

B. Moreover, petitioner failed to prove that Milan was involved in petitioner's criminal prosecution.

Even if Milan's personal involvement in petitioner's prosecution alone could provide a basis to find an actual conflict of interest (and it cannot), the circuit court properly denied petitioner's motion to rescind Milan's appointment because petitioner failed to prove that Milan was personally involved in his prosecution.

Petitioner's motions to rescind alleged only that Milan once took statements from two suspects in cases unrelated to petitioner's. *See* C409 (first motion asserting that Milan took confessions of two suspects in two unrelated cases); *see also* C915-17 (second motion asserting that an ASA sent Milan a memo recounting a different suspect's injuries and allegations of abuse while in custody in a different Area station in connection with a different murder).

Although the appellate majority overlooked petitioner's failure to present evidence by insisting that Milan "admitted" to some unspecified involvement in petitioner's prosecution, *see* A39, ¶ 115; A41, ¶¶ 120, 122, that

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assertion is belied by the record, which contains only Milan's repeated *denials* of any involvement in petitioner's prosecution, *see* C398 (Milan's statement that he "did not personally prosecute [petitioner]," "made no decisions on the case," and did not have "any involvement in the case whatsoever"); C638 (Milan's statement that he "never consulted about [petitioner's] case back in 1999 or 2000," "never interviewed witnesses," "had no role in charging [petitioner]" or "tr[ying] this case," and "never heard of [petitioner] . . . until [he] was appointed on [petitioner's] case two years ago"); C950 (Milan's statement that he "never participated personally or substantially in [petitioner's] case" and "had no knowledge of [petitioner's] case until [petitioner's current counsel] required [his] appointment as the Special Prosecutor").

The record also belies the majority's assertion that Milan "ignor[ed] that . . . *he initiated* the prosecution of [petitioner] years ago." A28, ¶ 80 (emphasis in original). Milan did not "ignore" that he charged petitioner; he *denied* that he did so, averring that he "had no role in charging [petitioner]." C638; *see* C398. And the Commission corroborated his denial in its referral decision, finding that the charges were approved by a different ASA. *See* C440 (finding that "[ASA] Tiernan approved [first] degree murder charges against [petitioner]").

Finally, the appellate majority's accusation that Milan "fail[ed] to disclose his relationship with Detective McDermott and violat[ed] due process

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and the rules of professional conduct," A28, ¶ 80, is wholly unfounded. As the dissent pointed out, *see* A62, ¶ 149, the record contains no evidence that Milan had any relationship with McDermott, much less a relationship that could give rise to an actual conflict of interest.

Therefore, absent any evidence that Milan was involved in petitioner's prosecution in any way, the circuit court did not abuse its discretion by denying petitioner's motions to rescind Milan's appointment due to an actual conflict of interest arising from such involvement. *See* 55 ILCS 5/3-9008(a-10) (circuit court "may appoint some competent attorney to prosecute or defend the cause," but only "[i]f the court finds that the petitioner has proven by sufficient facts and evidence that the [current prosecutor] has an actual conflict of interest in [that] specific case"); *see also McCall*, 334 Ill. App. 3d at 203 (petition for appointment of special prosecutor properly denied where petitioner "failed to allege any specific failure . . . which would illustrate that [the prosecutor] has abandoned his duties to the people of the State of Illinois in this case"); *Baxter v. Peterlin*, 156 Ill. App. 3d 564, 567 (3d Dist. 1987) (same where petitioner's allegations of conflict were "speculative and conclusory").

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CONCLUSION

The People of the State of Illinois respectfully request that this Court reverse the judgment of the appellate court.

October 23, 2024

Respectfully submitted,

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RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing 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 14,203 words.

/s/ Joshua M. Schneider
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CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On October 23, 2024, the foregoing **Brief of Respondent-Appellant People of the State of Illinois** and **Separate Appendix** were filed with the Clerk of the Supreme Court of Illinois, using the Court's electronic filing system, which provided service to the following:

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No. 130470

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court
	)	of Illinois, First Judicial District,
Respondent-Appellant,	)	No. 1-22-0372
	)	
	)	There on Appeal from the
	)	Circuit Court of Cook County,
v.	)	Illinois, No. 00 CR 13572
	)	
	)	
	)	The Honorable
ABDUL MALIK MUHAMMAD,	)	Lawrence Flood,
	)	Leroy K. Martin, Jr., and
Petitioner-Appellee.	)	Erica Reddick, Judges Presiding.

SEPARATE APPENDIX OF RESPONDENT-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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2023 IL App (1st) 220372
No. 1-22-0372
Opinion filed December 22, 2023

SIXTH DIVISION

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
	)	
v.	)	No. 00 CR 1357201
	)	
	)	
ABDUL MALIK MUHAMMAD,	)	Honorable
	)	Lawrence Flood,
Defendant-Appellant.	)	LeRoy K. Martin, Jr.
	)	Erica L. Reddick,
	)	Judges Presiding

JUSTICE HYMAN delivered the judgment of the court, with opinion.
Justice C.A. Walker concurred in the judgment and opinion.
Justice Tailor concurred in part and dissented in part, with opinion.

OPINION

¶ 1 For more than two decades, scores of criminal convictions in Chicago have been reversed due to confessions elicited through torture. This appeal involves allegations of a tortured confession and a conflict of interest by the special prosecutor appointed to probe it. Our determination of these two issues impacts the fairness, transparency, and effectiveness of the process established to redress a notorious injustice that has blemished the reputation of the Chicago Police Department and the overwhelming majority of officers who faithfully serve with honor.

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¶ 2 Abdul Malik Muhammad, convicted of a 1999 shooting death, made allegations to the Illinois Torture Inquiry and Relief Commission (Commission) that police officers of Area 2 extracted a statement from him through torture. In 2018, the Commission supported Muhammad's claim, which required Muhammad to move the circuit court to appoint a special state's attorney. In similar cases, Robert J. Milan was named the special state's attorney. Milan's appointment followed the decision by the Cook County State's Attorney's Office that it could not be involved because an alleged torturer of Muhammad, Detective Michael McDermott, had worked for the state's attorney's office as an investigator after he retired from the Chicago Police Department.

¶ 3 Milan later filed a motion to terminate the proceedings, arguing that Muhammad's "confession" fell outside the purview of the Illinois Torture Inquiry and Relief Commission Act (Act) (775 ILCS 40/1 *et seq.* (West 2018)). The circuit court granted Milan's motion without an evidentiary hearing.

¶ 4 Meantime, Muhammad's counsel challenged Milan as having a conflict of interest like that of the state's attorney's office and sought to rescind Milan's appointment. The circuit court denied several attempts to remove him.

¶ 5 Muhammad argues that the circuit court erred in dismissing his claim without an evidentiary hearing and refusing to remove Milan due to an actual conflict of interest. We agree because Milan is in the unusual position of having to judge himself and those who were his subordinates.

¶ 6 At the evidentiary hearing on remand, the circuit court should decide the merits of Muhammad's claim that he was tortured into giving the statement as well as the possible *Brady*

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v. Maryland, 373 U.S. 83 (1963), violation relating to the State's alleged failure to disclose that Muhammad participated in multiple lineups in which several witnesses did not identify him.

¶ 7 While the panel is unanimous on the disposition concerning the evidentiary hearing on remand, there is disagreement on the second issue involving Milan's conflict of interest. In light of all that Milan has disclosed in the record, we find that his staying on as special prosecutor violates Muhammad's right to a prosecutor unencumbered by conflicting loyalties and potentially prejudicial inclinations.

¶ 8 The dissent, however, finds no grounds to remove Milan. This approach undermines the integrity and legitimacy of the entire process. Had Milan been forthcoming at the hearing on his appointment, the judge, with input from Muhammad's counsel, would have been able to resolve his eligibility to serve. Instead, Milan remained silent, earning thousands of dollars in compensation and overseeing a case involving an underling at the state's attorney's office who, Muhammad alleged, had tortured him when he was a police officer. His actual conflict exposed, Milan cannot remain in place. As recognized almost 100 years ago, "No system of justice can rise above the ethics of those who administer it." National Wickersham Commission on Law Observances and Law Enforcement, 1929. Accordingly, we reverse the circuit court's orders denying Muhammad's motions to rescind Milan's appointment and remand for the appointment of a special prosecutor free of conflicts of interest.

¶ 9 Background

¶ 10 The State charged Muhammad with three counts of first degree murder and two counts of aggravated discharge of a firearm for the May 4, 1999, shooting death of Damone Mims. Following conviction by a jury, Muhammad was sentenced to 50 years' imprisonment. *People*

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v. Muhammad, 346 Ill. App. 3d 1177 (2004) (table) (unpublished order under Illinois Supreme Court Rule 23).

¶ 11 In 2014, Muhammad submitted a claim of torture to the Illinois Torture Inquiry and Relief Commission (TIRC) under section 45 of the Act (775 ILCS 40/45 (West 2014)) alleging (i) he had been "interrogated for four days at Area 2 in a cell that did not have a bed, food, toilet, or water"; (ii) "Detective [Michael] McDermott threatened him, boasting that he 'kn[ew] how to get [Muhammad] to confess without leaving a mark' " and "aggressively slammed a large casefile on the table, closed the interrogation room door and told his colleagues *** that he needed a moment alone with [Muhammad]"; (iii) alone with Muhammad, McDermott used racial intimidation by telling him that "a jury would be more likely to believe white witnesses than a black defendant"; and (iv) during two of four lineups, Muhammad was "forcefully held" by the arm.

¶ 12 Muhammad's alleged statement was included in a police report prepared by Detective McDermott. Detective David Fidyk, McDermott's partner, testified at trial that Muhammad made admissions during an interview after being Mirandized. See *Miranda v. Arizona*, 384 U.S. 436 (1966). According to Fidyk, Muhammad told him that "he was a Vice Lord. Member of the Vice Lord street gang from around 79th and Dobson. He denied any knowledge of the aggravated battery case report, which he was the victim, the one that was assigned to myself. He said he had no knowledge of the murder and knew that there was an arrest warrant for him regarding this case and he went to Washington." On redirect examination, Fidyk testified that Muhammad "stated that he knew of the warrant for his arrest and he decided to move to Washington to turn his life around."

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¶ 13 The Commission investigated Muhammad's claims. When questioned by the Commission staff, Muhammad's "allegations expanded, and he claimed he was actually beaten by McDermott with a case file on the head, denied food, forced to urinate on the floor and to defecate into a shirt in his interrogation room because he was denied bathroom use." According to the Commission, Muhammad never claimed he had been abused at trial or on appeal. The Commission further stated, "[Muhammad]'s own attorney noted to [the Commission] that *** there was no 'confession' in the traditional sense *** only partially incriminating statements."

¶ 14 The Commission voted on July 18, 2018, to refer the matter for judicial review, though it noted "severe reservations about [Muhammad]'s credibility in regards to his claims of physical abuse." Yet, the trial record indicates that Muhammad asserted an alibi defense and argued his statement corroborated with his alibi defense. At trial, Muhammad's grandmother, Flora Walker, testified that Muhammad came to stay with her in Seattle on May 3, 1999, the Monday before Mother's Day and the day before Mims's murder, because he had been beaten up. She picked up her grandson at the airport between 12:15 and 1 p.m. In closing argument, defense counsel used Muhammad's statement to Detective Fidyk to reinforce Muhammad's mother's testimony that Muhammad had left for Seattle long before police ever issued the warrant.

¶ 15 At the jury instruction conference, defense counsel said Muhammad wanted to "turn this into a second-degree murder case." Before closing arguments, defense counsel asked for a "second degree instruction because there is some evidence that my client was the victim of a beating" on May 1. The State objected. The trial judge recognized that Muhammad may be entitled to instructions on inconsistent defenses but denied the request, finding "there is no testimony that he was acting in the heat of passion."

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¶ 16 The Commission concluded that, even though Muhammad had not confessed to the murder, the statement he made to Fidyk came within the Commission's administrative rule of a

> " 'Tortured Confession' includ[ing] 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." 20 Ill. Adm. Code 2000.10 (2017).

The Commission further stated that the involvement of "[Jon] Burge Detective" McDermott, who had well-documented findings of abuse, and a possible *Brady* violation based on the State's failure to disclose nonidentifications of Muhammad after multiple lineups, amounted to "sufficient credible evidence of torture meriting judicial review."

¶ 17 In November 2018, Muhammad's counsel moved to have the Office of the Special Prosecutor (OSP) and Robert Milan (collectively, "Milan") appointed, given that the Cook County State's Attorney's Office (SAO) had concluded its involvement would be inappropriate, as Detective McDermott worked for the SAO as an investigator after he retired from the Chicago Police Department. Milan was appointed as the special prosecutor for the "Burge-related" cases in April 2017 and led the OSP after the previous special prosecutor resigned. The presiding judge of the criminal division appointed Milan on November 20, 2018.

¶ 18 After his review, Milan concluded that the evidence against Muhammad was overwhelming and the OSP would continue to defend the conviction. After that, on August 20, 2020, Milan moved the circuit court to terminate the proceedings on the basis that Muhammad had not articulated a claim of torture under the Act. Milan took the position that Muhammad's statement

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to Detective Fidyk did not amount to a "confession" as defined by Illinois law and required by the Act. Milan believed that the Commission did not have the authority to expand the scope of its statutory mandate by adopting regulations defining a "confession" more broadly.

¶ 19 For the *Brady* violation, Milan argued that the Act specifically limits the Commission's authority to conduct inquiries into "claims of torture," defined 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." 775 ILCS 40/5(1) (West 2018).

Relatedly, Milan argued that the Commission expressly found that Muhammad's allegations of abuse were not credible but still referred the matter for judicial review.

¶ 20 Shortly afterward, Muhammad filed a "Motion to Rescind" Milan's appointment as the special prosecutor, claiming: (i) Milan's appointment was improper under the Counties Code (55 ILCS 5/3-9008 (West 2018)); (ii) Milan suffered a disabling conflict of interest based on his service as the first assistant state's attorney and supervisor of felony review for the SAO; and (iii) even if no actual conflict of interest existed, Milan's appointment created an appearance of impropriety. Milan responded that his appointment adhered to the statute under which he continued the ongoing work as the "Burge" special prosecutor after his predecessor retired. Further, he did not suffer from a conflict of interest based on his SAO service, where he was not personally involved in Muhammad's case, and the attempts to have him removed smacked of "gamesmanship" since Muhammad waited two years to seek removal and did so after Milan filed the motion to terminate.

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¶ 21 After hearing arguments on the motions, the presiding judge of the criminal division denied Muhammad's motion to rescind, finding Muhammad's motion untimely and Milan's appointment proper and consistent with the original order appointing a special prosecutor for the entire class of Burge cases.

¶ 22 Muhammad filed a motion to reconsider. On January 21, 2021, a different presiding judge struck that motion, stating she would not reconsider her predecessor's decision. Muhammad filed a motion for leave to file a petition for *mandamus* or prohibition or, in the alternative, a motion for supervisory order challenging the ruling. On March 5, 2021, the supreme court denied the motion. *Muhammad v. Reddick*, No. 126977 (Ill. Mar. 5, 2021).

¶ 23 Muhammad filed a "new" motion to rescind Milan's appointment, again arguing that Milan's positions at the SAO created a disabling conflict of interest requiring his disqualification under the governing statute (55 ILCS 5/3-9008 (West 2018)) and asserting that Milan could be a witness in the proceedings in Muhammad's case based on a memorandum his counsel had recently obtained. The memorandum, sent to Milan in 1999 by an assistant state's attorney in the felony review unit, regarded the alleged torture of a different defendant during the felony review process. Milan argued that the memorandum was irrelevant, as it addressed a different murder committed by an unrelated offender and involved different detectives from a different Chicago police headquarters. The presiding judge of the criminal division rejected Muhammad's arguments and denied the motion.

¶ 24 Muhammad filed a motion for supervisory order, to which Milan objected. The supreme court denied Muhammad's motion on September 9, 2021. *Muhammad v. Reddick*, No. 127592 (Ill. Sept. 9, 2021).

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¶ 25 On November 5, 2021, Muhammad, in his response to the motion to terminate, argued that his alleged statement to Detective Fidyk constituted an inculpatory statement used by the prosecution to establish his consciousness of guilt and fell within the Commission's definition of a confession. In addition, the court must give the Commission's interpretation of the statute the force and effect of law. Finally, Milan waived challenging the propriety of the Commission's referral for judicial review by waiting over two years to file the motion to terminate, and the Commission could rely on the alleged *Brady* violations as corroboration of his claims of abuse.

¶ 26 Milan replied that Muhammad's statement to Detective Fidyk did not amount to a confession under Illinois law. Milan also argued (i) the Commission exceeded its statutory authority when it adopted an administrative rule defining a "claim of torture" broader than the definition adopted by the legislature, (ii) the Commission improperly referred the matter for judicial review where its formal disposition stated that Muhammad's claims of abuse were not credible, (iii) the Commission exceeded its authority by relying on an alleged *Brady* violation unrelated to a torture claim as a basis for a referral for judicial review, which instead should be brought in a postconviction petition, and (iv) the Commission's referral does not conform to the restrictions of the Act, depriving the court of subject-matter jurisdiction, a defect that cannot be waived or forfeited.

¶ 27 The circuit court heard arguments on the State's motion to terminate and took the matter under advisement. On February 10, 2022, Muhammad sought leave to file an "amended" postconviction petition, adding (i) the torture claims as well as the alleged *Brady* violation identified in the Commission's referral, (ii) a claim of actual innocence based on the fact that

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his statement was obtained through coercion by detectives, (iii) prosecutorial misconduct at trial, and (iv) ineffective assistance of his trial and appellate counsel.

¶ 28 On March 11, 2022, the circuit court granted Milan's motion to terminate. The circuit court held it "[is] not bound by the conclusions made by the Commission in making a referral" and "does not review the actions of the Commission in making the referral to determine whether they were appropriate." The court explained that it would not dismiss the referral "based upon the actions of the Commission in making the referral," as Milan requested, because the judiciary and the Commission have distinct roles and responsibilities. The court stated that "[t]he Commission acts to determine whether there is enough evidence of torture to merit judicial review. The Court makes the final determination of whether the provisions of the statute have been met."

¶ 29 Then the circuit court determined that Muhammad's statement to Detective Fidyk did not involve a "confession" within the meaning of the Act:

> "[T]he issue for the Court [ ] to decide at an evidentiary hearing is whether the defendant was tortured into confessing to the crime for which he was convicted, and the tortured confession was used to convict.
>
> As the full statement entered into evidence in this particular case at trial, it states as follows: He said, meaning the defendant, he said he was a Vice Lord member, a member of the Vice Lords street gang from around 79th and Dotson. He denied any knowledge of the aggravated battery case report which he was the victim. He said he had no actual knowledge of the murder and that he knew there was an arrest warrant for him regarding the case, and he went to the State of Washington.

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That is characterized in the referral as a confession. [Muhammad's counsel] has argued in her motion that she believes that the detectives fabricated that statement, but that was characterized by the Commission as the confession.

The problem is that the statement is not a confession based upon case law. There are a number of cases throughout the years that have specifically defined 'confession' going back to the case of People versus Nitti, N-i-t-t-i, from 1924. In that case, the Court stated that a confession is a direct acknowledgment of guilt on the part of the accused, either by statements of the details of the crime or an admission of the ultimate facts.

* * *

Clearly, the statement entered at trial was not a confession. Looking at the full statement, it is an exculpatory—it is exculpatory in nature.

[Muhammad] denies the murder and any knowledge of the facts prior to the murder. In the statement, he also makes certain admissions. He was a Vice Lord, he knew about the warrant issued for his arrest, and he went to the State of Washington to turn his life around. Such admissions do not equal a confession.

As the Illinois Supreme Court held in People versus Jeorgev, J-e-o-r-g-e-v, 38 Ill. 2d 165, a 1967 case, a confession must acknowledge all the elements of the crime and is a confession of guilt. In this case, the State argued in closing arguments at trial that his statement and his flight to Washington should be—should show consciousness of guilt. The State argued it to counter the defendant's alibi defense.

* * *

Neither the trial transcript nor the Appellate Court affirmance of the case makes

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reference to any confession being introduced at trial. Contrary to the Commission's referral of a tortured confession used to convict the defendant in this matter, there's no confession presented."

¶ 30 The circuit court noted that the Commission "had serious concerns about [Muhammad's] credibility." Regarding the alleged *Brady* violations, they should not be incorporated into Muhammad's torture claims because that would require an evidentiary hearing on the relevant part of the Commission's referral.

¶ 31 The circuit court terminated the proceedings on the Commission's referral and granted Muhammad leave to file his successive postconviction petition.

¶ 32 Analysis

¶ 33 We note that the Attorney General of the State of Illinois and the Solicitor General, on behalf of the Commission, filed an *amicus curiae* brief in support of Muhammad. Their brief raises essentially the same arguments as Muhammad, seeking to reverse the circuit court's denial of his claims under the Act.

¶ 34 The Act provides "an extraordinary procedure to investigate and determine factual claims of torture related to allegations of torture." 775 ILCS 40/10 (West 2020). An eight-member Commission was established to effectuate this purpose. *Id.* § 15. When the Commission receives a claim of torture, it hears the evidence and votes on an appropriate disposition. *Id.* § 45. If at least five of the eight members conclude by a preponderance of the evidence that there is sufficient evidence of torture, the Commission refers the matter to the circuit court for further review. *Id.* §§ 45(c), 50.

¶ 35 On receipt, the circuit court proceeds to an evidentiary hearing unless it finds that the

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Commission's "threshold determination was itself against the manifest weight of the evidence." *People v. Johnson*, 2022 IL App (1st) 201371, ¶ 76. If the court proceeds with an evidentiary hearing, the hearing is akin to a third-stage evidentiary hearing under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2020)). *People v. Wilson*, 2019 IL App (1st) 181486, ¶ 51. The circuit court may receive proof by affidavits, depositions, oral testimony, or other evidence. 775 ILCS 40/50 (West 2020). Similar to postconviction proceedings, the Illinois Rules of Evidence do not apply so that defendants may present evidence they may not have otherwise been able to present at trial. *People v. Gibson*, 2018 IL App (1st) 162177, ¶ 128.

¶ 36 When considering a Commission referral, the court must determine whether the outcome of the original suppression hearing would likely have been different if the officers who denied torturing the defendant had been subject to impeachment based on newly discovered evidence that those officers engaged in a pattern of abusive tactics in other cases. See *People v. Smith*, 2022 IL App (1st) 201256-U, ¶¶ 92, 95-96; *Johnson*, 2022 IL App (1st) 201371, ¶ 76 ("based on the evidence adduced at the evidentiary hearing, the circuit court can independently make factual findings as to whether torture actually occurred"); *cf. People v. Galvan*, 2019 IL App (1st) 170150, ¶ 68; *People v. Whirl*, 2015 IL App (1st) 111483, ¶ 80. As for pattern and practice, the circuit court is charged with looking at the similarity "between the misconduct at issue in the present case and the misconduct shown in other cases, such that it may fairly be said the officers were acting in conformity with a pattern and practice of behavior." *People v. Jackson*, 2021 IL 124818, ¶ 34.

¶ 37 The Commission's Definition of "Tortured Confession"

¶ 38 Muhammad argues that the circuit court erred by dismissing the Commission's referral

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without an evidentiary hearing. Specifically, Muhammad claims that the court misstated its role in judicial review in not giving proper deference to the Commission as an administrative body or following the Commission's regulatory definition of the term "tortured confession." Milan argues that the circuit court properly terminated the proceedings without an evidentiary hearing because the undisputed facts demonstrated that Muhammad could not establish he was "tortured into confessing to the crime" as the Act required (775 ILCS 40/5(1) (West 2020)), where Muhammad's statement to Detective Fidyk did not rise to the level of a "confession" under the plain meaning of the word.

¶ 39 Under the Act, a " '[c]laim of torture' " means an assertion on behalf of a person convicted in Illinois that "he [or she] 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." (Emphasis added.) *Id.* Both parties acknowledge that the Act does not define "tortured confession."

¶ 40 Muhammad contends that, in denying him an evidentiary hearing because his statement to Detective Fidyk did not amount to a confession, the court failed to consider the definition of "tortured confession" the Commission adopted or how it applied to the statement he made to Detective Fidyk. See 20 Ill. Adm. Code 2000.10 (2017). The Commission defined a " 'Tortured Confession' " as "any incriminating statement *** that the convicted person alleges [was] a result of *** [an] interrogation that the convicted person claims included torture." *Id.*; see *People v. Bonutti*, 212 Ill. 2d 182, 188 (2004) (administrative rules have "force and effect of law and are [to be] construed according to the same standards that govern the construction of statutes").

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¶ 41 Milan responds that the court's definition of confession adopted the meaning of "confession" found repeatedly in Illinois caselaw. Milan further argues that the Commission's definition of "tortured confession," which includes "incriminating statements," exceeds the power granted to the Commission because the meaning of "confession" as used in the Act is unambiguous.

¶ 42 Standard of Review

¶ 43 When reviewing a circuit court's decision on a Commission referral, we employ a different standard of review for issues of law and fact. See *People v. Tyler*, 2015 IL App (1st) 123470, ¶ 195. We defer to the circuit court's findings of fact unless they are against the manifest weight of the evidence, which occurs only where the opposite conclusion is "clearly evident, plain, and indisputable." *Id.* The circuit court did not make factual findings since it terminated the proceedings before receiving evidence. We review legal conclusions *de novo*; that is, we owe no deference to the circuit court and perform the same analysis as the trial judge. *Id.*

¶ 44 Statutory Construction

¶ 45 The fundamental principle of statutory construction involves determining and giving effect to the legislature's intent. *People v. Reese*, 2017 IL 120011, ¶ 30. The statutory language provides the best indication of legislative intent. *Id.*

> "When the meaning of a statute is not clearly expressed in the statutory language, a court may look beyond the language [used] and consider the purpose behind the law and the evils the law was designed to remedy. [Citation.] When the language of an enactment is clear, it will be given effect without resort to other interpretative aids." *Petersen v. Wallach*, 198 Ill. 2d 439, 444-45 (2002).

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¶ 46 Illinois law has long provided that an administrative agency is a "creature of statute" with "no general or common-law powers." *Goral v. Dart*, 2020 IL 125085, ¶ 33; *Schalz v. McHenry County Sheriff's Department Merit Comm'n*, 113 Ill. 2d 198, 202 (1986). Instead, an "agency is limited to those powers granted to it by the legislature in its enabling statute." *Prate Roofing & Installations, LLC v. Liberty Mutual Insurance Corp.*, 2022 IL 127140, ¶ 22. An administrative agency administers and enforces the statute; courts give deference to the agency's interpretation of statutory ambiguities. *Hadley v. Illinois Department of Corrections*, 224 Ill. 2d 365, 370 (2007); *Taddeo v. Board of Trustees of the Illinois Municipal Retirement Fund*, 216 Ill. 2d 590, 595 (2005); *People ex rel. Birkett v. City of Chicago*, 202 Ill. 2d 36, 48 (2002). Thus, " '[a] court will not substitute its own construction of a statutory provision for a reasonable interpretation adopted by the agency charged with the statute's administration.' " *Hadley*, 224 Ill. 2d at 371 (quoting *Church v. State*, 164 Ill. 2d 153, 162 (1995)). But reviewing courts are not bound by an agency interpretation that conflicts with the statute or is unreasonable or otherwise erroneous. *Id.*

¶ 47 The Act and the Commission's Interpretation

¶ 48 The Act defines a " '[c]laim 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 the allegations of torture." (Emphases added.) 775 ILCS 40/5(1) (West 2020).

As a result of the rule-making authority granted by the General Assembly (see *Hadley*, 224 Ill. 2d at 370), the Commission implemented its own definition of "torture" and "tortured

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confession."

¶ 49 The Commission defined " 'Torture' " as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for the purpose of obtaining from that person a confession to a crime." 20 Ill. Adm. Code 2000.10 (2017). It defined " 'Tortured Confession' " as "any incriminating statement, vocalization or gesture alleged by police or prosecutors to have been made by a convicted person that the convicted person alleges [was] a result of (or, if the convicted person denies making the statements, occurred shortly after) [an] interrogation that the convicted person claims included torture." *Id.* The Commission's definition of "tortured confession" goes beyond a confession as Illinois reviewing courts have historically understood the term and expressly encompasses a statement short of a confession.

¶ 50 We defer to an agency's interpretation when the statute is ambiguous. *Boaden v. Department of Law Enforcement*, 171 Ill. 2d 230, 239 (1996). Commonly, a "confession" is "a statement of guilt or obligation in a matter pertaining to oneself." Webster's Third New International Dictionary 475 (2000); see *Landis v. Marc Realty, L.L.C.*, 235 Ill. 2d 1, 8 (2009) (courts may consult dictionaries for plain and ordinary meaning of undefined words or phrases).

¶ 51 As Milan points out, our courts have defined "confession" repeatedly over the past 100 years. See *People v. Nitti*, 312 Ill. 73, 92 (1924) ("a direct acknowledgment of guilt on the part of the accused, either by a statement of the details of the crime or an admission of the ultimate fact"); *People v. Manske*, 399 Ill. 176, 184-85 (1948) ("A confession is an acknowledgment of guilt, and not of any particular fact connected with the case ***."); *People v. Stapleton*, 300 Ill. 471, 476 (1921) ("a voluntary declaration by a person charged with crime of his agency or

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participation in the crime, and not merely a declaration or admission of facts criminating in their nature or tending to show guilt"); *People v. Rollins*, 119 Ill. App. 2d 116, 131 (1970) ("a comprehensive admission of guilt or of facts which necessarily and directly imply guilt"); *People v. Georgev*, 38 Ill. 2d 165, 175 (1967) (confession must acknowledge all elements of crime and is confession of guilt).

¶ 52 Nevertheless, we must consider the context in which "confession" is used in the Act. Muhammad and the Commission argue that the law has "evolved" and "confession," as used in "tortured confession," encompasses all incriminating statements. In support, they cite section 114-11 of the Code of Criminal Procedure of 1963, which has been recognized as the proper pretrial mechanism for challenging the admissibility of all statements by a defendant, regardless of whether they correspond to a "confession." See 725 ILCS 5/114-11 (West 2020). Section 114-11 provides that "[p]rior to the trial of any criminal case a defendant may move to suppress as evidence any *confession* given by him on the ground that it was not voluntary" and employs "confession" repeatedly in the statute. (Emphasis added.) *Id.*

¶ 53 Our supreme court has held that, under section 114-11, "the word 'confession' must be read to include both inculpatory and exculpatory statements," thereby embracing the then-new constitutional standards in *Miranda*, 384 U.S. 436. *People v. Costa*, 38 Ill. 2d 178, 182-83 (1967).

¶ 54 Due to these multiple interpretations of "confession," Muhammad contends that its meaning is at least ambiguous.

¶ 55 Milan acknowledges *Costa* expanded the definition of "confession" under section 114-11 but suggests that no constitutional mandate exists to construe the Act beyond its plain and

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unambiguous language. Milan points to *Georgev*, 38 Ill. 2d 165, and *People v. Lefler*, 38 Ill. 2d 216 (1967), which were decided on the same day as *Costa*.

¶ 56 In *Georgev*, the defendant claimed his statements should not have been admitted into evidence because the State failed to provide him the writing of the oral statements he made and, whether his oral statements were reduced to a writing or not, the State had to give him the names and addresses of persons present when he made the statements. *Georgev*, 38 Ill. 2d at 174 (citing Ill. Rev. Stat. 1963, ch. 38, ¶ 729). As to the meaning of "confession" under paragraph 729 of the Criminal Code of 1961 (Ill. Rev. Stat. 1963, ch. 38, ¶ 729), the court explained,

> "Confessions must be distinguished from admissions against interest. Jones on Evidence, 5th Ed., sec. 398 states: '*** As the terminology is used in criminal law, a "confession" must be distinguished from an "admission" of lesser import ***. A confession out of court or an extra-judicial confession is comprehensive in its scope, *** in that it acknowledges all of the elements of the crime and therefore is a confession of guilt ***. A verbal (that is, expressed in words, oral or written) admission in criminal law, as generally understood, is different from a confession in that it is not an acknowledgment of guilt but is a statement having evidentiary value in proof of an element of the offense charged.' " *Georgev*, 38 Ill. 2d at 175.

¶ 57 The court found that the "statements of the defendant here were admissions against interest and not confessions" and, given the spontaneity of the statement and circumstances under which the statement was made, "[t]here [was] nothing to suggest that the admission by the defendant was not a spontaneous and voluntary one and nothing to suggest that [the sheriff] devised any stratagem to induce it." *Id.* at 176. So, the trial court did not err. *Id.*

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¶ 58 In *Lefler*, the defendant father's infant daughter died with a skull fracture, extensive brain injury, and rib injuries. *Lefler*, 38 Ill. 2d at 218. The defendant admitted to shaking and squeezing his daughter to get her to stop crying, and he could have broken her ribs in the process. Defendant was convicted of involuntary manslaughter. *Id.* at 222. The main issue on appeal was whether the defendant's statements that he " 'squeezed her' " and " 'wanted her to stop crying' " amounted to admissions for which the voluntariness needed to be determined. *Id.* at 219-21. Our supreme court acknowledged that "the statements of the defendant were not in the strict sense of the word confessions to the crime of murder, [but] it is apparent that they were not entirely exculpatory and that his admissions that he squeezed the child to keep her from crying were incriminating." *Id.* at 220. The court found consistent with its holding in *People v. Hiller*, 2 Ill. 2d 323 (1954), the "voluntary character of any out-of-court statement must first be established before the statement may be used, even for impeachment purposes." *Lefler*, 38 Ill. 2d at 220.

¶ 59 The court further found that "[o]ur adoption of this rule finds support in the decision of the U.S. Supreme Court in *Miranda v. State of Arizona*" and "that the rule enunciated in these recent decisions of our court and the U.S. Supreme Court[ ] is the proper one and we adhere to it in this case." *Id.* The court reversed and remanded for a new trial because the trial court erred by not holding a preliminary hearing to determine the voluntariness of the defendant's admissions. *Id.* at 221. The court noted that, as stated in *Georgev*, "the distinction between confessions and admission is preserved by section 114-10 of the Code of Criminal Procedure in connection with the furnishing of a list of witnesses to oral statement." *Id.*

¶ 60 Milan urges that *Costa*, *Georgev*, and *Lefler* read together stand for the proposition that a

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"confession" is an acknowledgment of guilt and applies to all instances other than the limited circumstances of permitting a pretrial hearing on a motion to suppress a confession under section 114-11. See 725 ILCS 5/114-11 (West 2020). Milan contends that since *Costa*, *Georgev*, and *Lefler* our supreme court has used this definition of "confession" when addressing jury instruction issues. See *People v. Floyd*, 103 Ill. 2d 541, 548-49 (1984) (giving jury instruction on confession error when defendant's statement, while incriminating, not inconsistent with his contention that victim's death was accidental and not "confession"); *People v. Horton*, 65 Ill. 2d 413, 418 (1976) (error "to instruct a jury that defendant has confessed to a crime when he has made only an admission" (internal quotation marks omitted)).

¶ 61 Three flaws thwart Milan's argument. First, in this case, the phrase is "tortured confession," not "confession." Milan's plucking of "confession" from the phrase "tortured confession" divorces it from the context in which the Act uses the term. Second, although the terms "confession" and "admission" had different definitions in the context of jury instructions in the first edition of the pattern jury instructions (see Illinois Pattern Jury Instructions, Criminal, Nos. 3.06, 3.07 (1st ed. 1968) (hereinafter IPI Criminal 1st)), that is no longer true. In the past, the two separate jury instructions required the parties to litigate whether a statement was a "strict confession of guilt or merely an admission of an incriminating fact." *People v. James*, 2017 IL App (1st) 143391, ¶ 125. Regardless, in the second edition of the pattern jury instructions, IPI Criminal 1st Nos. 3.06 and 3.07 were consolidated into one instruction and employed the general term "statement" in place of the more specific terms "confession" and "admission." Illinois Pattern Jury Instructions, Criminal, No. 3.06-3.07 (2d ed. 1981) (hereinafter IPI Criminal 2d). These changes "avoid[ed] the complications that ensue when a judge

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characterizes a statement," eliminating this unnecessary risk of prejudice to the defendant. IPI Criminal 2d No. 3.06-3.07, Committee Note; *James*, 2017 IL App (1st) 143391, ¶ 126. This court has held that the current version of Illinois Pattern Jury Instructions, Criminal, No. 3.06-3.07 (4th ed. 2000), which also uses "statement" applies "to a defendant's self-incriminating statements—confessions, admissions, or false exculpatory statements—relating to the charged offense(s)." *James*, 2017 IL App (1st) 143391, ¶ 133.

¶ 62 Third and most significantly, we are tasked with considering Muhammad's torture claim through the lens of whether the outcome of the suppression hearing would likely have been different given the new pattern and practice evidence. *People v. Anderson*, 2023 IL App (1st) 200462, ¶ 154. As Milan acknowledges, a "confession" is an acknowledgment of guilt and applies to all instances other than the limited circumstances of permitting a pretrial hearing on a motion to suppress a confession under section 114-11. See 725 ILCS 5/114-11 (West 2020). As the Act requires us to consider whether the result of a suppression hearing would have been different, it necessarily follows that this is also a limited circumstance where the definition of "confession" as an acknowledgment of guilt would be inapplicable.

¶ 63 This court has allowed the circuit court to simultaneously consider a petitioner's claim under the Act and request to suppress his or her statement under section 114-11. See *Wilson*, 2019 IL App (1st) 181486, ¶ 50; *Gibson*, 2018 IL App (1st) 162177, ¶ 139 (trial court's inquiry at suppression hearing significantly overlaps with inquiry at evidentiary hearing on police torture). Thus, the circuit court can consider whether Muhammad's statement to Detective Fidyk should be suppressed at an evidentiary hearing on his torture claim. Given that possibility, the Act cannot be limited to a confession as an acknowledgment of guilt.

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¶ 64 Our analysis of when "confession" means "confession" and when it means something more leads us to conclude that "confession" is ambiguous because reasonably well-informed persons reading the Act could understand "confession" in more than one sense. See *People v. Jameson*, 162 Ill. 2d 282, 288 (1994) (statute ambiguous if reasonably well-informed persons can understand it in two or more ways). Despite that, we do not impose our own construction on the statute as would be necessary without an administrative interpretation. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Instead, we must determine whether the agency's interpretation relies on a permissible construction of the statute. "A court will not substitute its own construction of a statutory provision for a reasonable interpretation adopted by the agency charged with the statute's administration." *Church*, 164 Ill. 2d at 162 (citing *Chevron*, 467 U.S. at 842-45).

¶ 65 We are not bound by the Commission's interpretation of "tortured confession" irrespective of its reasonableness. *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 97 (1992). Yet, if the Commission's interpretation is permissible, that we might have interpreted the statute differently does not justify reversal. See *Church*, 164 Ill. 2d at 162-63; *Chevron*, 467 U.S. at 843-44. We find the Commission's interpretation of "tortured confession" as reasonable based on both our discussion of recent Illinois court interpretations of "confession" and the legislature's intent as explained by the Act's stated purpose: "an extraordinary procedure to investigate and determine factual claims of torture related to allegations of torture." 775 ILCS 40/10 (West 2020). Any suggestion that certain kinds of statements are not within the province of the Commission's investigatory authority is notably absent from this express purpose. Moreover, we recognize that a torturer not only seeks to obtain

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confessions but statements that can be used against a suspect. Based on the Act's stated purpose, it would be nonsensical for the Commission to consider only a tortured confession that acknowledges guilt and nothing less. Our interpretation respects the Act's purpose and spirit.

¶ 66 Further support comes from legislation that made it a felony to "compel[ ] a confession or information by force or threat." 720 ILCS 5/12-7 (West 2020). Adopted well before the Commission was established, this offense forbids a person with the intent to "obtain a confession, statement or information regarding any offense" to knowingly threaten or inflict "bodily harm upon the person threatened or upon any other person." *Id.* § 12-7(a). Although separate from the Act, when considered in conjunction with the Act, this statutory offense shows an overall movement to rectify convictions based on prior statements made on account of torture and prevent future statements from being obtained as a result of force or threat of force. It would be odd that a police officer can be prosecuted for obtaining "information" by force from a suspect but a convict could not obtain relief under the Act for a statement obtained by torture. We see no definitive indication that the legislature intended to distinguish between "confessions" obtained by torture, which acknowledge guilt, and other statements containing admissions or incriminating information.

¶ 67 Accordingly, we find that Muhammad's statement to Detective Fidyk qualifies as a "tortured confession" under the Commission's interpretation of the Act. We reverse and remand for the circuit court to conduct an evidentiary hearing to determine the merits of Muhammad's claim that he was tortured into giving the statement. We make no findings on the issue.

¶ 68 Muhammad's Claimed *Brady* Violation

¶ 69 Muhammad next argues that the circuit court erred by failing to consider the Commission's

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finding of a possible *Brady* violation, under which the State must disclose to the defense all evidence favorable to defendant and material to either guilt or punishment. See *Brady*, 373 U.S. 83. Milan argues that a potential *Brady* violation is irrelevant to Muhammad's claim of torture under the Act. The Commission found otherwise. We address this issue because it is likely to recur on remand.

¶ 70 As discussed, the circuit court terminated the proceedings after determining that Muhammad's statement to Detective Fidyk was not a "confession" as the Act uses that term. Concerning the *Brady* violation, the circuit court found,

> "In essence, the Commission is making an alleged *Brady* violation part of the claim of torture to shore up the credibility of a person the Commission had grave reservations regarding his claim of coercion made approximately 14 years after he was convicted. Incorporating the *Brady* claim into the claim of torture—into the claim of the torture analysis would require an evidentiary hearing on the part of the referral without the appropriate opportunity for separate consideration as would be appropriate under the Post-Conviction Act or post-judgment proceeding under 2-1401."

So, the court heard no evidence regarding Muhammad's claim of torture or the potential *Brady* violation.

¶ 71 The Commission, in determining whether sufficient evidence of torture exists to refer a claim for judicial review, may "use any measure provided in the Code of Civil Procedure and the Code of Criminal Procedure of 1963 to obtain information necessary to its inquiry." 775 ILCS 40/40(d) (West 2020). And the Commission may "issue subpoenas or other process to compel the attendance of witnesses and the production of evidence, administer oaths, petition

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the Circuit Court of Cook County or of the original jurisdiction for enforcement of process or for other relief." *Id.* If, as the result of the Commission's investigation, it discovers "[e]vidence of criminal acts, professional misconduct, or other wrongdoing disclosed through formal inquiry or Commission proceedings," that information "shall be referred to the appropriate authority" as well as to the convicted person or his counsel if the evidence is favorable. *Id.* § 45(d).

¶ 72 Again, the Act establishes "an extraordinary procedure to investigate and determine factual claims of torture related to allegations of torture." *Id.* § 10. To reiterate, a " '[c]laim of torture' " is defined as an assertion that a person "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." *Id.* § 5(1).

¶ 73 In line with the Act's purpose, when evaluating a Commission referral, the circuit court asks whether the outcome of the original suppression hearing would likely have been different if the officers who denied torturing the defendant had been subject to impeachment based on newly discovered evidence that those officers engaged in a pattern of abusive tactics in other cases. See *Smith*, 2022 IL App (1st) 201256-U, ¶¶ 92, 95-96. In creating the Act, "[t]he legislature clearly did not create a new form of postconviction relief." *Wilson*, 2019 IL App (1st) 181486, ¶ 52. Ultimately, the trial court determines the merits of a torture claim.

¶ 74 The "possible" *Brady* violation the Commission uncovered related to the State's failure to disclose that Muhammad participated in several lineups in which multiple witnesses did not identify him. We find this issue relevant to Muhammad's claim of torture. As the Commission and circuit court observed, Muhammad did not bring his claim of torture until 14 years after

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Detective Fidyk interrogated him. In his motion to terminate the proceedings before the circuit court, Milan argued Muhammad's delay made it less credible; thus, we can safely assume that the State will make the same argument. But Muhammad claims that he repeatedly told his attorney before trial that the police coerced the statement from him, yet his attorney did not raise the issue with the trial court. The Commission determined this was plausible, stating, "[t]hat valid lineup issues were not discovered and litigated by Muhammad's attorney before trial makes it at least possible that Muhammad informed [his] attorney about any coercive interrogation tactics that were also not explored by trial." Thus, the Commission concluded that there was enough evidence to merit the referral of Muhammad's torture claim for an evidentiary hearing.

¶ 75 We cannot say that the Commission's finding is against the manifest weight of the evidence. See *Johnson*, 2022 IL App (1st) 201371, ¶ 76 (on receipt of referral, circuit court should proceed to evidentiary hearing unless court finds Commission's "threshold determination was itself against the manifest weight of the evidence"). Indeed, the Commission's factual findings do not bind the circuit court in determining the merits of a torture claim.

¶ 76 This court has held that proceedings under the Act and the Post-Conviction Hearing Act are intended to work together, not against each other. See *Gibson*, 2018 IL App (1st) 162177, ¶¶ 136-37. A permissible and prudent pleading procedure would be to file a joint petition under both the Commission referral and the postconviction statute for a combined evidentiary hearing, as the Commission referral is a type of "postconviction hearing[ ]" within the meaning of Illinois Rule of Evidence 1101(b)(3) (eff. Sept. 17, 2019).

¶ 77 Because the alleged *Brady* violation is closely tethered to the merits of Muhammad's torture

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claim, we reject Milan's contention that the potential *Brady* violation is irrelevant to Muhammad's torture claim and could not be raised under the Act.

¶ 78 Conflict Issues

¶ 79 The law is explicit: To ensure a prosecutor's impartial judgment, a prosecutor with an actual conflict of interest must be removed. The conflict, without more, creates the perception that bias, favoritism, or personal interests may influence the prosecutor, thereby compromising the integrity and fairness of the proceedings.

¶ 80 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.

¶ 81 Where, as here, no factual dispute exists, we review *de novo* the legal issue of whether an attorney operates under a conflict of interest. *People v. Peterson*, 2017 IL 120331, ¶ 101 (reviewing conflict of interest *de novo* where relevant facts not disputed).

¶ 82 Actual Conflict of Interest

¶ 83 Muhammad contends Milan has a personal interest because he was "the direct supervisor for the felony review unit and the felony trial attorneys at the time Muhammad was tortured and tried." Muhammad contends Milan's personal involvement undermines the proceedings "in ways known, unknown, and perhaps even unknowable," "cast[ing] doubt on the procedures in place to ensure due process under the law."

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¶ 84 Milan replies that Muhammad invited this error by asking for Milan's appointment. The record shows Muhammad moved to appoint Milan, who had already served as the special prosecutor in other cases at the time the SAO determined it could not participate.

¶ 85 Generally, parties cannot complain of errors they induced the court to make and to which they consented. *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004). But that general rule does not apply when an "interested party" acts as a prosecutor, given that the resulting error is "fundamental and pervasive," raising doubts that "undermine[ ] confidence in the integrity of the criminal proceeding" and " 'call[ing] into question the objectivity of those charged with bringing a defendant to judgment.' " (Internal quotation marks omitted.) *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 809-10 (1987) (plurality opinion) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986)). Because this error casts doubt on the integrity of the process, we have a duty to act. See *Hux v. Raben*, 38 Ill. 2d 223, 225 (1967) (noting "the responsibility of a reviewing court for a just result and for the maintenance of a sound and uniform body of precedent may sometimes override the considerations of waiver that stem from the adversary character of our system"); *People v. Lang*, 346 Ill. App. 3d 677, 682 (2004) (even in absence of prejudice to defendant, special prosecutor may be necessary to remove appearance of unfair prosecution under plain error principles protecting integrity of proceedings).

¶ 86 Milan next contends the circuit court appointed him as special prosecutor and, as a result, could only remove him for an "actual conflict of interest," which he claims he does not have. Milan adds that an appearance of impropriety alone would not justify removal under the statute.

¶ 87 Section 3-9008(a-10) governs the appointment of a special prosecutor and outlines the procedures:

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> "The court on its own motion, or an interested person in a cause or proceeding, civil or criminal, may file a petition alleging that the State's Attorney has an actual conflict of interest in the cause or proceeding. The court shall consider the petition, any documents filed in response, and if necessary, grant a hearing to determine whether the State's Attorney has an actual conflict of interest in the cause or proceeding. If the court finds that the petitioner has proven by sufficient facts and evidence that the State's Attorney has an actual conflict of interest in a specific case, the court may appoint some competent attorney to prosecute or defend the cause or proceeding." 55 ILCS 5/3-9008(a-10) (West 2020).

¶ 88 Before this statute's amendment in 2016, courts held the mere appearance of impropriety warranted the removal of a prosecutor. See, *e.g.*, *People v. VanderArk*, 2015 IL App (2d) 130790, ¶ 38 (citing preamendment version). But the amendment added the language "actual conflict of interest." Pub. Act 99-352 (eff. Jan. 1, 2016) (adding 55 ILCS 5/3-9008(a-10)). Thus, one panel of this court has held that the party seeking a special prosecutor must demonstrate an actual conflict of interest, not just the appearance of impropriety. See *In re Appointment of Special Prosecutor*, 2019 IL App (1st) 173173, ¶¶ 33-39. Another district of this court has held that the appearance of impropriety remains enough under the statute's current version to warrant removal. See *People v. Benford*, 2022 IL App (2d) 200349-U, ¶ 39 (citing 2018 version of section 3-9008 and finding appearance of impropriety as form of actual conflict of interest). We need not enter this debate: Milan has an actual conflict of interest.

¶ 89 Before explaining why, we note that the statute does not define "actual conflict of interest." Absent a statutory definition, this court has found that a state's attorney has "an actual conflict of interest" if he or she "is interested in" the case as either (i) a private individual, or (ii) an

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actual party to the action. (Internal quotation marks omitted.) *In re Appointment of Special State's Attorney*, 2020 IL App (2d) 190845, ¶ 17. This statute "prevent[s] any influence upon the discharge of the duties of the State's Attorney by reason of personal interest." (Internal quotation marks omitted.) *McCall v. Devine*, 334 Ill. App. 3d 192, 199 (2002).

¶ 90 The defendant must have more than speculation or suspicion. *Id.* at 205 (motion to appoint special prosecutor denied where no pleaded facts showed probability state's attorney would conduct biased investigation and prosecution). Consistent with this decision, we have found an actual conflict of interest where a newly appointed state's attorney acted as defense counsel for the defendant. *People v. Courtney*, 288 Ill. App. 3d 1025, 1034 (1997).

¶ 91 We have found no Illinois decision where a party sought to remove a special prosecutor for an actual conflict of interest. But the parties do not dispute that section 3-9008 controls. And we agree. Section 3-9008, as our courts interpret it, applies to removing a special prosecutor. See *In re Appointment of a Special State's Attorney*, 305 Ill. App. 3d 749, 758 (1999) (section 3-9008 also states grounds for disqualifying special state's attorney under preamendment version). Indeed, as we will show, deciding this issue takes no novel insight. Instead, we employ "a longstanding interpretive principle: When a statutory term is ' "obviously transplanted from another legal source," ' it ' "brings the old soil with it." ' " *Taggart v. Lorenzen*, 587 U.S. ___, ___139 S. Ct. 1795, 1801 (2019) (quoting *Hall v. Hall*, 584 U.S. 59, 73 (2018), quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)).

¶ 92 Finding an "actual conflict of interest" requires us sifting caselaw to clarify the role of the prosecutor. "Prosecutors 'have available a terrible array of coercive methods to obtain information,' such as 'police investigation and interrogation, warrants, informers and agents

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whose activities are immunized, authorized wiretapping, civil investigatory demands, [and] enhanced subpoena power.' " *Young*, 481 U.S. at 811 (quoting Charles W. Wolfram, Modern Legal Ethics 460 (1986)). Milan, when with the SAO, was one of its most senior members with these powers.

¶ 93 Of critical significance is the United States Supreme Court's and the Illinois Supreme Court's shared understanding of the prosecutor's role. "No attorney is more integral to the accusatory process than a prosecutor who participates in a major adversary decision." *Williams v. Pennsylvania*, 579 U.S. 1, 9 (2016). And of the many decisions a prosecutor makes, the first among equals is the prosecutorial choice to bring charges. "It is the functional comparability of [prosecutor's] judgments to those of the judge that has resulted in *** prosecutors being referred to as quasi-judicial officers ***." (Internal quotation marks omitted.) *Imbler v. Pachtman*, 424 U.S. 409, 423 n.20 (1976); see *People ex rel. Schreiner v. Courtney*, 380 Ill. 171, 179 (1942) (describing prosecutor as "quasi-judicial officer"). Accordingly, "[i]t is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935).

¶ 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, reprosecute him, and terminate the proceedings. See 775 ILCS 40/50(a), (b) (West 2020) (successful petitions may lead to "rearraignment, retrial, custody, pretrial release or discharge" and directing state's

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attorney or designee to represent state). The exercise of these powers dictates that Milan judge the validity of his original decision to prosecute. Thus, Milan possesses the improper ability to "judge" himself and his subordinates.

¶ 95 "The due process guarantee that 'no man can be a judge in his own case' would have little substance if it did not disqualify a former prosecutor from sitting in judgment of a prosecution in which he or she had made a critical decision." *Williams*, 579 U.S. at 9. In *Williams*, due process barred a sitting justice from ruling on a collateral appeal by the same defendant when decades earlier, as a prosecutor, the judge had authorized seeking of the death penalty. *Id.* at 11. "The involvement of multiple actors and the passage of time [did] not relieve the former prosecutor of the duty to withdraw in order to ensure the neutrality of the judicial process in determining the consequences that his or her own earlier, critical decision may have set in motion." *Id.*

¶ 96 Similarly, First Assistant State's Attorney Milan's exercise of the quasi-judicial power in Muhammad's underlying case precludes him from exercising, or seeking to exercise, the power of a special prosecutor. Due process does not tolerate the "risk of actual bias" that Milan presents. *Id.* at 8. Failing to replace Milan as special prosecutor would undermine the integrity of the court.

¶ 97 In reaching this conclusion, we reject as baseless the dissent's claim that Muhammad "[a]t no point" argued Milan's appointment violated his due process rights. *Infra* ¶ 133. The due process clause forms the cornerstone of his challenge, as Muhammad contended Milan's personal involvement in the prosecution undermined the integrity of these proceedings "in ways known, unknown, and perhaps even unknowable" and thus "cast[ed] doubt on the procedures

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in place to ensure due process under the law." See *Williams*, 579 U.S. at 13 (noting, statutes and professional codes of conduct provide more protection than due process requires). Illinois law on conflicts of interest marks the ethical ceiling; the due process clause sets the legal floor.

¶ 98 Decades of torture by Chicago police took place before the courts and legislature acted. See Kim D. Chanbonpin, *Truth Stories: Credibility Determinations at the Illinois Torture Inquiry and Relief Commission*, 45 Loy. U. Chi. L.J. 1085, 1091-1106 (2014) (canvassing this history and concluding "the crisis of police torture is more far-reaching than the 'bad apples' myth suggests"). That formal recognition culminated with the enactment of the Illinois Torture Inquiry and Relief Commission Act. See Pub. Act 96-223, § 1 (eff. Aug. 10, 2009) (adding 775 ILCS 40/1); *TIRC*, Ill. Torture Inquiry & Relief Comm'n, https://tirc.illinois.gov/ (last visited Jan. 10, 2024) [https://perma.cc/M5VL-KNXF]; *Leach v. Department of Employment Security*, 2020 IL App (1st) 190299, ¶ 44 ("[i]nformation on websites and in public records are sufficiently reliable such that judicial notice may be taken" and collecting examples).

¶ 99 The Act created "an extraordinary procedure to investigate and determine factual claims of torture related to allegations of torture." 775 ILCS 40/10 (West 2010).

¶ 100 But Milan seeks to halt any inquiry, as the head of the office directing the response to Muhammad's allegations, even though all the reasons the SAO withdrew apply in every respect to Milan. The dissent would let Milan remain, even though the undisputed facts show that Milan directly supervised the felony review unit and felony trial attorneys when the State arrested, interrogated, charged, and tried Muhammad. *Infra* ¶ 175. By fiat, the dissent asserts Milan's direct participation in Muhammad's prior prosecution constitutes neither "actual facts" nor "actual evidence." *Infra* ¶ 150. The dissent appears to require that Milan have personally

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secreted the key to the interrogation room in which Muhammad alleges he remained for four days straight, thus forcing him to urinate and defecate on the floor. At the same time, the dissent acknowledges that prosecutors generally "are not disinterested parties to criminal prosecutions." *Infra* ¶ 162.

¶ 101 The central conflict within the dissent, recognizing the significance of Muhammad's claims but downplaying the significance of Milan's involvement, cannot hold. Nor should it. As Muhammad rightly insists, when an "interested party" acts as a prosecutor, the resulting error is "fundamental and pervasive." *Young*, 481 U.S. at 809-10. The undisputed facts of Milan's prior involvement trigger this court's duty to remove him. *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 now threatens, 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.

¶ 102 The dissent's insistence that Muhammad offer something more as proof than undisputed evidence underscores the absurdity of Milan's participation. The dissent insists that Milan was no judge in his own case. *Infra* ¶¶ 161-63. But it is no answer to the charge that Milan acts as a judge in his own case to say he may proceed as he wishes, acting both as advocate and witness. 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 is inconsistent with the search for truth and guts the reliability of the circuit court's "ultimate decision," as the dissent describes it. *Infra* ¶ 165.

¶ 103 Finally, Milan argues that in 2017, before accepting his appointment, he obtained an ethics opinion from a former senior counsel to the Administrator of the Illinois Attorney Registration

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and Disciplinary Commission. According to the opinion that he personally sought from a private attorney, Milan did not have a conflict of interest in serving as special prosecutor "in the Burge cases" even though "some of the cases may have been in the State's Attorney's system while you [Milan] were First Assistant or Chief Deputy."

¶ 104 But this case cannot be classified as a "Burge case" since Burge was suspended in 1991 and terminated in 1993, years before Muhammad's case arose. Rather, this case involves allegations against Detective McDermott, who, after he retired from the police department, became an investigator for the SAO. Many TIRC decisions, including this one, concern alleged torture by McDermott. See *Search Results*, Ill. Torture Inquiry & Relief Comm'n, https://tirc.aem-int.illinois.gov/search.html?q=mcDermott&contentType=everything (last visited Jan. 10, 2024) [https://perma.cc/73N4-SVKM]; *Leach*, 2020 IL App (1st) 190299, ¶ 44 (noting "[i]nformation on websites and in public records are sufficiently reliable such that judicial notice may be taken" and collecting examples).

¶ 105 Indeed, the opinion focuses on Rule 1.11(a) of the Illinois Rules of Professional Conduct of 2010. See Ill. R. Prof'l Conduct (2010) R. 1.11(a) (eff. Jan. 1, 2010). That rule addresses successive government and private employment, which is not at all relevant here. When Milan became special prosecutor, he represented the same governmental client he did before, not a different client as contemplated by Rule 1.11(a).

¶ 106 Tellingly, the conflict Muhammad alleges does not fit squarely within the type of conflicts recognized in the rules. But, the concepts expressed in Rule 1.7(a)(2) support rescinding Milan's appointment, as Muhammad's expert witness explained in an affidavit to the circuit court.

¶ 107 Rule 1.7 prohibits a lawyer from representing a client in a matter that "involves a concurrent

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conflict of interest." Ill. R. Prof'l Conduct (2010) R. 1.7(a) (eff. Jan. 1, 2010). Subparagraph (a)(2) states that concurrent conflict exists where "there is a significant risk that the representation of one or more clients will be materially limited *** by a personal interest of the lawyer." Ill. R. Prof'l Conduct (2010) R. 1.7(a)(2) (eff. Jan. 1, 2010). Disqualification under the "material limitation conflict" provision of Rule 1.7(a)(2) requires a showing that "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." Ill. R. Prof'l Conduct (2010) R. 1.7 cmt. 8 (eff. Jan. 1, 2010). Moreover,

> "[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." Ill. R. Prof'l Conduct (2010) R. 1.7 cmt. 10 (eff. Jan. 1, 2010).

¶ 108 Milan's representation of the State as a special prosecutor is materially limited by his personal interests. Milan supervised felony review attorneys and trial attorneys when Muhammad was arrested, interrogated, charged, and tried. He was involved in interrogating felony suspects at that time and received at least one detailed report about the apparent police torture of a detained suspect in the felony review process. The Commission found sufficient factual support for Muhammad's claims that he was tortured in police custody during the felony review process to warrant judicial examination. The Commission also found evidence that the police and SAO committed significant *Brady* violations—multiple witnesses at lineups were unable to identify Muhammad, and these were covered up and never disclosed.

¶ 109 Regardless of whether Milan was personally involved in interrogating suspects or knew that

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police officers obtained tortured confessions, he has a personal interest that constitutes a conflict. Milan spent nearly 20 years at the SAO, eventually becoming first assistant. Allegations of misconduct by the SAO, particularly during his tenure as first assistant, pose risks to the SAO and Milan's reputation. See Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. Rev. 463, 481 (2017) (prosecutors' personal interest in their public image undermines their ability to view evidence objectively, and dropping charges may be viewed as public concession that prosecutor previously made mistake).

¶ 110 Moreover, under the Illinois Rules of Professional Conduct of 2010, Milan had an ethical duty to supervise the attorneys under his watch. See Ill. R. Prof'l Conduct (2010) R. 5.1(b) (eff. Jan. 1, 2010) ("lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules"). Milan is subject to discipline for failing to make reasonable efforts to ensure those attorneys act ethically. Milan had a personal interest in avoiding an evidentiary hearing at which the evidence might have exposed that he violated rules of professional conduct.

¶ 111 Muhammad has the burden of proving the misconduct he alleges that the police as well as the SAO attorneys engaged in under Milan's supervision, which could include violations of Illinois Rules of Professional Conduct (2010) R. 4.1(a) (eff. Jan. 1, 2010) (false statements to third person; presenting recreated lineup photos at trial, and falsely pretending to be public defender during Muhammad's interrogation), Rule 4.4(a) (eff. Jan. 1, 2016) (using "methods of obtaining evidence that violate the legal rights of *** a person"), or Rule 8.4(c), (d) (eff. Jan. 1, 2010) (engaging "in conduct involving dishonesty, fraud, deceit, or misrepresentation" or

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that is "prejudicial to the administration of justice"). Illinois ethical rules and general principles of due process and conflicts of interest mandate that a special prosecutor is not involved in the proceeding that will adjudicate claims in which he or she has a personal interest and that the special prosecutor disclose the facts and circumstances surrounding an actual or potential conflict of interest as soon as he or she becomes aware of it to the court and affected defendant(s). See Ill. R. Prof'l Conduct (2010) R. 1.7(a) (eff. Jan. 1, 2010); *Williams*, 579 U.S. at 8; *Young*, 481 U.S. at 809-10; *Blue*, 189 Ill. 2d at 136; *Hux*, 38 Ill. 2d at 225.

¶ 112 Despite knowing of accusations concerning McDermott and McDermott's presence in this case as an alleged torturer, Milan not only continued working the case but, according to the record, resisted Muhammad's counsel's attempt to elicit the facts underlying Milan's association with McDermott.

¶ 113 We agree with Muhammad that Milan labored under an actual conflict of interest. Milan's removal as special prosecutor fosters public confidence in the impartiality and integrity of our criminal judicial system. Thus, we need not address Muhammad's alternative theories.

¶ 114 The Dissent's Missteps

¶ 115 The dissent's core contention is that "no actual facts [tie] Milan to Muhammad's torture or subsequent prosecution." *Infra* ¶ 150. For example, the dissent writes, "[N]othing in the record *** support[s] the majority's assertion that Milan had a 'relationship' with McDermott (*supra* ¶ 80) or that McDermott's position with the SAO aligned with or overlapped Milan's work-related responsibilities (*supra* ¶ 100)." *Infra* ¶ 149. So, in the dissent's view, it is not relevant that Milan had supervisory authority over everyone in the office. Thus, by fiat, the dissent excuses Milan's admitted participation in Muhammad's prosecution as supervisor. See *infra*

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¶ 149 (demanding proof "McDermott's position with the SAO aligned with or overlapped Milan's work-related responsibilities"). The dissent apparently insists on more evidence, something like a jointly signed performance review by Milan of McDermott.

¶ 116 Drawing lines (here, around Milan) is a common, though mistaken, move in legal reasoning. Yet the dissent goes further and mischaracterizes our opinion, the briefing before this court, and the applicable law. So, we take this moment to correct course.

¶ 117 The dissent's multiple missteps begin with the standard of review. Like Muhammad's briefing, we formulate the key question before this court as one of law, and thus *de novo* review applies. See *supra* ¶ 81 (citing *Peterson*, 2017 IL 120331, ¶ 101). The dissent disagrees, asserting that abuse of discretion standard applies. *Infra* ¶ 136.

¶ 118 But, like reviewing courts, circuit courts rule on legal questions from time to time. Even the abuse of discretion standard may require this court to determine " 'the legal adequacy of [the] way the [circuit] court reached its result.' " *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill. 2d 85, 99 (2006) (quoting *People v. Ortega*, 209 Ill. 2d 354, 360 (2004)). And, of course, the circuit court must exercise its discretion within the bounds of the law. *People v. Williams*, 188 Ill. 2d 365, 369 (1999). When the circuit court fails to do so, this court may not sidestep a hard question of law by falsely invoking judicial modesty. See *People v. Herrera*, 2023 IL App (1st) 231801, ¶ 24 ("legal error is actionable under even the most deferential standard of review").

¶ 119 The duty to determine hard questions of law dovetails with the duty to decide the questions before this court to reach a just result sensitive to the need for a sound and uniform body of precedent. See *Hux*, 38 Ill. 2d at 225 ("the responsibility of a reviewing court for a just result and for the maintenance of a sound and uniform body of precedent may sometimes override the

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considerations of waiver that stem from the adversary character of our system").

¶ 120 The issue is whether Milan harbors an "actual conflict of interest" requiring his disqualification under section 3-9008, given his admitted involvement in Muhammad's prosecution. Answering this question requires us to recognize that this term of art, "actual conflict of interest," has no statutory definition. *Supra* ¶ 89. Second, this question requires examining the full context in which this dispute arose—from an "extraordinary procedure to investigate and determine factual claims of torture related to allegations of torture." 775 ILCS 40/10 (West 2020); see *supra* ¶¶ 98-99.

¶ 121 The dissent distorts all this, faulting us for "manufactur[ing] a due process theory." *Infra* ¶ 130. A fair reading refutes that kind of specious reasoning. As Muhammad contends, the professional rules of conduct are essential to the just resolution of this issue, which Muhammad's expert witness ably applied in an affidavit to the circuit court. And as critical is Muhammad's insight that Milan's involvement undermines the integrity of the proceedings "in ways known, unknown, and perhaps even unknowable," "cast[ing] doubt on the procedures in place to ensure due process under the law."

¶ 122 Our analysis, which draws together insights from Muhammad and his expert, does not transform the conflict of interest into anything other than what it is. We agree with the dissent that, "[u]nder the law, it *does* matter if Milan has a personal interest." (Emphasis in original.) *Infra* ¶ 167. But unlike the dissent, we find critical Milan's admitted involvement in Muhammad's prosecution and relation with McDermott, whose employment at the SAO figured in the SAO's conflict.

¶ 123 We do not share the dissent's far-fetched concern that this opinion may require mass

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disqualifications. *Infra* ¶ 164. For the reasons we gave, section 3-9008 dictates disqualification of prosecutors alleged to have committed misconduct against petitioners, and the rules of professional conduct and principles of due process also require nothing less.

¶ 124 Conclusion

¶ 125 We reverse the circuit court's order terminating proceedings under the Act and the circuit court's orders denying Muhammad's motions to rescind Milan's appointment. We remand for the appointment of a special prosecutor and an evidentiary hearing on Muhammad's claim of torture referred to the circuit court by the Commission.

¶ 126 We also direct the clerk of the Appellate Court, First District, to provide a copy of this opinion to the Illinois Attorney Registration and Disciplinary Commission.

¶ 127 Reversed and remanded with directions.

¶ 128 JUSTICE TAILOR, concurring in part and dissenting in part:

¶ 129 I concur in the majority's decision that Judge Lawrence Flood erred in (a) rejecting the Commission's definition of a "tortured confession" under the Illinois Torture Inquiry and Relief Commission Act (Act) (775 ILCS 40/1 *et seq.* (West 2020)); (b) concluding that Muhammad's statement was not a "tortured confession" under the Act; and (c) not providing Muhammad an evidentiary hearing on his claim that his statement was obtained through torture. However, I respectfully dissent from the majority's decision that then Presiding Judge LeRoy Martin Jr. and his successor, Presiding Judge Erica Reddick, erred in denying Muhammad's successive motions to rescind Robert Milan's appointment as special prosecutor in this case. This record does not show that Milan harbors a conflict of interest, actual or otherwise, and the circuit court did not abuse its discretion in rejecting Muhammad's successive bids to have Milan replaced.

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¶ 130 The majority removes Milan as special prosecutor finding that his appointment violates Muhammad's due process rights. However, Muhammad did not advance a due process theory below or on appeal. The majority manufactures a due process theory by quoting from the last page of Muhammad's opening brief where he states that Milan should be removed as special prosecutor because his personal involvement in the Cook County State's Attorney's Office (SAO) as a "direct supervisor for the felony review unit and the felony trial attorneys at the time Muhammad was tortured and tried" undermines the integrity of the proceedings "in ways known, unknown, and perhaps even unknowable," "cast[ing] doubt on the procedures in place to ensure due process under the law." *Supra* ¶¶ 83, 97. These quotations come from the section of Muhammad's brief arguing that Milan has a conflict of interest under Illinois Rules of Professional Conduct (2010) R. 5.1(b) (eff. Jan. 1, 2010), which addresses the responsibility of a supervisor for the actions of his subordinate attorneys. There is no mention of due process in Muhammad's reply brief. Muhammad does not cite a single due process case in any of his briefs. The case he does cite, *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), was not a due process case, although Justice Blackman in a special concurrence said he would go further than the majority and also find a due process violation when an interested party's counsel is appointed to prosecute a criminal contempt arising out of a civil proceeding. Notably, no other justice joined Justice Blackman's concurrence. Yet, somehow the majority concludes from the two quotations found on the last page of Muhammad's brief that the "due process clause forms the *cornerstone* of [Muhammad's] challenge" to Milan's appointment as special prosecutor. (Emphasis added.) *Supra* ¶ 97. Not so. As explained further below, the cornerstone, indeed the only stones, of Muhammad's argument to remove Milan is that he has an actual

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conflict of interest under section 3-9008(a-10) of the Counties Code (55 ILCS 5/3-9008(a-20) (West 2020)) and that his appointment violates the Rules of Professional Conduct of 2010.

¶ 131 Muhammad advanced numerous arguments below in support of his successive motions to have Milan removed as special prosecutor: (a) Milan's initial appointment as special prosecutor in 2017 violated section 3-9008(a-20) because the court did not first seek out another public agency that would be willing to serve as special prosecutor before appointing Milan, a private practitioner; (b) the court did not enter a written order in this case appointing Milan as special prosecutor in violation of section 3-9008(c); (c) Milan harbored a *per se* conflict of interest because he worked at the Cook County State's Attorney's Office (SAO) under then-State's Attorney Richard Devine, who was found to have an actual conflict of interest in the Jon Burge cases because he represented Burge when in private practice; (d) Milan had an actual conflict of interest because of his supervisory role in the SAO where he was in the position to charge Muhammad, trained and supervised the assistant state's attorneys who allegedly failed to disclose *Brady* material (see *Brady v. Maryland*, 373 U.S. 83 (1963)), when he was supervisor of the felony review unit of the SAO, and was first assistant state's attorney when Detective McDermott, Muhammad's alleged torturer, was hired by the SAO as an investigator; and (e) an appearance of impropriety existed because of Milan's previous employment with the SAO and because Milan may be called as a witness.

¶ 132 In his brief filed in this court, Muhammad argues, *inter alia*, that Milan has an actual conflict of interest and his appointment as special prosecutor should be rescinded under section 3-9008 of the Counties Code because (a) he was the "Bureau Chief at the [SAO] at the very time Mr. Muhammad was being tortured and tried, which calls into question his impartiality"; (b) Milan's

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role at the SAO included supervising the felony review division and the felony criminal trial attorneys, "the very [assistant state's attorneys] that Mr. Muhammad claims helped to frame him for the murder of Mr. Mims and whose misconduct the [Torture Inquiry and Relief Commission] specifically recommended for judicial examination"; and (c) Milan was "First Assistant at the [SAO] at the very time Mr. McDermott, a serial torturer and one of the detectives who tortured Mr. Muhammad, was hired by the [SAO]." Muhammad also argues that Milan has a conflict of interest under Illinois Rules of Professional Conduct (2010) Rs. 1.7(a)(2) and 5.1(b) (eff. Jan. 1, 2010) for the same reasons. Finally, Muhammad argues that Milan should be removed from this case because Milan will be called as witness in this case, resulting in an appearance of impropriety. At oral argument, Muhammad's counsel stated she was only seeking to have Milan replaced on a prospective basis.

¶ 133 At no point has Muhammad argued that Milan's appointment as special prosecutor violated his due process rights. Arguments not raised in an opening brief are "forfeited." Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020). Our supreme court has cautioned that "a reviewing court should exercise its power to raise unbriefed issues only sparingly, to avoid assuming a role of advocacy and being forced to speculate as to arguments the parties might have presented had the issues been raised." *People v. Class*, 2023 IL App (1st) 200903, ¶ 97 (citing *Jackson v. Board of Election Commissioners of Chicago*, 2012 IL 111928, ¶¶ 33-34, and *People v. Givens*, 237 Ill. 2d 311, 323-24 (2010)). Our inquiry should be whether Milan suffers an actual conflict of interest under section 3-9008(a-10) of the Counties Code (55 ILCS 5/3-9008(a-10) (West 2020)) and the Illinois Rules of Professional Conduct of 2010, nothing further.

¶ 134 Despite requesting review of then-Presiding Judge Martin's and Presiding Judge Reddick's

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rulings, Muhammad did not cite the standard of review that is applicable here. Citing *People v. Peterson*, 2017 IL 120331, ¶ 10, the majority contends that because the facts are not in dispute our standard of review is *de novo*. *Supra* ¶ 81. The majority's reliance on *Peterson* is misplaced, because there the defendant claimed that his counsel labored under a *per se* conflict of interest under the sixth amendment where the attorney entered into a media contract regarding the case. Muhammad has not argued at any time that Milan labored under a *per se* conflict of interest under the sixth amendment.

¶ 135 In undertaking *de novo* review, the majority has imposed a far less deferential standard of review on Muhammad's only claims, that Milan suffers an actual conflict of interest under section 3-9008 and the Illinois Rules of Professional Conduct of 2010. Moreover, and contrary to the majority's conclusion, even where the facts are undisputed, the trial court still has discretion in making certain decisions. *In re Appointment of Special Prosecutor*, 2019 IL App (1st) 173173, ¶ 20 (*Farmer*) (citing *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 123 (1998)). The Counties Code provides that the circuit court "may appoint" a special prosecutor when the state's attorney suffers from an actual conflict of interest. Compare 55 ILCS 5/3-9008(a-10) (West 2020), with *id.* § 3-9008(a-15) ("the court shall appoint a special prosecutor" when the state's attorney recuses). Because the legislature employed the word "may," this court has held that the decision to appoint a special prosecutor rests in the sound discretion of the trial court. *Farmer*, 2019 IL App (1st) 173173, ¶ 20. Indeed, our supreme court long ago explained that the statute

> "clearly gives the courts of this State the power to appoint special State's attorneys under some circumstances. To properly construe the statute and determine what will and what will

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not present a proper case for such appointment clearly involves the exercise of judicial power, and it is easy to see that different courts might differ as to the extent and character of the interest of the Attorney General or State's attorney which would justify the appointment of a special officer under the statute." *Lavin v. Board of Commissioners of Cook County*, 245 Ill. 496, 502 (1910).

¶ 136 Consequently, our review of the circuit court's decisions to deny Muhammad's successive motions to rescind Milan's appointment as special prosecutor under section 3-9008 is for an abuse of discretion only. *Farmer*, 2019 IL App (1st) 173173, ¶ 20 (determining that abuse of discretion standard applies to decision regarding appointment of special prosecutor). Likewise, the determination as to whether counsel should be disqualified under the Illinois Rules of Professional Conduct of 2010 is left to the sound discretion of the trial court and will not be disturbed on review absent an abuse of discretion. *Schwartz v. Cortelloni*, 177 Ill. 2d 166, 176 (1997). An abuse of discretion occurs when the decision of the circuit court is arbitrary, fanciful, or unreasonable or where no reasonable person would agree with the position adopted by the court. *People v. Simmons*, 2019 IL App (1st) 191253, ¶ 9.

¶ 137 No abuse of discretion can be found here. To review, on August 20, 2020, the Office of the Special Prosecutor (OSP), which Milan led, filed a motion before Judge Flood to terminate the proceedings in Muhammad's case. On November 16, 2020, Muhammad filed both a motion to strike the OSP's motion to terminate proceedings and a motion to rescind Milan's appointment as the special prosecutor on the basis that Milan had not been properly appointed pursuant to section 3-9008(c) and (a-20) of the Counties Code, that Milan suffered from the same *per se* conflict of interest as prior State's Attorney Richard Devine, and that Milan suffered from an

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"actual or apparent" conflict of interest based on his previous employment with the SAO. Milan filed an objection, arguing that he was properly appointed in the Burge cases pursuant to section 3-9008(c) and (a-20) and that he did not suffer from a conflict of interest based on his previous positions with the SAO. Milan argued that he "did not personally prosecute Muhammad, made no decisions on the case nor had any involvement in the case whatsoever." In addition, Milan argued that then-Presiding Judge Martin had recently ruled that the SAO, including State's Attorney Kim Foxx, "no longer has a conflict representing the State in Burge related matters" and therefore, if Foxx and her office were not conflicted, neither was Milan. Muhammad filed a reply, arguing again that Milan was not properly appointed under section 3-9008(c) and (a-20) and that Milan suffered from a conflict of interest.

¶ 138 At the hearing on Muhammad's motion, Milan argued, "this is really a thinly veiled attempt to forum shop prosecutors[;] the attorney of record in this case since the beginning, Candace Gorman, is unhappy with decisions I made on both the Muhammad case and the Donald Elam case, a case that was in front of your Honor." Milan further argued:

> "Let's fast forward to September 14, 2018. Candace Gorman, the attorney of record on this case, files a motion with you, your Honor, with Judge Martin—and me, by the way, notices me—asking your Honor to assign the Muhammad case to a judge that never was an Assistant State's Attorney. Notices me up on that because she recognized me as the special prosecutor on these cases since 2017.
>
> On November 7, 2018, Candace Gorman files a notice of motion with you, your Honor, and with me—again, notices me on it—to appoint a special prosecutor.
>
> On November 20th, 2018, you appointed our office in her presence. She's in your

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courtroom. And on your half sheet, reflects your appointment of our office. No objection by Candace Gorman about how your—your appointment of me was unperfected or that I have some kind of conflict. Nothing. She wanted us on there.

Between November 20th, 2018 and today, I have more than a dozen emails from Attorney Candace Gorman to me and the O'Rourke law firm about the Muhammad case. And I am not going to go through all the dozens of them, your Honor, but I will note two of them.

January 2019, she reaches out to TIRC for more documentation and to me asking for more documentation, and TIRC emails both of us. The email goes to Candace Gorman and to me regarding the materials they are going to send over. There is no objection by [Ms.] Gorman about my serving as the special prosecutor. She wanted me.

May 2019, she files a Rule to Show Cause against the Chicago Police Department. She files it in front of Judge Flood and serves me with it in order to get documents from the Chicago Police Department. No objection to me. She actually serves me on it, wants me to help her on this.

What then happens? We exchange discovery over months on the Muhammad case. She calls for a meeting with me in person to talk about the case where she requests a reinvestigation of the Muhammad case. She hands me this (indicating). This is her request for new investigation of the conviction of Abdul-Malik Muhammad, pages and pages of documents that she asks me to review.

And based upon her request, I do so. I tell her that I am going to initiate a reinvestigation. Don't confirm that I am going to do a whole investigation. I need to see if what she is telling

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me is it accurate and confirm what she does. So I begin to do so. I go through hundreds of pages of documents to start the reinvestigation.

As part of that, I interview Mr. Abdul-Malik Muhammad with her, okay. We do a Zoom interview of Mr. Muhammad. I go through the investigation. 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 a determination to proceed against Mr. Muhammad. I inform [Ms.] Gorman of that, and then I filed a motion to terminate these proceedings in front of Judge Flood.

It is important to note that during the same period of time, from 2018 to 2020, I am serving as the special prosecutor on a case called Donald Elam, which is a Burge-related case, and which [Ms.] Gorman was the attorney of record the entire time in front of your Honor. At no time does she object to my— does she claim that your appointment of me was unperfected or the appointment of my office was unperfected or that I had a conflict."

¶ 139 On December 1, 2020, Judge Martin, then the presiding judge of the criminal division, denied Muhammad's motion, finding that Milan's appointment as special prosecutor in the "Burge cases" complied with section 3-9008(a-20) and that his appointment in this case likewise complied with section 3-9008(c). Judge Martin further found:

"[T]his argument that you are raising about how the court went about appointing Mr. Milan in this particular matter, this issue—I am just troubled by the fact that this issue is being raised now all these many years after this was—this issue first appeared before the court. And, frankly, I don't think that that's—it's appropriate, and it appears to me that—as Mr. Milan has stated, that now this argument arises as Mr. Muhammad is dissatisfied with how

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the litigation has gone. And so, that—that, I find to be—I find that to be troubling."

¶ 140 On January 7, 2021, Muhammad filed a motion to reconsider then-Presiding Judge Martin's order denying his motion to rescind. Therein, Muhammad again argued that Milan was not properly appointed pursuant to the statute and Milan's background as an assistant state's attorney prevented him from being named special prosecutor in this case. On January 18, 2021, Milan filed a motion to strike Muhammad's motion to reconsider, asserting that Muhammad's motion to remove him was untimely, Milan's appointment was proper under the Illinois statute, and Milan did not suffer from a conflict of interest. Judge Reddick was named presiding judge of the criminal division shortly thereafter. On January 21, 2021, Presiding Judge Reddick struck Muhammad's motion for reconsideration of then-Presiding Judge Martin's December 1, 2020, order, finding that the motion stated no new grounds and therefore it would be improper "to reconsider the prior sitting judge's decision."

¶ 141 Thereafter, on April 6, 2021, Muhammad filed a "new motion to rescind appointment" on the grounds that Milan had an actual conflict, this time because Muhammad may call Milan as a witness. Muhammad stated that defense counsel had uncovered a memorandum addressed to Milan from an assistant state's attorney in 1999 in another, unrelated case that arose almost two years prior to Muhammad's arrest, describing visible injuries to a suspect's face after arriving at the Area 4 police station. The suspect later told the assistant that two unidentified "men" came into the room and kicked him as he was sleeping on the floor. The suspect did not see the men. The assistant relayed this information to the "Deputy Supervisors in Felony Review." Muhammad claimed that this memorandum made clear that "the practice within the [SAO] was to inform Mr. Milan in instances when police misconduct became known or apparent." Milan

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filed an objection to Muhammad's successive motion to disqualify on May 18, 2021.

¶ 142 On July 30, 2021, after hearing argument, Presiding Judge Reddick delivered a lengthy oral ruling denying Muhammad's motion. She found that Milan's initial appointment was proper and that Muhammad had not "shown sufficient facts and evidence that Milan has a conflict of interest in this case." Presiding Judge Reddick's oral ruling bears quoting at length because she, like then-Presiding Judge Martin, comprehensively explained why Muhammad's arguments lacked merit and thoughtfully and cogently exercised her discretion:

> "Under the statute, the person bringing the motion, the petitioner in this case, must plead specific facts to show that the State's Attorney is either sick, absent, unable to attend, or has a conflict of interest.
>
> * * *
>
> Now, in this case, the Court specifically finds that the controlling authority is the current version of the statute found at 55 ILS—ILCS 5/3-9008. And based on the interpretation of that version of the statute, the current version, it does seem to disavow the [appearance of impropriety] language that was cited. And I believe that['s] derived from the Lang decision, L-A-N-G, with respect to the issue of appearance of impropriety.
>
> * * *
>
> The Court turns then to the issues of whether the petitioner has shown that Special Attorney Milan has a conflict of interest under the laws.
>
> Now, the—part of the claim is really that Milan's previous positions as supervisor of the Felony Review Unit and First Assistant State's Attorney create a conflict in the TIRC proceedings; that, specifically, Special Attorney Milan was the direct supervisor for the

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Felony Review Unit at the time that the petitioner's case was proceeding; and that he was not only responsible for the training of Felony Review Attorneys, but he was also responsible for their direct supervision. And the Court does clearly consider this claim under the statutory provision.

In doing so, the Court determines that, although Special Attorney Milan was the supervisor of the Felony Review Unit, and, again, the petitioner has detailed that he not only was the supervisor, but he had, in essence, responsibility for these attorneys who reported to him and that he was responsible for their direct supervision, the Court will consider that.

Under the standard of the statute as it currently exists, without evidence of Special Attorney Milan's direct involvement, the Court does ultimately determine that the conflict of interest claim is not supported.

* * *

So returning to the prior point with respect to the conflict, the Court did again consider and find that the petitioner has not shown that Attorney—Special Attorney Milan participated directly in or was at all involved in Petitioner's case beyond his responsibility as the supervisor. And that without evidence of Attorney Milan's direct involvement, the Petitioner's claim of a conflict of interest is not supported, is not shown.

* * *

But the Court concludes that even under the standard as it is discussed within the Relevant authority, it does not appear, again, at this point the petitioner has made an adequate showing.

Now, the Court does look to our Illinois Rules of Professional Conduct for instruction

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as to how we determine. And if we look at Rule 5.1, that addresses supervising attorneys. And I'll just read the formal title, The Responsibilities of Partners, Managers, and Supervisory Lawyers.

When you look at the language of that particular ethical rule for instruction, for guidance, it talks about the supervising attorney having to have actual knowledge to be held accountable for subordinate attorneys' unethical actions. And I don't think that's instructive because in this instance, and, particularly, in the face of Attorney Milan's denials during argument and offer to provide an affidavit, he has stated that he had no involvement or engagement in the case, direct or otherwise, during the time that he was in the office.

* * *

However, once again, as we look at the actual controlling language of the law, as well as how it has been interpreted, it—again, the petitioner has not made the showing under the law that at this time there has been a showing that Attorney Milan had any direct knowledge or participation. And there's not a showing that he had any actual knowledge with respect to the actions of either the Felony Review State's Attorneys who are alleged to have engaged in certain acts that caused concern and are the basis for claims that are currently pending before the Court or the Assistant State's Attorneys who were assigned to the felony trial division who actually tried the case.

This is important because there were claims that there are police reports that were not tendered by the State's Attorneys to the defense before trial, that there was specific information within the reports that several witnesses, and I believe there might have been five, were unable to identify the petitioner during the police investigation at the time during

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which he was held in question, that that information was not tendered to defense counsel or Petitioner Muhammad before trial. And that the significance of these actions by or inactions by either the Felony Review Assistants or the Assistant State's Attorneys who actually tried the case, that those are matters over which Mr. Milan held some measure of responsibility.

But as the law and the governing provisions and as the Court considers them, to hold Special State's Attorney Milan accountable without a showing that he had direct knowledge would, in essence, set a precedent that every managing or supervising attorney would be presumed to have actual knowledge of all subordinate attorneys' conduct. And I don't believe that's the reach of the law at this point. And, again, I'm looking to ethical rules for guidance as I interpret how the Court should consider the claims here.

I also do note that prior to Attorney Milan's 2018 appointment as Special Prosecutor, that he sought and obtained an expert advisory opinion. This was from an individual named Stephanie, S-T-E-P-H-A-N-I-E, middle initial L, last name Stewart, S-T-E-W-A-R-T, who was senior counsel to the administrator of the ARDC. And this individual opined that Special Attorney Milan did not have a conflict of interest that would prohibit him from serving. And this was based on the finding that his supervisory role was too attenuated from [Detective McDermott] to create a conflict of interest.

I further note, however, that petitioner also engaged the services of Professor Andrew, common spelling, Kent, K-E-N-T. And he provided an affidavit analyzing these very facts before the Court as well and reached an opposite conclusion.

He, in essence, determined that, excuse me, the conclusions of Attorney Stewart *** [f]ailed to directly address the concerns raised by the ethical rules regarding Rule 1.11

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and, specifically, Rule 1.7, excuse me, the conflict of interest.

And, ultimately, the conclusion of the petitioner's expert is that Attorney Milan does have a personal interest, in essence, in ascertaining or upholding the work of the State's Attorney's Office because there is a significant risk or that there is a conflict of interest because—and I'll quote here. There is a significant risk that Milan's representation of the People as a Special Prosecutor in this case will be materially limited by personal interest of Milan's.

And it was explained in greater detail. And this was under Illinois Rule of Professional Conduct 1.7(a)(2).

Again, as the Court looks to the specific issues in this case that arise, the claim of a significant risk that he will be material[ly] limited, again, is not a sufficient showing under the language of the statute that there—if he established that there is evidence that he has an actual conflict or *per se* conflict. Even as I look at the language for, again, the appearance of impropriety, at this stage, based on the information the Court has, I do ultimately conclude there has not been the showing, the requisite showing.

I do also want to make clear, however, that should additional evidence come forward showing a direct connection between Special Attorney Milan and the petitioner's case, his direct involvement, his direct knowledge, that certainly it will be important that those matters are brought before the Court because then there would be a showing, and that is what is not present and what is necessary."

¶ 143 Presiding Judge Reddick then addressed Muhammad's claim that Milan suffered from a conflict of interest because Muhammad may potentially call him as a witness. Presiding Judge

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Reddick stated:

"And in this instance the petitioner has indicated its desire, as well as its intention, to call Special Attorney Milan as a witness with respect to discovering or learning his information about the procedures, about his supervision of the attorneys involved in the case back at that time. But, in essence, there really would still need to be a showing for the need to call Attorney Milan to testify at an evidentiary hearing.

The petitioner specifically alleged that Attorney Milan has important knowledge regarding the alleged prosecutorial and police misconduct. And that petitioner—that counsel expects that once the petitioner is allowed to call Mr. Milan as a witness, he will be—the petitioner would be entitled to full discovery, not only as to all the memos from Felony Review at the pertinent time, but also Mr. Milan's knowledge of torture by the Chicago Police Department, the processes in place when confronted with evidence of that torture, and also the training to his subordinates on this crucial subject. Again, in the face of that, Attorney Milan stated that he has no personal knowledge of the circumstances of the petitioner's case.

And in this instance, even given the wide reaching bases upon which the petitioner would seek to call Special Attorney Milan, that's a hurdle that still has to be overcome. It is not a certainty that he would be called as a witness. There must be a showing that that is, therefore, necessary information for the matter to proceed.

In this instance it's as if the petitioner—and it is—the petitioner is asking me to declare that because there might be a conflict I should disqualify him now. And I think it's putting the cart before the horse. There has to be established that there is the conflict to have him

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removed. You can't say there might be a conflict, so remove him.

At this point there has to be a showing, a sufficient showing, that there is enough of a conflict for that to occur. And I repeat again if there is that showing, this matter should be brought before the Court for the Court then to make these determinations."

¶ 144 Finally, Presiding Judge Reddick found that Muhammad forfeited his claim to have Milan removed as special prosecutor by failing to bring his motion until two years after Milan was appointed. She stated:

"But I do note that the petitioner has known about Special Attorney Milan's appointment as the Special Prosecutor since the beginning stages of this TIRC petition, and that dates back to 2018. And I note that Judge Byrne had appointed Attorney Milan as Special Prosecutor back in 2017.

And in this instance the petitioner is the one who sought Special Attorney Milan's appointment as Special Attorney for the petitioner's matters. And after Special Attorney Milan became engaged with the matter, the discovery process happened, the initial investigation that Special Attorney Milan conducted, and the petitioner submitted to an interview with Attorney Milan in the presence of petitioner's counsel. That only after these matters occurred and Special Attorney Milan announced that he would proceed with the prosecution, it was at that time that the initial motion to rescind occurred and then, ultimately, the new motion that is currently before the Court. ***

Now, petitioner's counsel did explain to the Court that it was only after additional measures she took to obtain information did she become more fully aware of Special Attorney Milan's role as supervisor of the Felony Review Unit at the relevant time. But

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even giving consideration to that, the concern for the Court is the timing then of the motions to rescind while petitioner had knowledge of Special Attorney Milan's roles within the State's Attorney's Office. And that only after the passage of almost two years, only after learning that petitioner—that Special Attorney Milan, who pursued the prosecution versus dismissing it, did then the petition to rescind surface.

And I do think under the language of the term forfeiture, that failure to raise the issue in a timely manner really speaks to the concern about it being raised now."

¶ 145 Turning to the law governing this dispute, article VI, section 19, of the Illinois Constitution provides for the election of a state's attorney in each county. Ill. Const. 1970, art. VI, § 19. The powers and duties of a state's attorney include commencing and prosecuting all actions, civil and criminal, in which the people of the State may be concerned. 55 ILCS 5/3-9005(a)(1) (West 2020). A special prosecutor may be appointed when the state's attorney suffers from an actual conflict of interest. *Id.* § 3-9008(a-10). An actual conflict of interest occurs when the state's attorney "is interested in" the case as either (1) a private individual or (2) an actual party to the action. (Internal quotation marks omitted.) *In re Appointment of Special State's Attorney*, 2020 IL App (2d) 190845, ¶ 17. Section 3-9008 also applies to the removal of a special prosecutor. *In re Appointment of a Special State's Attorney*, 305 Ill. App. 3d 749, 758 (1999). Milan is not an actual party to the action, so the only issue is whether he is interested in Muhammad's case as a private individual. "When the alleged interest is personal, a defendant must show either (1) that the relationship involves significant emotional ties; or (2) that defendant suffered 'actual and substantial prejudice.' " *People v. Arrington*, 297 Ill. App. 3d 1, 3 (1998) (quoting *People v. Polonowski*, 258 Ill. App. 3d 497, 502 (1994)).

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¶ 146 Contrary to Muhammad's argument, the appearance of impropriety is no longer enough to establish that a prosecutor harbors an actual conflict of interest under section 3-9008. Under the current version of section 3-9008, which was amended in 2016 to expressly add the "actual conflict of interest" language, the party seeking a special prosecutor must demonstrate an actual conflict of interest, not merely the appearance of impropriety. See *Farmer*, 2019 IL App (1st) 173173, ¶¶ 33-39. Therefore, the line of cases under the preamendment version of the statute that holds that the appearance of impropriety is sufficient to remove a prosecutor no longer apply. See, *e.g.*, *People v. VanderArk*, 2015 IL App (2d) 130790, ¶ 38 (citing preamendment version); *People v. Weeks*, 2011 IL App (1st) 100395, ¶ 46 (citing preamendment version); *People v. Lang*, 346 Ill. App. 3d 677, 682 (2004) (citing preamendment version). The majority correctly points out that the court in *People v. Benford*, 2022 IL App (2d) 200349-U, ¶ 39, stated the appearance of impropriety was enough to disqualify a prosecutor, but that court cited cases interpreting the preamendment version of the statute and did not analyze the text of the amended version of the statute adding the "actual conflict of interest" language.

¶ 147 Muhammad bears the burden of proving by sufficient facts and evidence that the special prosecutor has an actual conflict of interest in a specific case requiring the appointment of a new special prosecutor. 55 ILCS 5/3-9008(a-10) (West 2020); *Arrington*, 297 Ill. App. 3d at 4; *Farmer*, 2019 IL App (1st) 173173, ¶ 44 n.3. Absent such facts, Milan has no burden to show that he was not conflicted. See *Arrington*, 297 Ill. App. 3d at 4 (distinguishing *People v. Courtney*, 288 Ill. App. 3d 1025, 1034 (1997), where prosecutor had a *per se* conflict, in which case prosecutor bears burden to show no conflict).

¶ 148 Our precedents demonstrate that a defendant bears a substantial and exacting burden to

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remove a prosecutor on the basis that he has a personal interest in the matter under section 3-9008 of the Counties Code. See, *e.g.*, *In re Harris*, 335 Ill. App. 3d 517, 525 (2002) (juvenile's allegations that two police detectives and an assistant state's attorney conspired to present perjured testimony at a probable cause hearing and that the brother of one of the police detectives was an assistant state's attorney who was also the supervisor of the organized crimes division did not show that the state's attorney was an interested party and, therefore, should be disqualified); *People v. Tracy*, 291 Ill. App. 3d 145, 150 (1997) (the trial court did not abuse its discretion in denying the defendant's motion for the appointment of a special prosecutor, which alleged that one of the assistant state's attorneys who had initially been involved in the case was going to testify as a witness at trial regarding an incriminating statement made by the defendant in court); *People v. Morley*, 287 Ill. App. 3d 499, 505 (1997) ("[t]o hold that a special prosecutor must always be appointed whenever a victim or witness is employed by a state, county, or local agency would be an illogical, as well as impractical, encroachment upon the authority of a constitutional officer"); *People v. Max*, 2012 IL App (3d) 110385, ¶ 62 (finding no abuse of discretion in the trial court's decision not to appoint a special prosecutor even though the victim was the brother of the county sheriff and had made campaign contributions to the state's attorney); *Farmer*, 2019 IL App (1st) 173173, ¶ 20 (no inherent conflict of interest any time the state's attorney is called upon to investigate and prosecute police-involved shootings); *Weeks*, 2011 IL App (1st) 100395, ¶ 52 (holding no special prosecutor was required even though an assistant state's attorney was the complaining witness against defendant in an unrelated case); *People v. Bickerstaff*, 403 Ill. App. 3d 347, 354 (2010) (holding that the defendant failed to show that the state's attorney's public criticism of his predecessor's handling of the defendant's

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case warranted removal).

¶ 149 Muhammad has failed to meet his initial burden to offer facts or evidence to show that Milan played any role in Muhammad's interrogation or prosecution for Mims's murder. The majority's assertion that "[t]he 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" (*supra* ¶ 94) is as ambiguous as it is misleading, for it suggests that, because Milan supervised the felony review unit he made the decision to charge Muhammad. But there is no such evidence in the record. Similarly, there is nothing in the record to support the majority's assertion that Milan had a "relationship" with McDermott (*supra* ¶ 80) or that McDermott's position with the SAO aligned with or overlapped Milan's work-related responsibilities (*supra* ¶ 100). Further, Muhammad has not alleged at any time that any assistant state's attorneys working in the felony review unit were present for, played a role in, or were aware of his alleged torture. There is no indication in the record or in Muhammad's complaint that suggests that an assistant state's attorney was even present when Muhammad provided the subject statement to Detectives Fidyk and McDermott. And even if Milan was involved in charging Muhammad, Milan would still not harbor an actual conflict of interest. Muhammad has not cited any case disqualifying a prosecutor based on police wrongdoing imputed to the prosecutor. To the contrary, in *McCall v. Devine*, 334 Ill. App. 3d 192, 205 (2002), we held that allegations of police misconduct were not sufficient to establish that the state's attorney was personally interested in the case, and appointing a special prosecutor without specific facts would "open the door to requiring a special prosecutor to be appointed any time a police officer is suspected of wrongdoing." Muhammad has not come

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forth with any evidence showing Milan participated in, or knew of, Muhammad's alleged tortured confession.

¶ 150 The majority acknowledges that a defendant must establish an "actual conflict of interest" under section 3-9008(a-10) for the appointment and removal of a special prosecutor and may not rely on speculation or suspicion (*id.*), but the majority cites no actual facts tying Milan to Muhammad's torture or subsequent prosecution and relies solely on the fact that he held a supervisory position in the SAO. Lacking any actual evidence, the majority improperly engages in speculation and supposition in finding that Milan has an actual conflict. As Presiding Judge Reddick reasoned, there is simply no evidence of any disqualifying connection between Milan and Muhammad.

¶ 151 The majority cites *Lang*, 346 Ill. App. 3d 677, for the proposition that, when an error casts doubt on the integrity of a proceeding, we have a constitutional duty to act. *Supra* ¶ 85. In *Lang*, after a hearing related to the defendant allegedly driving with a revoked license, an assistant state's attorney followed the defendant out of court and hid behind potted plants to watch the defendant drive away from the courthouse. The assistant state's attorney then contacted police to inform them that the defendant was driving without a license. *Lang*, 346 Ill. App. 3d at 678-79. The assistant state's attorney then prosecuted the case until trial, when another attorney from the Lake County State's Attorney's Office prosecuted the case. *Id.* at 679. The assistant state's attorney who witnessed the alleged crime was the State's chief witness at trial. *Id.*

¶ 152 On appeal, the Second District found that the defendant's prosecution created an appearance of impropriety because the assistant state's attorney surreptitiously followed the defendant until he observed the defendant commit a crime, which resulted in charges. *Id.* at 684. The reviewing

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court believed that the "aggressive behavior toward the defendant created the appearance that the State's Attorney's office was obsessed with finding evidence against the defendant to obtain a conviction against him at all costs." *Id.* "[T]hese facts created an improper appearance that the State was too involved with the underlying case to be fair in its prosecution of the defendant." *Id.*

¶ 153 Aside from the obvious factual differences (see *id.* at 685 ("we emphasize that our holding is based on the specific facts of this case")), *Lang* is inapplicable here. *Lang* does not impose a duty on this court, constitutional or otherwise, to remove Milan from this case. Rather, the *Lang* holding was based on the statutory language, "is interested in any cause or proceeding" in the preamendment version of section 3-9008 of the Counties Code (55 ILCS 5/3-9008 (West 1998)). *Lang*, 346 Ill. App. 3d at 681. In the 2016 amended version of section 3-9008(a-10), that language has been replaced with "the State's Attorney has an actual conflict of interest in the cause or proceeding." 55 ILCS 5/3-9008(a-10) (West 2016). This "actual conflict of interest" language forecloses the possibility of a special prosecutor being appointed where there is the mere "appearance of impropriety." *Farmer*, 2019 IL App (1st) 173173, ¶ 39.

¶ 154 The majority's reliance on *Courtney*, 288 Ill. App. 3d at 1034, is also misplaced because it involved a prosecutor's *per se* conflict of interest. There, the defendant's former counsel became the state's attorney of Kankakee County before the defendant's trial. The prosecutor assigned to the case assured the court that the Attorney General's office would be taking over the prosecution. However, just before trial, the prosecutor announced without explanation that the Attorney General's office would not be entering the case and that the State was ready for trial. The defendant did not object at that point but raised the issue in a posttrial motion and on

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appeal. Under those circumstances, the appellate court overlooked the forfeiture and reversed the defendant's conviction, finding that a special prosecutor was required when a defendant's trial counsel accepts a managerial position in the office that is prosecuting the defendant where that attorney was "intimately involved in the defendant's representation prior to becoming State's Attorney" and made "numerous court appearances on behalf of the defendant and was clearly privy to the defendant's confidences." *Id.* at 1031-32, 1034, 1037. Unlike in *Courtney*, Milan never represented Muhammad. Thus, Muhammad did not establish that Milan suffered an actual conflict of interest under section 3-9008(a-10) on account of a personal interest in his case.

¶ 155 Nor does Milan suffer a conflict of interest under Rule 1.7(a)(2) or Rule 5.1(b) of the Illinois Rules of Professional Conduct of 2010. Rule 1.7(a)(2) provides:

> "(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> ***
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Ill. R. Prof'l Conduct (2010) R. 1.7(a) (eff. Jan. 1, 2010).

Rule 5.1(b) provides that "[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." Ill. R. Prof'l Conduct (2010) R. 5.1(b) (eff. Jan. 1, 2010).

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¶ 156 A party seeking to disqualify counsel under the Illinois Rules of Professional Conduct of 2010 bears the burden of proving a conflict of interest. *Franzoni v. Hart Schaffner & Marx*, 312 Ill. App. 3d 394, 400 (2000). Disqualification is a drastic measure. *In re Possession & Control of the Commissioner of Banks & Real Estate of Independent Trust Corp.*, 327 Ill. App. 3d 441, 478 (2001).

¶ 157 As explained above, Muhammad did not offer any evidence that Milan had a personal interest in Muhammad's case. Contrary to Muhammad's argument, the 1999 memorandum from an assistant state's attorney to Milan does not constitute evidence of Milan's personal involvement because it describes a separate, unrelated case involving different detectives that occurred almost two years prior to Muhammad's arrest. There is similarly no evidence that Milan, in this supervisory capacity, was aware of any alleged *Brady* violations that occurred related to Muhammad's prosecution. Accordingly, Muhammad failed to meet his burden to establish that Milan suffered a conflict of interest under Rule 1.7(a)(2) or Rule 5.1(b) of the Illinois Rules of Professional Conduct of 2010. Therefore, Presiding Judge Reddick did not abuse her discretion in denying Muhammad's request to disqualify Milan on this basis.

¶ 158 Unable to find a basis to conclude that Milan suffers an actual conflict of interest under section 3-9008(a-10) of the Counties Code or the Illinois Rules of Professional Conduct of 2010, the majority cherry-picks two sentences from the second-to-last paragraph of Muhammad's 46-page opening brief, announces that Muhammad has advanced a due process argument, and sets out to resolve this phantom argument by repeatedly equating Milan's role as special prosecutor with that of a sitting judge. To be clear, the words "due process" appear but once on the last page of Muhammad's opening brief and not at all in his reply brief. The majority has

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manufactured Muhammad's due process argument out of whole cloth, denying Milan an opportunity to respond, in derogation of our supreme court's repeated admonition to avoid assuming the role of advocate. See *Givens*, 237 Ill. 2d at 324 (appellate court raising an issue *sua sponte* was a violation of well-established principles); *People v. Rodriguez*, 336 Ill. App. 3d 1, 14 (2002) (we must refrain from raising unbriefed issues, to avoid having the "effect of transforming this court's role from that of jurist to advocate").

¶ 159 The majority concludes that due process does not allow, and we must not tolerate, the "*risk* of actual bias" that Milan's personal participation in this case presents. (Emphasis added.) *Supra* ¶¶ 96, 101. The majority points out that "[d]ecades of torture by Chicago police took place before the courts and legislature acted" and quotes an article that states that " 'the crisis of police torture is more far-reaching than the 'bad apples' myth suggests.' " *Supra* ¶ 98 (quoting Kim D. Chanbonpin, *Truth Stories: Credibility Determinations at the Illinois Torture Inquiry and Relief Commission*, 45 Loy. U. Chi. L.J. 1085, 1102 (2014)). In so doing, the majority effectively holds that, under a due process analysis, the appearance of impropriety is sufficient to remove a special prosecutor. *Cf. Farmer*, 2019 IL App (1st) 173173, ¶¶ 33-39 (under the current version of section 3-9008, the party seeking a special prosecutor must demonstrate an actual conflict of interest, not merely the appearance of impropriety). The implication of the majority's finding is that Muhammad's unsupported allegations of guilt by association are enough to have Milan removed from this case.

¶ 160 The phrase "risk of actual bias" in the due process context is generally found in cases involving a defendant's motion for substitution of judge for cause. A motion for substitution of judge for cause is heard by a second judge, allaying due process concerns, and "ensures that

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any substitution coming after a substantive ruling has been made is the result of a proven bias or high probability of the high risk for actual bias and is not a mere ploy for tactical advantage." *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 46. However, the forced removal of a judge in such circumstances requires that actual prejudice, "that is, either prejudicial trial conduct or personal bias," be established. *Id.* ¶ 30. It is not enough for a defendant to allege there is a potential appearance of impropriety, as it does not equate to actual prejudice. See *id.* ¶ 43; *People v. Klein*, 2015 IL App (3d) 130052, ¶ 89.

¶ 161 Milan is not a judge, nor is he acting as one here. Nevertheless, quoting *Williams v. Pennsylvania*, 579 U.S. 1, 9 (2016), the majority finds that, because Milan had quasi-judicial power as supervisor of the felony review unit that charged Muhammad with first degree murder, Milan now has the improper ability to " 'judge' himself and his subordinates" because he is required to assess "the validity of his original decision to prosecute," thereby violating Muhammad's due process rights. *Supra* ¶¶ 94-95. Again, there is no evidence in the record that Milan had any role in the decision to charge Muhammad. In any case, Milan in no sense is acting as a "judge" in this case.

¶ 162 The majority attempts to find a due process violation by equating Milan's position as special prosecutor in this case to that of the "sitting justice" (*supra* ¶ 95) in *Williams*, who had the opportunity to rule on a collateral appeal by the same defendant when decades earlier as a prosecutor, the judge had authorized the seeking of the death penalty. *Williams*, 579 U.S. at 11. This analogy falls flat because Milan had no such power in this case. Moreover "there is general agreement that prosecutors' participation in a case is not subject to the same conflict of interest rules that govern judges." *State v. Galindo*, 994 N.W.2d 562, 598 (Neb. 2023) (*per curiam*)

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(citing *Young*, 481 U.S. 787; *People v. Vasquez*, 137 P.3d 199 (Cal. 2006)). That is because prosecutors, unlike judges, are not disinterested parties to criminal prosecutions. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248-50 (1980) ("Prosecutors need not be entirely 'neutral and detached.' [Citation.]"); *Wright v. United States*, 732 F.2d 1048, 1056 (2d Cir. 1984) ("[o]f course, a prosecutor need not be disinterested on the issue [of] whether a prospective defendant has committed the crime with which he is charged"). Moreover, the United States Supreme Court does not appear to have expressly recognized a due process right to a conflict-free prosecutor. See *Galindo*, 994 N.W.2d at 598.

¶ 163 Rather, the farthest the United States Supreme Court appears to have gone is to state that a prosecutor's personal conflict of interest "may" "in some contexts raise serious constitutional questions." *Marshall*, 446 U.S. at 249-50. Regardless, the majority ventures far afield with its novel "judge in his own case" due process theory. "It is well settled that the American prosecutor plays a special role in the search for truth: the prosecutor's interest is in seeing that justice is done, not winning a case." *People v. Wilson*, 2019 IL App (1st) 181486, ¶ 78 (citing *People v. Beaman*, 229 Ill. 2d 56, 73 (2008), citing *Strickler v. Greene*, 527 U.S. 263, 281 (1999)). The appointment of a special prosecutor does not change the objective of the office, nor is there anything in the record showing that Milan's role as special prosecutor in this case is inconsistent with the search for truth. The cornerstone of the majority's analysis—that Milan became the judge of his own case—crumbles under its own weight because there is no evidence in the record that Milan had any involvement in Muhammad's prosecution, let alone any alleged police or prosecutor wrongdoing. Milan is no more a judge of his own case than any other prosecutor would be in seeking the truth in this or any other case.

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¶ 164 Under the majority's reasoning, a postconviction petitioner could disqualify a prosecutor by simply alleging prosecutor or police misconduct because such allegations would call on the prosecutor to "judge" his own conduct or the decision to prosecute or the conduct of police. But no court has ever adopted such an expansive due process theory of prosecutor conflict. And for good reason. Appointing a special prosecutor implicates the public prosecutor's duty as an elected officer under the Illinois Constitution to represent the People (*Morley*, 287 Ill. App. 3d at 505 ("[t]o hold that a special prosecutor must always be appointed whenever a victim or witness is employed by a state, county, or local agency would be an illogical, as well as impractical, encroachment upon the authority of a constitutional officer")) and the fiscal purse because counties are responsible for the special prosecutor's fees (55 ILCS 5/3-9008(b) (West 2020)). Moreover, Commission proceedings, like postconviction proceedings, are civil matters. "Judicial review of a TIRC disposition is a civil proceeding, akin to the third stage of a postconviction proceeding, which is also civil in nature." (Internal quotation marks omitted.) *People v. Gibson*, 2018 IL App (1st) 162177, ¶ 85. As this court explained in *People v. Christian*, 2016 IL App (1st) 140030, ¶ 78, the Act is unusual in that a claim of torture is considered first by the Commission and then by the circuit court.

> "[T]hinking about the process of a torture claim through the lens of the more common postconviction process shows that the initial screening of the claim is roughly comparable to the first stage, the Commission's inquiry and recommendations are the second stage, and the circuit court hearing is the third stage evidentiary hearing." *Christian*, 2016 IL App (1st) 130030, ¶ 78.
>
> " '[I]f a matter is referred to [the circuit] court, a claimant can receive what is referred to in

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Illinois as a "third stage post-conviction hearing." This means that the claimant can have a full court hearing before a judge to show by a preponderance of the evidence that his confession was coerced.' " *Id.* (quoting State of Illinois Torture and Relief Commission, Mission and Procedure Statement, http://www.illinois.gov/tirc/Pages/default.aspx (last visited Mar. 1, 2016)); see *People v. Whirl*, 2015 IL App (1st) 111483, ¶ 51.

¶ 165 The majority misconstrues Milan's role in these proceedings. As special prosecutor in this case, Milan's role was to represent the State. 775 ILCS 40/50(b) (West 2020). Milan was no more a "judge" in this case than any assistant state's attorney filing a motion to dismiss or an answer in a postconviction proceeding. Illinois caselaw is replete with instances of assistant state's attorneys representing the People in postconviction cases where petitioners allege that assistant state's attorneys and police officers violated their constitutional rights by obtaining tortured and involuntary confessions or engaging in other misconduct, including specifically not turning over *Brady* material. Following the majority's rationale for its newfound due process right, a public prosecutor would be disqualified from representing the People in such proceedings because they would be called upon to judge themselves. However, Milan's decision that the evidence against Muhammad in this case is overwhelming, and even insufficient to warrant an evidentiary hearing, is no more outcome-determinative than a prosecutor's decision to defend a conviction in a postconviction proceeding. The circuit court makes the ultimate decision on whether an evidentiary hearing is necessary following a referral by the Commission and, if so, whether the evidence presented supports a finding for the petitioner. *Id.* § 50(a); *People v. Johnson*, 2022 IL App (1st) 201371, ¶ 74 ("[W]e read the [Act] to require the circuit court to hold an evidentiary hearing upon referral from TIRC, *unless* the circuit court finds that

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the TIRC's finding of 'sufficient evidence of torture to merit judicial review' [citation] was 'against the manifest weight of the evidence' [citation]." (Emphasis in original.)).

¶ 166 The majority then pivots and states that it does not matter if "Milan was personally involved in interrogating suspects or knew that police officers obtained tortured confessions" because he "spent nearly 20 years at the SAO, eventually becoming first assistant" and is trying to protect his professional reputation. *Supra* ¶ 109. The majority claims Milan could not possibly be objective in this case because he has a personal interest in his public image and dropping charges against Muhammad would be seen as an admission of error that would harm Milan's reputation.

¶ 167 Under the law, it *does* matter if Milan has a personal interest. Milan's reputation is not at issue here. What is at issue here is whether then-Presiding Judge Martin and Presiding Judge Reddick abused their discretion in denying Muhammad's motions to remove Milan pursuant to section 3-9008(a-10) of the Counties Code or the Illinois Rules of Professional Conduct of 2010. As Muhammad has not met his burden to prove an actual conflict under section 3-9008(a-10) or the Illinois Rules of Professional Conduct of 2010, I would find that then-Presiding Judge Martin and Presiding Judge Reddick did not abuse their discretion.

¶ 168 There is simply no evidence that Milan or anyone from the SAO played a part in the alleged torture of Muhammad or its alleged cover-up or knew of any wrongdoing by Detectives Fidyk or McDermott in obtaining his alleged tortured confession. The fact that Milan supervised the felony review unit or was the first assistant when McDermott was hired is not indicative of his or the SAO's complicity in the police department's pattern and practice of torture. There has to be some actual nexus between Muhammad's case and Milan's involvement. Speculation, supposition, and conjecture are not sufficient.

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¶ 169 Finally, the majority conveniently ignores the well-reasoned decisions of then-Presiding Judge Martin and Presiding Judge Reddick regarding the suspicious timing of Muhammad's motions to rescind Milan's appointment. Not only did they not abuse their discretion in denying Muhammad's motions on the merits, they also did not abuse their discretion in denying Muhammad's motions under the principle of forfeiture. Milan argued below and in this court that Muhammad's successive motions to rescind his appointment were an effort to shop for a more favorable prosecutor. Despite specifically requesting that Milan be appointed in this case, Muhammad sought to have Milan removed two years after his appointment, alleging that Milan had a disabling conflict of interest, but only once Milan moved to terminate the proceedings in this case for lack of evidence supporting Muhammad's claim of torture. Both then-Presiding Judge Martin and Presiding Judge Reddick expressly found that the timing of Muhammad's successive motions was highly suspect.

¶ 170 Gorman, however, averred in her affidavit that, until mid-September 2020, she "had no idea that Mr. Milan had been an assistant state's attorney in a high-ranking role at the time of [Muhammad's] arrest, torture, and trial." It is not clear from Gorman's affidavit whether she claims she was unaware that Milan had previously been an assistant state's attorney or whether she claims that she was unaware that Milan held a high-ranking position with the SAO. However, Milan points out that the 2017 order appointing him in the "Burge" cases expressly states that he is a former First Assistant Cook County State's Attorney. In addition, as Milan advised then-Presiding Judge Martin, he had also been appointed the special prosecutor in the case of Donald Elam, another client of Gorman's. Milan advised then-Presiding Judge Martin that he was appointed as the special prosecutor in the Elam case on June 6, 2018, and on August

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21, 2020, he successfully moved to terminate Elam's case. At no time did Gorman challenge Milan's appointment in the Elam case.

¶ 171 At oral argument, Gorman told us, "It never dawned on me in a million years that the special prosecutor would be coming from that same office because of the nature of what the special prosecutor was doing. So, no, this was the person I was told by the state's attorney's office was hearing these [cases] when they recused themselves and to me it's still mindboggling that this is who in fact was appointed." Yet, as far as the judge who was assigned to hear Muhammad's case, Gorman also told us, "I did ask in my motion for a judge not to have a former state's attorney for a judge because of the potential for bias but as far as Mr. Milan, I knew nothing about him and I certainly didn't know he was head of felony review at the very time my client was being tortured during felony review."

¶ 172 There are many reasons why then-Presiding Judge Martin and Presiding Judge Reddick could have determined that Muhammad's motions to remove Milan were gamesmanship and not based on any genuine conflict of interest. In the age of the Internet, it is difficult to comprehend how Gorman was not aware of Milan's high-ranking position with the SAO. In 2017, Milan had succeeded to the role of special prosecutor in the high-profile and newsworthy Burge cases. There had been substantial media coverage of Milan's work as special prosecutor in the Burge cases. By way of example, on July 10, 2019, after Milan was appointed special prosecutor in this case and 16 months before Gorman filed the first of Muhammad's successive motions to disqualify Milan, the *Chicago Sun-Times* published a story under the headline, "Judge to Reconsider if Special Prosecutor Needed for Burge-Related Cases," identifying Milan as "a former top deputy to ex-State's Attorney Richard Devine." Andy Grimm, *Judge to*

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Reconsider if Special Prosecutor Needed for Burge-Related Cases, Chicago Sun-Times (July 10, 2019), https://chicago.suntimes.com/crime/2019/7/10/20689109/judge-reconsider-special-prosecutor-jon-burge-related-cases [https://perma.cc/T6KX-746H]. In addition, Gorman herself moved for Muhammad's case to be assigned to a judge who had not previously worked for the SAO, begging the question why she did not similarly move as to the special prosecutor that would be assigned to Muhammad's case. Further, Gorman's affidavit is ambiguous regarding her knowledge of Milan's prior association with the SAO. Finally, Milan was the special prosecutor in the Elam case with Gorman.

¶ 173 There is a more than ample basis in this record to support then-Presiding Judge Martin's and Presiding Judge Reddick's finding that the suspicious timing of Muhammad's motions to disqualify Milan required their denials under the principle of forfeiture. I would find on this record that Muhammad's bid to have Milan removed was prompted not by any conflict of interest but a desire for a more favorable prosecutor, as Milan argued below and on appeal.

¶ 174 Then-Presiding Judge Martin and Presiding Judge Reddick did not abuse their discretion in denying Muhammad's successive motions to have Milan removed from this case based on an alleged conflict of interest under section 3-9008(a-10) of the Counties Code and the Illinois Rules of Professional Conduct of 2010. Muhammad never raised a due process argument, and in any case his due process rights were not violated.

¶ 175 Accordingly, I would affirm then-Presiding Judge Martin and Presiding Judge Reddick's orders denying Muhammad's successive motions to rescind Milan's appointment as special prosecutor in this case.

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***People v. Muhammad*, 2023 IL App (1st) 220372**

Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 00-CR-13572(01); the Hon. Lawrence Flood, the Hon. LeRoy K. Martin Jr., and the Hon. Erica L. Reddick, Judges, presiding.
Attorneys for Appellant:	H. Candace Gorman, of Chicago, for appellant.
Attorneys for Appellee:	Robert Milan, Special State's Attorney, of Chicago, and Alan J. Spellberg, Assistant Special State's Attorney, of Highland Park, for the People.
***Amicus Curiae*:**	Kwame Raoul, Attorney General, of Chicago (Alex Hemmer, Deputy Solicitor General, and David E. Neumeister, Assistant Attorney General, of counsel), for *amicus curiae* Illinois Torture Inquiry and Relief Commission.

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	
Respondent,	)	
v.	)	Case No. 00 CR 1357201
Abdul Malik Muhammad,	)	
Petitioner.	)	

2022 MAR 11 PM 2:2 IRIS Y. MARTINEZ CLERK OF THE CIRCUIT COURT OF COOK COUNTY FILED

NOTICE OF APPEAL

Petitioner-appellant, Abdul Malik Muhammad, hereby appeals to the Appellate Court ofIllinois, First Judicial District, from the order of the Circuit Court of Cook County,Illinois, (Honorable Judge Lawrence Flood) entered March 11, 2022, which granted the special prosecutor's Motion to Terminate Mr. Muhammad's referral from the Torture Inquiry and Relief Commission (TIRC) thereby terminating Muhammad's claim of Torture under 775 ILCS 40/. Mr. Muhammad is indigent and an inmate at Stateville Correctional Center. Mr. Muhammad's pro-bono counsel will continue to represent him on this appeal.

Muhammad also appeals the three orders by the Chief Judge (and acting Chief Judge) of the Cook County Criminal Court entered on:

ENTERED MAR 11 2022 IRIS Y. MARTINEZ CLERK OF THE CIRCUIT COURT OF COOK COUNTY, IL

- December 1, 2020 denying Muhammad's motion to rescind the appointment of Special Prosecutor Robert Milan;
- January 21, 2021 denying Muhammad's motion to reconsider the denial of the motion to rescind the appointment of Special Prosecutor

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Robert Milan;

- July 30, 2021 denying Petitioner's (New) motion to rescind Appointment.

By this appeal, plaintiff-appellant will ask the appellate court to reverse the termination of Petitioner's TIRC claim and the orders of the Circuit Court denying the recusal of the special prosecutor, the motion to reconsider the denial of the recusal of the special prosecutor, and petitioners "new motion for recusal." Petitioner seeks the reinstatement of Petitioner's TIRC claim, and an order that the special prosecutor be removed from this case and such other relief as he may be entitled to on this appeal.

Notices should be sent to the undersigned counsel.

Respectfully submitted,

/s/ H. Candace Gorman
Attorney for Defendant-Petitioner

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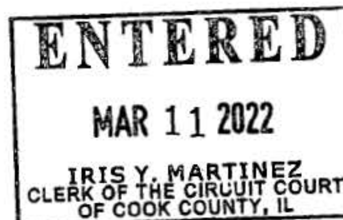

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Sheet #	CRIMINAL DISPOSITION SHEET	Branch/Room/Location	Court Interpreter
2	Defendant Sheet #1	Criminal Division, Courtroom 101 2650 South California Avenue, Chicago, IL, 60608	

Case Number	Defendant Name	Attorney Name	Session Date	Session Time
00CR1357201	MUHAMMAD, ABDUL	PUBLIC DEFENDER B. FOX, 91580	12/1/2020	09:30 AM

CB/DCN#	IR #	EM	Case Flag	Bond #	Bond Type	Bond Amt
004468639	1170296					

CHARGES	COURT ORDER ENTERED	CODES
C001 720-5/9-1(A)(1) MURDER/INTENT TO KILL/INJURE 12/12/2001 DEFT. SENTENCED TO IDOC	Motion for dismissal of Special Pros Denied	
C002 720-5/9-1(A)(2) MURDER/STRONG PROB KILL/INJUR		
C003 720-5/9-1(A)(3) MURDER/OTHER FORCIBLE FELONY 11/13/2001 Nolle Prosequi		
C004 720-5/24-1.2(A)(2) AGG DISCHARGE FIREARM/OCC VEH 11/13/2001 Nolle Prosequi		
C005 720-5/24-1.2(A)(2) AGG DISCHARGE FIREARM/OCC VEH 11/13/2001 Nolle Prosequi		

JUDGE: Martin, LeRoy K, Jr. LeRoy K. Martin Jr.	JUDGE'S NO: 1844	RESPONSIBLE FOR CODING AND COMPLETION BY DEPUTY CLERK:	VERIFIED BY:

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1 STATE OF ILLINOIS)
) SS:
2 COUNTY OF C O O K)

3 IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT-CRIMINAL DIVISION

4
THE PEOPLE OF THE)
5 STATE OF ILLINOIS,)
)
6 Plaintiff,)
) No. 00 CR 13572-01
7 vs.)
) Charge:
8 ABDUL MUHAMMAD,)
)
9 Defendant.)

10

11 REPORT OF VIDEO-CONFERENCE PROCEEDINGS

12 of the hearing had before the HONORABLE LeROY K. MARTIN,

13 JR., on the 1st day of December 2020, in Chicago,

14 Illinois.

15

16 APPEARANCES:

17 MR. ROBERT MILAN,
Special Prosecutor,
18 on behalf of the People;

19 MR. JOEL FLAXMAN,
on behalf of the Defendant.

20

21

22 Sandra Battaglia
Official Court Reporter
23 Criminal Division
C.S.R. #084-003168

24

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1 THE COURT: Abdul Muhammad.
2 This is your matter, Mr. Milan and
3 Mr. Flaxman.
4 MR. MILAN: Yes, good morning, your Honor.
5 THE COURT: Good morning, gentlemen.
6 MR. FLAXMAN: Good morning, your Honor.
7 THE COURT: Good morning.
8 Okay. Gentlemen, if you don't mind, I am
9 going to pass your matter for just a few moments; and I
10 will recall your matter.
11 MR. FLAXMAN: Thank you, your Honor.
12 THE COURT: Thank you.
13 (WHEREUPON the case was passed and
14 later recalled.)
15 THE COURT: Okay. Mr. Flaxman and Mr. Milan. This
16 is on -- I'm recalling the matter of Abdul-Malik
17 Muhammad.
18 Mr. Flaxman, your motion.
19 MR. FLAXMAN: Thank you, your Honor. Kenneth
20 Flaxman, for the Petitioner.
21 We filed a reply memorandum which I think
22 sets out very succinctly -- the crucial question in this
23 case is that there is no order appointing Mr. Milan to
24 be the special prosecutor in this case.

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1 On November 30th, there is a half sheet
2 entry: "Motion to appoint special prosecutor granted."
3 And then there is no order appointing Mr. Milan. There
4 is no indication in the record -- and Mr. Milan very
5 nicely submitted the records to eliminate any dispute
6 about what's in the record and what's not in the record.
7 There is no indication that the court complied with the
8 statute in seeking a public entity to represent the
9 People in this case.
10 So this -- Mr. Milan is not the special
11 prosecutor here. And if the court should enter an order
12 making it clear that he is not the special prosecutor,
13 then follow the procedure of the statute to see which
14 public agency would be willing to take on this case.
15 This is a lot different than 2007 when the
16 Attorney General had suffered big budget cutbacks and
17 was unable to take on all of the Burge postconviction
18 matters. This is just one case. And I would be very
19 surprised if the Attorney General said we don't have the
20 person power to take on this one case.
21 So I think your Honor has to follow the
22 statute and look for a public agency to represent the
23 People.
24 THE COURT: I see.

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1 Mr. Milan.
2 MR. MILAN: Yes, your Honor.
3 You are acutely aware of the issues
4 presented in this motion, having dealt with them on
5 several occasions before. And on behalf of the Office
6 of the Special State's Attorney, I would ask that you
7 deny this motion.
8 As will become readily apparent in both of
9 our motions we filed and my argument today, that this is
10 really a thinly veiled attempt to forum shop prosecutors
11 the attorney of record in this case since the beginning,
12 Candace Gorman, is unhappy with decisions I made on both
13 the Muhammad case and the Donald Elam case, a case that
14 was in front of your Honor. The decisions that I made
15 on those cases were based on the merits of the case
16 only, the facts and the law only.
17 What Counsel doesn't touch on or discuss
18 is that, as Judge Biebel did and as your Honor knows
19 from the history of this case and going over the orders
20 going all the way back, that the Burge-related matters
21 are unique in scope and complexity.
22 Your Honor knows that when Judge Biebel
23 appointed former Judge Nudelman to serve as the Special
24 Prosecutor on the TIRC cases and the Burge-related

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1 postconviction matters, former Judge Nudelman and the
2 O'Rourke firm were to prosecute all of these cases.
3 There was no intent to give these cases to different
4 lawyers or back to the Attorney General's Office, which
5 already occurred -- that debate went on years ago -- or
6 to the Cook County State's Attorney's Office. Why?
7 Because they are so unique in scope and complexity.
8 The detectives involved, the defendants
9 involved, the alleged patterns and practice involved
10 were unique. And the number of cases were unique in
11 anything that Cook County has seen before. The intent
12 was for former Judge Nudelman to prosecute all of the
13 cases.
14 And when Judge Byrne appointed me in 2017
15 to succeed Judge Nudelman, the intent was for me to
16 oversee the prosecution of all of the TIRC and
17 Burge-related cases appointed to me and appointed to our
18 office. There was never an intent to send cases to the
19 Attorney General or Appellate Prosecutor cases. To do
20 so would make absolutely no sense since the issues, the
21 detectives, the defendants, the number of cases, and the
22 alleged patterns and practices were the same.
23 If anybody wants to look at the intent of
24 Judge Biebel or his actions, you can go back to his

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1 April 6, 2009 memorandum opinion and order. When he
2 refers to his appointment, the 2002 appointment of Judge
3 Egan, he states: "The underlying cause was initiated
4 when several public interest groups filed a petition for
5 a special prosecutor to investigate numerous allegations
6 of abuse, torture and other offenses by Commander Jon
7 Burge and officers under his command at Area 2 and Area
8 3."
9 He then refers to his April 9th, 2003
10 order appointing the Attorney General where he states:
11 "This Court directed the Attorney General to assume
12 complete supervision of the defense of postconviction
13 petitions which included allegations of police
14 misconduct by Burge and officers under his command."
15 He then references -- he then goes into
16 his 2009 order, the resolution, in which he states the
17 following: "These postconviction proceedings are
18 difficult cases to manage and, as the Attorney General
19 notes, require extensive resources to adequately handle.
20 This Court realizes that these cases must be resolved
21 expeditiously and properly. In the exercise of its
22 discretion and realizing the gravity of the matters
23 presented, this Court orders the appointment of Special
24 State's Attorney pursuant to statute 55 ILCS 5/3-9008.

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1 And he then appointed former Judge Nudelman. He did so
2 because this was a unique scenario involving multiple
3 defendants, multiple officers under Burge, and he
4 assigned these cases to a special prosecutor in his
5 discretion.
6 Where are we now? Let's fast forward to
7 September 14, 2018. Candace Gorman, the attorney of
8 record on this case, files a motion with you, your
9 Honor, with Judge Martin -- and me, by the way, notices
10 me -- asking your Honor to assign the Muhammad case to a
11 judge that never was an Assistant State's Attorney.
12 Notices me up on that because she recognized me as the
13 special prosecutor on these cases since 2017.
14 On November 7, 2018, Candace Gorman files
15 a notice of motion with you, your Honor, and with me --
16 again, notices me on it -- to appoint a special
17 prosecutor.
18 On November 20th, 2018, you appointed our
19 office in her presence. She's in your courtroom. And
20 on your half sheet, reflects your appointment of our
21 office. No objection by Candace Gorman about how
22 your -- your appointment of me was unperfected or that I
23 have some kind of conflict. Nothing. She wanted us on
24 there.

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1 Between November 20th, 2018 and today, I
2 have more than a dozen emails from Attorney Candace
3 Gorman to me and the O'Rourke law firm about the
4 Muhammad case. And I am not going to go through all the
5 dozens of them, your Honor, but I will note two of them.
6 January 2019, she reaches out to TIRC for
7 more documentation and to me asking for more
8 documentation, and TIRC emails both of us. The email
9 goes to Candace Gorman and to me regarding the materials
10 they are going to send over. There is no objection by
11 Miss Gorman about my serving as the special prosecutor.
12 She wanted me.
13 May 2019, she files a Rule to Show Cause
14 against the Chicago Police Department. She files it in
15 front of Judge Flood and serves me with it in order to
16 get documents from the Chicago Police Department. No
17 objection to me. She actually serves me on it, wants me
18 to help her on this.
19 What then happens? We exchange discovery
20 over months on the Muhammad case. She calls for a
21 meeting with me in person to talk about the case where
22 she requests a reinvestigation of the Muhammad case.
23 She hands me this (indicating). This is her request for
24 new investigation of the conviction of Abdul-Malik

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1 Muhammad, pages and pages of documents that she asks me
2 to review.
3 And based upon her request, I do so. I
4 tell her that I am going to initiate a reinvestigation.
5 Don't confirm that I am going to do a whole
6 investigation. I need to see if what she is telling me
7 is it accurate and confirm what she does. So I begin to
8 do so. I go through hundreds of pages of documents to
9 start the reinvestigation.
10 As part of that, I interview
11 Mr. Abdul-Malik Muhammad with her, okay. We do a Zoom
12 interview of Mr. Muhammad. I go through the
13 investigation. I get to the point where there is just
14 too much evidence against him. All right. There is no
15 way that I can continue the investigation and bill the
16 County for an investigation that I know is going
17 nowhere. And I make a determination to proceed against
18 Mr. Muhammad. I inform Miss Gorman of that, and then I
19 filed a motion to terminate these proceedings in front
20 of Judge Flood.
21 It is important to note that during the
22 same period of time, from 2018 to 2020, I am serving as
23 the special prosecutor on a case called Donald Elam,
24 which is a Burge-related case, and which Miss Gorman was

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1 the attorney of record the entire time in front of your
2 Honor. At no time does she object to my -- does she
3 claim that your appointment of me was unperfected or the
4 appointment of my office was unperfected or that I had a
5 conflict.
6 And, of course, she was claiming he was
7 innocent. And I did an extensive investigation
8 regarding fingerprints and other physical evidence. And
9 on August 21st, 2020, argued a motion in front of your
10 Honor successfully to terminate that case.
11 So here we are. Not more than two years
12 later, after my appointment to the Muhammad case and a
13 considerable amount of time expended by me and my office
14 and resources, and she comes to you and says, your
15 Honor, Judge Martin, your appointment of Milan was
16 unperfected. And, by the way, he has a -- Milan has an
17 actual or perceived conflict.
18 As to the unperfected appointment
19 argument, again, Defense ignores the fact that this
20 isn't just any case or one case, but multiple cases that
21 are unique both in complexity and numbers. And Judge
22 Biebel, in his discretion, decided to assign all of
23 these cases to a Special State's Attorney. Judge Byrne
24 in appointing me noted the following: "Since Judge

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1 Nudelman's appointment, the Special State's Attorney has
2 been assigned in a number of additional -- additional
3 cases to represent the interests of the People in
4 Burge-related postconviction claims. It is hereby
5 ordered that Robert Milan is appointed to succeed
6 Nudelman in the assignment of Special State's Attorney
7 as ordered by Judge Biebel on April 7, 2009."
8 Your Honor, Judge Martin, followed those
9 orders in both the letter and spirit of the law based on
10 this unique scenario. And your appointment of my office
11 was and is appropriate.
12 As to the alleged conflict allegations,
13 the allegations that I have actual or perceived conflict
14 is false. Your Honor's aware that prior to my
15 appointment, I retained the opinion of ethics expert
16 Stephanie Stewart. She was the former senior counsel at
17 the ARDC. And I asked her to determine if my role as a
18 high-ranking Cook County Assistant State's Attorney
19 would raise any conflicts regarding my role in these
20 cases. And she concluded as follows: "My appointment
21 as special prosecutor would involve representing the
22 same client, that being the People of Illinois, not a
23 different client as the rules contemplate." My role has
24 never changed.

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1 She said -- and, by the way, I have never
2 represented Mr. Muhammad in my life.
3 She also concluded that -- and the
4 argument could end right there because my role has never
5 changed. There is no conflict. But if we go on, she
6 also concluded I never participated personally or
7 substantially in the Muhammad case or in these cases
8 until my service as the Special Prosecutor. I never
9 consulted about this case back in 1999 or 2000. I never
10 interviewed witnesses. I had no role in charging him
11 nor did I try this case.
12 Again, she referred to that on the cases
13 that I was assigned back then, but I am submitting that
14 the same argument is here. I never handled the Muhammad
15 case as an Assistant State's Attorney. Never. I didn't
16 charge him. I didn't try it. I never heard of him --
17 of Mr. Muhammad until I was appointed on this case two
18 years ago. And if your Honor would need an affidavit
19 for that, I would submit it.
20 But even if I had been consulted on the
21 Muhammad case back when I was an Assistant State's
22 Attorney or I charged the case or I tried the case,
23 there would still be no conflict because I am on the
24 same role on the same side. And when I was back in the

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1 Cook County State's Attorney's Office, I actually tried
2 cases that I had charged while in the office. This
3 wasn't one of them, but I actually did that and there
4 was never a conflict.
5 The conflict allegations regarding Brady
6 violations against the Assistant State's Attorneys also
7 fails. They claim that because there is alleged Brady
8 violations in this case against Assistant State's
9 Attorneys back in '99 and 2000, that I have a conflict.
10 What the defendant fails to explain to
11 your Honor is how this situation differs from any other
12 postconviction claim of a coerced confession,
13 prosecutorial misconduct, or a Brady violation claim
14 such as these. These are regularly handled by the same
15 State's Attorney's Office that originally prosecuted the
16 case. So I am not even in the office anymore, so I have
17 no conflict. But even if I was, I could step up on
18 behalf of this and argue the Brady violations, and there
19 would be no conflict.
20 Over the past three-and-a-half years that
21 I have served as a Special Prosecutor, allegations have
22 been levied against Assistant State's Attorneys that I
23 knew, police officers that I worked with, and I made
24 decisions based on the facts and the law only. No

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1 conflict existed then when I made those decisions; no
2 conflict exists now. Otherwise, dozens of cases that I
3 dealt with in the past three-and-a-half years would be
4 impacted.
5 Even if this case -- even if there was a
6 conflict -- and there is not -- Defense has waived this
7 argument. An attorney can't wait in the weeds for more
8 than two years, wait to see if I dismiss their case or
9 make decisions favorable to them after an investigation,
10 and then say -- and then when I don't, when I disagree
11 with their theory, say -- cry conflict two-and-a-half
12 years later. That can't happen.
13 In the caselaw that I submitted, your
14 Honor, they provide you with tests, and the test is as
15 follows: The length of the delay in the matter -- more
16 than two years. Did the movant know the issue? Did
17 Candace Gorman know I was a high-ranking State's
18 Attorney in my prior experience? Absolutely. Was the
19 defendant represented? This defendant was always
20 represented. She's always -- Candace Gorman always
21 represented Muhammad and Elam in these cases for the
22 past two-and-a-half years. Why the delay occurred? We
23 know why the delay occurred. We know why. It's readily
24 apparent. And would removal prejudice the non-movement

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1 party, us? Yes. We have expended considerable
2 resources in this case and to do so, to send this case
3 to somebody else, would cause great undue delay and
4 cost.
5 Again, if the Court were to mistakenly
6 find my appointment was unperfected or that I had a
7 conflict, numerous cases previously disposed of by me
8 could be impacted, cases that I dismissed, plea
9 agreements, past and pending, that I have made, and
10 successful prosecutions could be impacted.
11 And what else is something we should
12 consider is the chilling effect this would have on the
13 Special Prosecutor's Office now and in the future. If
14 every time a defense attorney was unhappy with a
15 prosecutor's decision, they could wait -- wait two
16 years, three years to see what the prosecutor is going
17 to do and when they don't like that decision, they could
18 cry conflict.
19 What would happen? Special prosecutors
20 would no longer be making decisions based on the facts
21 and law but based on potentially their future, and
22 that's a horrible thing.
23 In conclusion, your Honor, this motion has
24 zero -- zero to do with an unperfected appointment or a

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1 perceived conflict and has everything to do with a
2 lawyer that is unhappy with my decisions, decisions that
3 I made based on the facts and the law only. This is all
4 about forum shopping for a prosecutor to agree with
5 them, and I would ask that you deny the motion. Thank
6 you.
7 THE COURT: Thank you.
8 Mr. Flaxman.
9 MR. FLAXMAN: (Inaudible.)
10 THE COURT: You are on mute.
11 MR. FLAXMAN: Thank you.
12 Mr. Milan has made a very compelling
13 argument that he should not be serving as Special
14 Prosecutor in any of these cases. He pointed us to the
15 previous orders entered by judges who preceded you.
16 One of them is appended to the petition as
17 Exhibit 1. On Page 17, I think it was Judge -- Judge
18 Biebel discussed whether the Cook County State's
19 Attorney's Office could represent defendants in these
20 cases. Judge Biebel said that they couldn't because
21 there was a conflict in 2003 that existed under Devine
22 which infected the entire office. And one of the
23 members of that office in 2003 who was about to become
24 first assistant was Mr. Milan. So if we follow Judge

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1 Biebel's office, Mr. Milan should not be serving as
2 Special Prosecutor in any of these cases.
3 And I am sorry that Mr. Milan tells us
4 that he was appointed by your Honor as Special
5 Prosecutor in this case. If we look at the order that
6 Mr. Milan attached to his pleadings, Mr. Milan's name
7 isn't mentioned. The half sheet shows the motion to
8 appoint a Special Prosecutor is granted.
9 But this case isn't about Mr. Milan
10 testifying here, not under oath, making a lot of
11 representations which aren't in his papers, making a lot
12 of unfair ad hominem attacks to Miss Gorman. What this
13 case is about is what the legislature said when it
14 amended the Special Prosecutor's statute.
15 It didn't say there is a special rule for
16 Burge cases. It didn't say there is a special rule for
17 special prosecutors who were appointed in 2007. It said
18 whenever the court is appointing a special prosecutor,
19 it must follow this procedure of finding -- of seeing if
20 there is a public entity which will represent the
21 People.
22 The court did not follow that procedure in
23 this case. The court did not enter an order limiting
24 the powers of the special prosecutor or delineating the

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1 powers of the special prosecutor in this case.
2 This is not about Mr. Milan being
3 honorable or dishonorable or making false statements to
4 the Court or Miss Gorman being negligent or tardy or
5 sitting on her rights. This is about what the
6 legislature said when it amended the statute in 2012 and
7 again in 2016.
8 There is no special rule for Burge cases.
9 There is no special rule for Mr. Milan cases. There is
10 one rule for all cases, which wasn't followed in this
11 case; and the Court has to follow it. Thank you.
12 THE COURT: Thank you, Mr. Flaxman.
13 I will tell you, Mr. Flaxman, that I
14 disagree with your argument in part about sitting on the
15 rights. I do find it troubling that when this matter
16 first appeared before myself and with Miss Gorman and we
17 had discussion about the appointment of a special
18 prosecutor -- and this was some years ago -- there was
19 no objection raised at that time. And I am -- it is
20 troubling to me that we are having this discussion some
21 two, three years after Miss Gorman first appeared before
22 me on this matter and we had this kind of discussion.
23 So I will tell you, that is troubling to
24 me for us to be having this discussion at this time.

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1 And so I do -- I do consider this as -- as you
2 characterized it, sitting on -- sitting on her rights --
3 or not her rights necessarily -- but on the rights of
4 Mr. Muhammad such as they are in these cases; so I do
5 see that as an issue.
6 I will say this as well, I think that --
7 and I am well-familiar with the statute that you have
8 cited to, 55 5/3-9008 and its requirements. I -- as --
9 looking at the history of the appointment of special
10 prosecutor going back to Judge -- when Judge Nudelman --
11 former Judge Nudelman was appointed, at that time Judge
12 Biebel, in his discretion, decided -- and I appreciate
13 the fact that the law has changed since that time -- but
14 decided at that time that these kinds of cases warranted
15 the appointment of a special prosecutor.
16 I think it to be -- I don't read the law
17 that in the -- a court, in its discretion, deciding that
18 there is a particular category -- and in this particular
19 category, we are talking about these Burge era cases --
20 that there is something inappropriate about Judge
21 Biebel's decision to appoint a special prosecutor to
22 review all of those cases. And, frankly, I don't see
23 anything in the statute that would prohibit a judge from
24 doing that.

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1 Certainly, the statute addresses itself to
2 the procedure that a judge should -- the analysis that
3 the judge should have in appointing the special
4 prosecutor, but I don't -- I see nothing inappropriate
5 or untoward or illegal in a judge saying we have this
6 particular category of cases and rather than appointing
7 nine different special prosecutors, the court could not,
8 in its discretion, say that I'm going to appoint a
9 special prosecutor, having satisfied myself that the
10 statute is met in appointing a special prosecutor, and I
11 am appointing a special prosecutor to look at these
12 cases.
13 I don't think that the statute requires
14 that a judge in my hypothetical would have to appoint a
15 special prosecutor in each and every case if a judge
16 believes that there is a category of cases that needs to
17 be looked at. I don't see the statute as prohibiting a
18 judge from doing that. So I don't think that what Judge
19 Biebel did is problematic.
20 And in this particular -- in this
21 particular case, this argument that you are raising
22 about how the court went about appointing Mr. Milan in
23 this particular matter, this issue -- I am just troubled
24 by the fact that this issue is being raised now all

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1 these many years after this was -- this issue first
2 appeared before the court. And, frankly, I don't think
3 that that's -- it's appropriate, and it appears to me
4 that -- as Mr. Milan has stated, that now this argument
5 arises as Mr. Muhammad is dissatisfied with how the
6 litigation has gone. And so, that -- that, I find to
7 be -- I find that to be troubling.
8 So I -- I think that my appointment of
9 Mr. Milan in this matter was consistent with Judge --
10 with the spirit of what Judge -- of Judge Biebel's
11 earlier determination that these particular cases
12 warranted the appointment of a special prosecutor. And
13 I don't think in any way reading Judge Biebel's orders
14 that Judge Biebel intended it to be any different than
15 how I have -- I have interpreted it. And I don't
16 believe that the statute would require me, each and
17 every time one of these came up, to do anything
18 different.
19 And I would note that the statute reads
20 that the court on its own motion or on the motion of
21 some petitioner. Well, Judge Biebel decided this, and
22 there weren't necessarily petitions filed in each one of
23 these cases. Judge Biebel decided that this was a
24 category of case, and I'll appoint a special prosecutor

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1 to hear this category of case.

2 And so I think that what we have done here

3 is consistent; though, in this particular case, I will

4 concede that Miss Gorman did ask individually for the

5 appointment of a special prosecutor; but at no time

6 until now or until recently -- certainly, after the

7 Court's appointment and after we had gotten deep into

8 this thing -- because I recall Miss Gorman standing

9 before me asking about an investigation and Mr. Milan

10 and Miss Gorman standing before me asking the court for

11 additional time so that an investigation -- some sort of

12 investigation could take place. And I don't remember

13 all of the details, but I do recollect both Miss Gorman

14 and Mr. Milan standing before me and basically being in

15 agreement with taking some time for this investigation

16 to take place.

17 And, again, Mr. Flaxman, I apologize, I

18 don't remember all of the details, but I do recollect

19 them being here before me and all of us having that

20 discussion.

21 So at the end of it all, Mr. Flaxman, the

22 way I view it is I think that, considering the reasons

23 set forth in Judge Biebel's order and that this court

24 certainly took into consideration when making its

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1 decision about appointing a special prosecutor, I think
2 that what I did was in consideration of the number of
3 cases here, in consideration of delay that would be
4 created by bringing in different people after the
5 O'Rourkes and Mr. Milan had already spent time
6 investigating these matters and also considering the
7 Court's own discretion, I think that there was nothing
8 inappropriate about the -- how Mr. Milan and that office
9 was appointed; and so I would respectfully deny your
10 request for that reason.
11 But, also, as an added consideration, I
12 think that the timing is -- is not opportune. I think
13 that the timing is -- has been delayed for a number of
14 years; and I think that that alone is a sufficient
15 reason for me to deny your request.
16 And so for those reasons, I am
17 respectfully, Mr. Flaxman, going to deny your request.
18 MR. FLAXMAN: Could I -- could I make one
19 statement, your Honor?
20 THE COURT: You certainly may.
21 MR. FLAXMAN: I am not going to attempt to debate
22 your ruling, but your Honor's findings about the delay
23 in three years is -- is not -- is not based on a
24 complete record.

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1 What actually happened is that Miss Gorman
2 brought me in to help her with this case after the
3 motion to rescind was filed. That motion was filed more
4 than two years after the torture -- after the case had
5 been pending.
6 When I looked at that motion, my first
7 question was does the authorization appointing the
8 special prosecutor extend to filing a motion to
9 terminate proceedings. And as your Honor knows, the
10 Special Prosecutor Statute requires that the court set
11 out the powers of the special prosecutors so that there
12 isn't a special prosecutor can do whatever he or she
13 wants to do.
14 When I looked at that, I looked for -- I
15 looked for the record to see what the order was that
16 specified the powers of the special prosecutor. And lo
17 and behold, the only order I could find was this half
18 sheet, which didn't say Mr. Milan was appointed. Your
19 Honor kept referring to "my order appointing Mr. Milan".
20 And maybe I am missing something. Maybe there is an
21 order which names him by name. I couldn't find that.
22 And that's why we filed it.
23 This is not prosecutor shopping. This is
24 a new lawyer coming in the case and saying you missed

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1 this statutory problem. Let's file the motion.
2 THE COURT: I see. Then I apologize to you,
3 Mr. Flaxman, for my lack of clarity. I wasn't making
4 specific reference to a written motion, but the Court's
5 particular finding, that being the Court's order
6 appointing.
7 I suppose in response -- and I know that
8 you prefaced your comment by saying that you didn't wish
9 to engage in a debate and neither do I. But just for
10 the sake of clarity, I would say that the Court -- this
11 Court has looked to Judge Biebel's earlier determination
12 about the appointment of a special prosecutor, of
13 course. And obviously now I am sitting in Judge
14 Biebel's -- I won't say sitting in his stead -- but
15 sitting in this same position so that his order is
16 adopted by myself unless, of course, I were to change
17 the order.
18 So being consistent with the reasons that
19 Judge Biebel articulated as to the purpose of the
20 special prosecutor and what the special prosecutor was
21 charged with doing, what this Court has tried to do is
22 be consistent in that. And inasmuch as I have indicated
23 a few moments ago that the special prosecutor has
24 handled these kinds of matters, this Court, being

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1 consistent with that earlier determination by my
2 predecessor, merely inserted Mr. Milan and the O'Rourkes
3 into that position as Judge Biebel had determined
4 earlier.
5 So I would -- I don't contest the fact
6 with you that there may not be a written order
7 specifically appointing Mr. Milan, but it was my intent
8 to be consistent with what my predecessor had done in
9 determining that special prosecutor was appropriate or
10 necessary in these kinds of matters.
11 MR. FLAXMAN: Thank you for the opportunity to have
12 made that record, your Honor.
13 THE COURT: Thank you. Thank you, Mr. Flaxman.
14 All right. Thank you, gentlemen.
15 MR. MILAN: Thanks, Judge.
16 THE COURT: All right.
17 (WHEREUPON no further proceedings
18 were had.)
19
20
21
22
23
24

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Sheet #	CRIMINAL DISPOSITION SHEET	Branch/Room/Location	Court Intrerpreter
5	Defendant Sheet #1	Criminal Division, Courtroom 101 2650 South California Avenue, Chicago, IL, 60608	

Case Number	Defendant Name	Attorney Name	Session Date	Session Time
00CR1357201	MUHAMMAD, ABDUL	PUBLIC DEFENDER B. FOX, 91580	1/21/2021	09:30 AM -

CB/DCN#	IR #	EM	Case Flag	Bond #	Bond Type	Bond Amt
004468639	1170296					

CHARGES	COURT ORDER ENTERED	CODES
C001 720-5/9-1(A)(1) MURDER/INTENT TO KILL/INJURE 12/12/2001 DEFT. SENTENCED TO IDOC	Office of the Special Prosecutor Bob Milan Bob McQuan Mtn to Strike Petitioner's Mtn to Reconsider order denying request to Rescind appointment Candace Gorman for petitioner Petitioner's Motion to Rescind Stricken 2-1-21 before J. Hood	
C002 720-5/9-1(A)(2) MURDER/STRONG PROB KILL/INJUR		
C003 720-5/9-1(A)(3) MURDER/OTHER FORCIBLE FELONY 11/13/2001 Nolle Prosequi		
C004 720-5/24-1.2(A)(2) AGG DISCHARGE FIREARM/OCC VEH 11/13/2001 Nolle Prosequi		
C005 720-5/24-1.2(A)(2) AGG DISCHARGE FIREARM/OCC VEH 11/13/2001 Nolle Prosequi		

JUDGE: Reddick, Erica L	JUDGE'S NO: 2038	RESPONSIBLE FOR CODING AND COMPLETION BY DEPUTY CLERK:	VERIFIED BY:
Erica L. Reddick			

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STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT-CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	
vs.	)	No. 00 CR 13572-01
ABDUL MUHAMMAD,	)	
Defendant.	)	

REPORT OF PROCEEDINGS of the trial had before the Honorable ERICA L. REDDICK, one of the Judges of said Criminal Division, heard on the 21st of January, 2021.

APPEARANCES:

HON. KIMBERLY M. FOXX,
State's Attorney of Cook County, by
MR. ROBERT MILAN,
MR. MATTHEW MCQUAID,
Assistant State's Attorney,
Appeared on behalf of the People;

LAW OFFICE OF H. CANDACE GORMAN, by
MS. H. CANDACE GOREMAN,
Assistant Public Defender of Cook County,
Appeared on behalf of the Defendant.

*****

Auhdikiam Carney,
Official Court Reporter
Criminal Division #084-004658

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1 MR. MILAN: Robert Milan and Matt McQuaid on
2 behalf of the Office of the Special State's Attorney.
3 MS. GOREMAN: Candace Goreman.
4 THE COURT: Good morning to everyone. The
5 matter appears on the call today on the motion of the
6 defendant petitioner and this is specifically
7 entitled Petitioner's Motion to Reconsider Order
8 Denying Motion to Rescind Appointment. Then I have
9 also in the file date being January 7th, 2021, the
10 Court has also received a notice of motion filed
11 January 19th, 2021, on behalf of the Office of the
12 Special State's Attorney entitled Motion to Strike
13 Petitioner's Motion to Reconsider Order Denying
14 Request to Rescind Appointment.
15 Now I will let both parties know that
16 I did fully review each of the filings together with
17 the attachments and first to request whether there
18 were any amendments, updates to the filing on behalf
19 of the petitioner, attorney Goreman.
20 MS. GOREMAN: No, your Honor. I have not filed
21 a response to the motion to strike. I was hoping to
22 go address that with the Court.
23 THE COURT: You are requesting to file a
24 response or a reply to the Office of the Special

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1 State's Attorney's motion to strike.
2 MS. GOREMAN: No, I was hoping to just orally
3 respond to it today. If the Court prefers obviously
4 in writing, I will do that.
5 THE COURT: Understood.
6 Attorney Milan with the Special
7 State's Attorney's office, does your filing reflect
8 all of what it is you wish the Court to consider with
9 respect to the petitioner's motion.
10 MR. MILAN: With respect to our motion to
11 strike, yes, your Honor.
12 THE COURT: Ms. Goreman, if there is something
13 additional you wish the Court to consider, you may
14 speak with respect to that and I believe you just
15 indicated your desire was to provide additional
16 information to the Court orally so go ahead.
17 MS. GOREMAN: This is in regards to the special
18 prosecutor's motion to strike. The cases that were
19 cited by the special prosecutor are not on point.
20 The special prosecutor is citing cases that fall
21 under Section 2-1203 of the Illinois Code of Civil
22 Procedure. That section governs postjudgment motions
23 in nonjury cases.
24 This is not a postjudgment motion in a

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1 nonjury case. This is a motion to correct the record
2 from the earlier filing.
3 THE COURT: And, Special State's Attorney
4 Milan, was there anything you wish the Court to hear
5 further before I address the motions?
6 MR. MILAN: No, your Honor.
7 THE COURT: All right. I will say that it
8 appears based on the attachments to the actual
9 motions that were provided that Judge Martin, who
10 actually heard the original motion seeking that the
11 appointment of the special prosecutor be rescinded
12 and the enumerated reasons therefore, that was heard
13 and decided by former Presiding Judge Leroy Martin,
14 Jr., and that is my understanding based on the
15 transcript that that occurred on December 1st, 2020.
16 Is that information accurate, Ms. Goreman?
17 MS. GOREMAN: Yes, it is, your Honor.
18 THE COURT: All right. And as a consequence of
19 the matter being heard by former Presiding Judge
20 Martin, all of the issues contained in the current
21 filings are those issues that were presented before
22 Judge Martin as well, from my review of the
23 transcript as well as the filing. It is certainly
24 the case that when a particular judge rules with

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1 respect to a motion, that a motion to reconsider is
2 properly brought before the judge rendering that
3 decision. With that decision having been rendered
4 December 1st and the request to reconsider being
5 filed January 7th, that of course presents a concern
6 for the actual judge entering the order to have heard
7 it in this particular case.
8 As the parties may be aware, I was
9 appointed to the position formerly occupied by Judge
10 Martin on January 4th, first full day January 5th. I
11 am in that role as the acting Presiding Judge now.
12 This motion to reconsider would properly have been
13 brought before Judge Martin. At this stage to ask a
14 similar suited judge to review the decision of the
15 prior sitting judge of the same level I do not think
16 is appropriate particularly tailored to the fact that
17 in this case all of the issues supporting the
18 requests were raised before that prior sitting judge.
19 Both sides were fully and fairly heard
20 as I can determine from the transcript provided by
21 both counsel for the petitioner as well as counsel
22 for the Office of the Special State's Attorney's
23 Office. All of that being the case, I do not believe
24 it would be appropriate for me as the new acting

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1 presiding judge to sit in the function of what would
2 be tantamount to an Appellate Court by reviewing the
3 decision of a judge who has already fully heard and
4 ruled upon the issues before the Court. As such the
5 Court's action with respect to the filings is to
6 strike the petition to rescind. I am not in a
7 position to reconsider the prior sitting judge's
8 decision.
9 MS. GOREMAN: Your Honor, can I clarify one
10 issue?
11 THE COURT: Yes.
12 MS. GOREMAN: You said you're striking it. Are
13 you actually dismissing the petition?
14 THE COURT: I'm not ruling on it, I'm striking
15 it.
16 MS. GOREMAN: Thank you.
17 MR. MILAN: Judge, we're up in front of
18 Judge Flood -- Ms. Goreman, I can't recall what date
19 we had, but it can be sent back to Judge Flood.
20 THE COURT: Ms. Goreman, is that your
21 understanding it's in front of Judge Flood?
22 MS. GOREMAN: That is correct, your Honor.
23 THE COURT: What is your next agreed date,
24 parties?

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1 MR. McQUAID: Your Honor, Matt McQuaid. I have
2 January 26th and that's Tuesday in front of
3 Judge Flood.
4 THE COURT: Ms. Goreman, is that what you have?
5 MS. GOREMAN: No, your Honor. I believe it's a
6 date in February.
7 THE COURT: Let's get that clarified so
8 everyone is in the same room on the same date.
9 MR. MILAN: Ms. Goreman, what date do you have?
10 MS. GOREMAN: I have February 1st.
11 MR. MILAN: Matt, I think it is a February
12 date.
13 THE COURT: 2-1-21 before Judge Flood.
14 (WHICH WERE ALL THE PROCEEDINGS HAD)
15 *****
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STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT-CRIMINAL DIVISION

I, Auhdikiam Carney, an Official Court Reporter in the Circuit Court of Cook County, County Department, Criminal Division, do hereby certify that I reported in shorthand the proceedings had at the hearing of the aforementioned cause; that I thereafter caused the foregoing to be transcribed, which I hereby certify to be a true and accurate transcript taken to the best of my ability of the proceedings had before the Honorable Erica L. Reddick, Judge of said Court.

Auhdikiam Carney
Official Court Reporter

Dated this 4th day
of February, 2021.
CSR# 084-004658

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Sheet #	CRIMINAL DISPOSITION SHEET	Branch/Room/Location	Court Intrerpreter
2	Defendant Sheet #1	Criminal Division, Courtroom 101 2650 South California Avenue, Chicago, IL, 60608	

Case Number	Defendant Name	Attorney Name	Session Date	Session Time
00CR1357201	MUHAMMAD, ABDUL	PUBLIC DEFENDER B. FOX, 91580	7/30/2021	09:30 AM -

CB/DCN#	IR #	EM	Case Flag	Bond #	Bond Type	Bond Amt
004468639	1170296					

CHARGES	COURT ORDER ENTERED	CODES
C001 720-5/9-1(A)(1) MURDER/INTENT TO KILL/INJURE 12/12/2001 DEFT. SENTENCED TO IDOC	Atty H. Candace Gorman (FOR Ruling @ 9:30 AM)	
C002 720-5/9-1(A)(2) MURDER/STRONG PROB KILL/INJUR	Robert Milan	
C003 720-5/9-1(A)(3) MURDER/OTHER FORCIBLE FELONY 11/13/2001 Nolle Prosequi		
C004 720-5/24-1.2(A)(2) AGG DISCHARGE FIREARM/OCC VEH 11/13/2001 Nolle Prosequi		
C005 720-5/24-1.2(A)(2) AGG DISCHARGE FIREARM/OCC VEH 11/13/2001 Nolle Prosequi	New Petition to Rescind denied	
	BA OC 8-6-21 CFX c/rm before J. Flood 504	

JUDGE: Reddick, Erica L	JUDGE'S NO: 2038	RESPONSIBLE FOR CODING AND COMPLETION BY DEPUTY CLERK:	VERIFIED BY:
Erica L Reddick			

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1 STATE OF ILLINOIS)
) SS:
2 COUNTY OF C O O K)

3 IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
  COUNTY DEPARTMENT - CRIMINAL DIVISION
4

5 THE PEOPLE OF THE STATE)
  OF ILLINOIS,)
6)
  Plaintiff,)
7)
  vs.) No. 00 CR 13572-01
8)
  ABDUL MUHAMMAD,)
9)
  Defendant.)
10

11 REPORT OF PROCEEDINGS had in the

12 above-entitled cause before the HONORABLE ERICA L.

13 REDDICK, Judge of said court, on the 30th day of July,

14 2021.

15

16 PRESENT:

17 MR. MATTHEW MCQUAID, and
  MR. ROBERT MILAN,
18 appeared on behalf of the People via Zoom;

19

20 MS. CANDACE GORMAN,
  appeared on behalf of the Defendant via Zoom.
21

22

23 ADRIENNE ANDERSON, CSR
  Official Court Reporter
24 CSR No. 084-004320

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1 THE COURT: All right. I just have the remaining
2 matter on the court call, the case of Abdul Muhammad.
3 This is for here for ruling with respect to the
4 petitioner's request.
5 MR. MILAN: Good morning, Your Honor.
6 Robert Milan and Matthew McQuaid on behalf of
7 the People. Thank you, Your Honor.
8 MS. GORMAN: Good morning, Your Honor. Candace
9 Gorman for Mr. Muhammad.
10 THE COURT: All right. All right.
11 Let me, again, just say from the beginning,
12 the order has not reached the condition that I would
13 wish for it to be in for its publication, but I expect
14 to have the form fully entered by the close of business
15 today because the matter has been continued variously
16 and the Court is in a position to rule today. But,
17 again, the order I expect will have the greater details
18 behind the Court's ultimate conclusion or ultimate
19 decision with respect to the matter pending before the
20 Court at this time.
21 Let me just state that the petitioner -- and,
22 again, the petitioner is or is not present today,
23 Attorney Gorman?
24 MS. GORMAN: He is not present, Your Honor.

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1 THE COURT: All right. So his appearance may be
2 excused. This is not a matter where he is required to
3 be present.
4 But, essentially, petitioner, through counsel,
5 asked this Court to rescind the Special State's Attorney
6 Robert Milan's appointment and for his reasons states
7 that, one, the petitioner's attorney intends to call
8 Special State's Attorney Milan as a witness and that
9 Milan -- and I'll just refer to you as Milan. It is
10 not intended to be disrespectful. It's meant to be a
11 shortcut to not have to keep repeating the formal
12 title.
13 MR. MILAN: Understood.
14 THE COURT: All right. That essentially your prior
15 positions in the Cook County State's Attorney's Office
16 create a conflict of interest that requires you to be
17 disqualified.
18 The Court has reviewed the pleadings. I thank
19 the parties for the pleadings as well, detailing these
20 issues and their positions with respect to the same.
21 The Court has reviewed the attachments pertinent and
22 considered arguments and does rule as follows.
23 I don't need to go into the background.
24 Essentially, Petitioner Muhammad was convicted of the

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1 May 4th, 1999 murder of Damone, D-A-M-O-N-E, Mims,
2 M-I-M-S.
3 Procedurally, the petitioner appealed his
4 conviction. He argued that he was denied his Six
5 Amendment right to effective assistance of trial counsel
6 because his attorney submitted a jury instruction that
7 misstated the law concerning the evaluation of
8 eyewitness identification testimony, that the trial
9 court failed to conduct an adequate inquiry into his
10 claims, that his trial attorney was ineffective, that
11 the trial court abused its discretion in sentencing him
12 to 50 years imprisonment. His direct appeal was
13 affirmed by the Appellate Court.
14 He then filed a petition for leave to appeal, a
15 PLA, arguing that the jury instruction given at his
16 trial concerning eyewitness identification was plain
17 error and the basis for a new trial, as well as that the
18 Appellate Court committed error in upholding the trial
19 court's decision to sentence him to 50 years
20 imprisonment. The PLA was denied.
21 Petitioner then filed a pro se post-conviction
22 petition within which he claimed that he was denied a
23 fair trial and effective assistance of trial counsel
24 because prospective jurors were not questioned about

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1 potential bias against gang members. The appellate
2 counsel was ineffective for failing to argue that trial
3 counsel was ineffective for not questioning prospective
4 jurors about the potential bias against gang members;
5 that trial counsel was ineffective for failing to
6 examine two State witnesses and three eyewitnesses; that
7 trial counsel was ineffective for failing to file a
8 motion to suppress witness identification of him at that
9 time, defendant; that trial counsel was ineffective
10 because of the cumulative errors; that, additionally,
11 trial counsel had a conflict of interest. Trial counsel
12 was ineffective for refusing his request to testify at
13 his own trial; that the trial court abused its
14 discretion in imposing that 50-year sentence; that he
15 was illegally arrested because he had not been given an
16 extradition hearing; and that trial counsel was
17 ineffective for failing to ask that the jury be polled
18 about its guilty verdict.
19 The trial court ultimately denied petitioner's
20 post-conviction petition. Petitioner appealed, raising
21 the claim that the trial court committed error by
22 summarily dismissing the pro se post-conviction petition
23 when he had presented the gist of a constitutional claim
24 with regard to his trial counsel's ineffectiveness.

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1 However, that was affirmed on appeal.
2 The petitioner did file a PLA with respect to
3 that decision. The details, again, I'm not going to
4 continue to announce each of the procedural postures;
5 but, ultimately, the petitioner, after the denial of
6 that PLA, filed a petition for writ of habeas corpus.
7 He raised certain issues with respect to that matter.
8 And that was ultimately denied as well.
9 Now, turning to the facts that are pertinent or
10 the beginning of the facts pertinent to the issue before
11 the Court, on July 30th of 2014, the petitioner wrote a
12 letter to the Illinois Torture Inquiry and Relief
13 Commission. And I'll refer to it as TIRC.
14 In it he alleged physical abuse at the hands of
15 police. He sent a -- the petitioner sent a second
16 letter on August 28th of 2014 alleging, first, that he
17 did not make the statements the police attributed to
18 him; second, that he made no statements at all; third,
19 that the lineup witnesses could not identify him;
20 fourth, that he was forced to sleep on a hard floor
21 while handcuffed; fifth, that police used subtle tactics
22 to break him, including refusing him use of the
23 washroom, handcuffing him to the wall, pushing him,
24 mocking him, and threatening him.

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1 TIRC concluded its review on July 18th of 2018,
2 finding that there was sufficient evidence of torture to
3 merit judicial review of the petitioner's claim of
4 torture. And that can be found in the TIRC claim number
5 in re the claim of the petitioner.
6 Petitioner, through counsel, then moved on
7 November 7th of 2018 for the appointment of a Special
8 Prosecutor stating the reason as the State's Attorney's
9 Office indicated that the State's Attorney's Office had
10 a conflict proceeding with petitioner's case because one
11 of the individuals accused of torture by the petitioner,
12 specifically, former Detective Michael, common spelling,
13 McDermott, capital M, C, capital D, E-R-M-O-T-T, an
14 individual who had worked as an investigator for the
15 Cook County State's Attorney's Office was the basis for
16 the Cook County State's Attorney's Office being
17 conflicted.
18 The Court, this Court, then granted the
19 petitioner's request for the appointment of a Special
20 State's Attorney or Special Prosecutor. And on
21 November 20th of 2018, Special State's Attorney Milan,
22 who had been appointed by Judge Thomas J. Byrne,
23 B-Y-R-N-E, on April 13th of 2017, he then -- the
24 petitioner's case was assigned to him.

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1 Now, just to briefly retrace the history, and I
2 don't really want to waste the time and the record going
3 through it, Attorney -- Special State's Attorney Milan's
4 appointment resulted from matters that had originally
5 been brought before the then sitting presiding judge,
6 Judge Biebel.
7 And in -- within the order I do trace that
8 history. I do think it's significant to the ultimate
9 determination before the Court, but I'll spare our
10 court reporter and the parties the recounting of these
11 facts, but just I think for relevant purposes today to
12 note that Attorney Milan had been appointed the
13 Special State's Attorney by Judge Byrne as a result of
14 the matters that had been brought before the Court
15 beginning back as far as the early 2000s relative to
16 matters alleging that defendants had been subjected to
17 acts of torture under Commander Burge, so Special
18 Attorney Milan's appointment resulted from that line of
19 matters.
20 Now, after Attorney Milan, Special Attorney
21 Milan, was appointed, he then engaged in discovery with
22 the petitioner. There was an exchange of discovery.
23 There was a preliminary investigation of petitioner's
24 case conducted, which included the petitioner being

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1 interviewed with his counsel present. After which,
2 attorney -- Special Attorney Milan concluded that the
3 evidence against the petitioner was, quote,
4 overwhelming, end quote, and that the prosecution would
5 proceed.
6 Attorney -- Special Attorney Milan moved to
7 terminate the TIRC proceedings on August 3rd of 2020 on
8 grounds that, first, the petitioner never confessed to
9 the charged murder; second, petitioner provided an alibi
10 that he was in the state of Washington at the time the
11 murder occurred; third, that the petitioner filed that
12 alibi as an affirmative defense and used it at trial;
13 and, fourth, that the petitioner did not properly allege
14 a claim of torture under Illinois law.
15 Petitioner then, through counsel, filed a
16 motion to rescind Special Attorney Milan's appointment.
17 And that was filed August 20th of 2020, and those
18 allegations were that this Court had failed to comply
19 with the Special State's Attorney statute found at
20 55 ILCS 5/3-9008(c). That requires the Court to enter
21 an order describing the power and authority of the
22 Special Prosecutor; second, that the Court failed to
23 comply with 55 -- the same statute, but subsection A-20
24 that requires the Court to contact public agencies,

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1 including the Office of the Attorney General and others
2 before appointing a Special Attorney for the State; that
3 third, Special State's Attorney Milan served in high
4 ranking positions in the Cook County State's Attorney's
5 Office at the time of the alleged wrongdoing in this
6 case; and that as a result, he had an actual or apparent
7 conflict. And therefore, the Court's ruling in People
8 versus Plummer, P-L-U-M-M-E-R, et al., 91 CR 21451,
9 with the date April 11th, 2013, appeared to preclude
10 Attorney -- Special Attorney Milan from serving as
11 Special Prosecutor.
12 Now, at that time of the case, the presiding
13 Judge Martin, Leroy K. Martin, presided and heard
14 argument and ultimately denied the petitioner's first
15 motion to rescind. And that occurred on December 20th
16 of 2020.
17 And in his ruling Judge Martin stated -- and
18 I'm quoting from the transcript tendered -- so at the
19 end of it all, the way I view it is I think that,
20 considering the reasons set forth in Judge Biebel's
21 order and that this Court certainly took into
22 consideration when making his decision about appointing
23 a Special Prosecutor, I think that what I did was, in
24 consideration of the number of cases here, in

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1 consideration of delay that would be created by bringing
2 in different people after the O'Rourkes -- and it was
3 spelled capital O, apostrophe, capital R, O-U-R-K-E-S,
4 and I believe that is a misspelling -- and Mr. Milan had
5 already spent time investigating these matters and also
6 considering the Court's own discretion, I think there
7 was nothing inappropriate about the -- how Mr. Milan and
8 that office was appointed. And so I would respectfully
9 deny your request for that reason.
10 But, also, as an added consideration, I think
11 that the timing is -- is not opportune. I think that
12 the timing is -- has been delayed for a number of years,
13 and I think that alone is a sufficient reason for me to
14 deny your request. And so for those reasons, I am
15 respectfully going to deny your request.
16 Petitioner subsequently filed a motion to
17 reconsider; however, that motion was stricken on
18 January 21st of 2021.
19 Presiding Judge Leroy K. Martin, Jr., was
20 appointed to the Appellate Court and relieved from all
21 his regular duties in the Circuit Court of Cook County
22 effective January 4th of 2021.
23 On May 18th -- I'm sorry, on April 6th of 2021,
24 the petitioner filed the instant new motion to rescind

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1 appointment alleging the matters that the Court
2 detailed earlier with respect to this case, the two
3 factors.
4 The petitioner of course -- the respondent or
5 the Attorney Milan responded, the petitioner replied,
6 and the Court heard oral arguments on June 25th of this
7 year and July 16th of this year.
8 Now, just to make clear, the TIRC petition and
9 the motion to terminate the TIRC proceedings are pending
10 before Judge Flood.
11 The sole issue before this Court is whether
12 Special State's Attorney Milan's appointment should be
13 rescinded. To determine whether the appointment should
14 be rescinded, the Court looks to the same statute that
15 provides for when a Special State's Attorney should be
16 appointed. In essence, the statute itself provides that
17 any attorney appointed for any reason under the section
18 shall possess all the powers and discharge all the
19 duties of a regularly elected State's Attorney under the
20 laws of the State to the extent necessary to fulfill the
21 purpose of that appointment or such appointment.
22 And so, again, the Court looks to that very
23 same language. And under the statute, a petitioner --
24 and the change in the statute, which was noted in the

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1 Farmer decision, is such that the Court can bring the
2 motion on its own or an interested party or an
3 interested person, excuse me, in a cause or proceeding,
4 be it civil or criminal, may file a petition alleging
5 that the State's Attorney has an actual conflict of
6 interest.
7 There is further provision for those same
8 individuals. The Court on its own motion -- and that's
9 under A-10 of the Special State's Attorney statute.
10 And under the A-5 provision, the Court on its
11 own motion or an interested person in a cause or
12 proceeding, civil or criminal, may file a petition
13 alleging that the State's Attorney is sick, absent, or
14 unable to fulfill the State's Attorney's duties. And it
15 then becomes the Court's obligation to hear the
16 pleadings and arguments and a hearing, if necessary, to
17 determine such matters.
18 So this is where we are today. Under the
19 statute, the person bringing the motion, the petitioner
20 in this case, must plead specific facts to show that the
21 State's Attorney is either sick, absent, unable to
22 attend, or has a conflict of interest.
23 Now, the Court notes that this statute before
24 January 1st of 2016 provided for appointing a Special

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1 State's Attorney if the petitioner alleged and showed
2 that the State's Attorney is, quote, interested, end
3 quote, in the proceedings. And that's based on the
4 Farmer versus Cook County State's Attorney decision
5 found at 2019 IL App (1st) 173173. And that was
6 decided by the Appellate Court, the 1st District, in
7 2019.
8 And to show -- based on the prior version of
9 the statute, to show the State's Attorney's interested,
10 the petitioner was required to show that, one, the
11 State's Attorney is interested as a private person in
12 litigation or, two, the State's Attorney or his office
13 is an actual party to the litigation or, three, the
14 State's Attorney's continued participation would create
15 the appearance of impropriety in the defendant's
16 prosecution.
17 So when the petitioner alleges that the State's
18 Attorney's continued participation would create the
19 appearance of impropriety, the Court would further
20 consider another three factors. And those are the
21 burden that would be placed on the prosecutor's office
22 if this qualified; second, how remote the connection is
23 between the State's Attorney and the alleged conflict of
24 interest; and third, to what extent the public is aware

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1 of the alleged conflict of interest.
2 Now, in this case, the Court specifically finds
3 that the controlling authority is the current version of
4 the statute found at 55 ILS -- ILCS 5/3-9008. And based
5 on the interpretation of that version of the statute,
6 the current version, it does seem to disavow the
7 language that was cited. And I believe that derived
8 from the Lang decision, L-A-N-G, with respect to the
9 issue of appearance of impropriety.
10 However, the Court considers that which was
11 raised by the petitioner, that that too constitutes a
12 ground or basis for this matter, the Special State's
13 Attorney Milan to be removed from the case.
14 The Court, though, in analyzing the claim,
15 looks to whether the petitioner has shown, first, that
16 Special State's Attorney Milan was not properly
17 appointed. That issue was addressed previously. I
18 don't think that there is need for this Court to
19 further expound. I believe that the ruling read by --
20 the ruling entered by Judge Martin clearly shows and
21 this Court further finds based on the new motion to
22 rescind that the petitioner ultimately has not shown
23 that Special State's Attorney was not properly
24 appointed.

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1 The details of it again, the issue having
2 previously been raised, heard, and decided apply, but,
3 again, even as it pertains to the claim under the
4 current motion, the new motion to rescind, there has
5 not been any showing that the Special State's Attorney
6 was not properly appointed pursuant to statute at this
7 point.
8 The Court turns then to the issues of whether
9 the petitioner has shown that Special Attorney Milan has
10 a conflict of interest under the laws.
11 Now, the -- part of the claim is really that
12 Milan's previous positions as supervisor of the Felony
13 Review Unit and First Assistant State's Attorney create
14 a conflict in the TIRC proceedings; that, specifically,
15 Special Attorney Milan was the direct supervisor for the
16 Felony Review Unit at the time that the petitioner's
17 case was proceeding; and that he was not only
18 responsible for the training of Felony Review Attorneys,
19 but he was also responsible for their direct
20 supervision. And the Court does clearly consider this
21 claim under the statutory provision.
22 In doing so, the Court determines that,
23 although Special Attorney Milan was the supervisor of
24 the Felony Review Unit, and, again, the petitioner has

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1 detailed that he not only was the supervisor, but he
2 had, in essence, responsibility for these attorneys who
3 reported to him and that he was responsible for their
4 direct supervision, the Court will consider that.
5 Under the standard of the statute as it
6 currently exists, without evidence of Special Attorney
7 Milan's direct involvement, the Court does ultimately
8 determine that the conflict of interest claim is not
9 supported.
10 Now, both Special Attorney Milan as well as the
11 petitioner consulted and had -- I just noticed that
12 Attorney Milan was no longer on the screen and is in
13 the waiting room, so I have paused to readmit him.
14 That's unfortunate.
15 MR. MCQUAID: He's back now. He lost his
16 electricity.
17 THE COURT: Okay. But, Mr. McQuaid, you've been on
18 the line the entire time; is that correct?
19 MR. MCQUAID: I have, Your Honor.
20 THE COURT: Okay.
21 MR. MILAN: Judge, I just want to apologize to
22 everybody. Because of the storm the other night, our
23 electricity has gone off and on. And right in the
24 middle of your ruling, it went off; and therefore, I

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1 couldn't get back in.
2 Matt McQuaid will fill me in, and we'll go from
3 there. So I don't know if Matt said this, but it's up a
4 week from today in front of Judge Flood.
5 THE COURT: Thank you.
6 So returning to the prior point with respect to
7 the conflict, the Court did again consider and find that
8 the petitioner has not shown that Attorney -- Special
9 Attorney Milan participated directly in or was at all
10 involved in Petitioner's case beyond his responsibility
11 as the supervisor. And that without evidence of
12 Attorney Milan's direct involvement, the Petitioner's
13 claim of a conflict of interest is not supported, is not
14 shown.
15 Now, I think in this instance, the Illinois
16 Rules of Professional Conduct are instructive. Clearly,
17 this is a claim with regard to the Special State's
18 Attorney's direct involvement or not, whether there is a
19 conflict of interest per se, actual or otherwise. And I
20 will include in "or otherwise" even the petitioner's
21 claim of Attorney Milan's continuing participation,
22 violating the appearance of impropriety.
23 Although, again, I do note that based on the
24 current version of the statute and our authorities

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1 interpreting it, they do seem to back away from the
2 appearance of impropriety being a standard.
3 But the Court concludes that even under the
4 standard as it is discussed within the relevant
5 authority, it does not appear, again, at this point the
6 petitioner has made an adequate showing.
7 Now, the Court does look to our Illinois Rules
8 of Professional Conduct for instruction as to how we
9 determine. And if we look at Rule 5.1, that addresses
10 supervising attorneys. And I'll just read the formal
11 title, The Responsibilities of Partners, Managers, and
12 Supervisory Lawyers.
13 When you look at the language of that
14 particular ethical rule for instruction, for guidance,
15 it talks about the supervising attorney having to have
16 actual knowledge to be held accountable for subordinate
17 attorneys' unethical actions. And I don't think
18 that's instructive because in this instance, and,
19 particularly, in the face of Attorney Milan's denials
20 during argument and offer to provide an affidavit, he
21 has stated that he had no involvement or engagement in
22 the case, direct or otherwise, during the time that he
23 was in the office.
24 And I -- certainly from just plain appearances,

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1 when you look at the factors that the Court is guided to
2 consider when looking at appearance of impropriety, it
3 would appear that there are concerns to be raised before
4 the Court.
5 However, once again, as we look at the actual
6 controlling language of the law, as well as how it has
7 been interpreted, it -- again, the petitioner has not
8 made the showing under the law that at this time there
9 has been a showing that Attorney Milan had any direct
10 knowledge or participation. And there's not a showing
11 that he had any actual knowledge with respect to the
12 actions of either the Felony Review State's Attorneys
13 who are alleged to have engaged in certain acts that
14 caused concern and are the basis for claims that are
15 currently pending before the Court or the Assistant
16 State's Attorneys who were assigned to the felony trial
17 division who actually tried the case.
18 This is important because there were claims
19 that there are police reports that were not tendered by
20 the State's Attorneys to the defense before trial, that
21 there was specific information within the reports that
22 several witnesses, and I believe there might have been
23 five, were unable to identify the petitioner during the
24 police investigation at the time during which he was

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1 held in question, that that information was not tendered
2 to defense counsel or Petitioner Muhammad before trial.
3 And that the significance of these actions by or
4 inactions by either the Felony Review Assistants or the
5 Assistant State's Attorneys who actually tried the case,
6 that those are matters over which Mr. Milan held some
7 measure of responsibility.
8 But as the law and the governing provisions and
9 as the Court considers them, to hold Special State's
10 Attorney Milan accountable without a showing that he had
11 direct knowledge would, in essence, set a precedent that
12 every managing or supervising attorney would be presumed
13 to have actual knowledge of all subordinate attorneys'
14 conduct. And I don't believe that's the reach of the
15 law at this point. And, again, I'm looking to ethical
16 rules for guidance as I interpret how the Court should
17 consider the claims here.
18 I also do note that prior to Attorney Milan's
19 2018 appointment as Special Prosecutor, that he sought
20 and obtained an expert advisory opinion. This was from
21 an individual named Stephanie, S-T-E-P-H-A-N-I-E, middle
22 initial L, last name Stewart, S-T-E-W-A-R-T, who was
23 senior counsel to the administrator of the ARDC. And
24 this individual opined that Special Attorney Milan did

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1 not have a conflict of interest that would prohibit
2 him from serving. And this was based on the finding
3 that his supervisory role was too attenuated from
4 Directive Waltman (phonetic) to create a conflict of
5 interest.
6 I further note, however, that petitioner also
7 engaged the services of Professor Andrew, common
8 spelling, Kent, K-E-N-T. And he provided an affidavit
9 analyzing these very facts before the Court as well and
10 reached an opposite conclusion.
11 He, in essence, determined that, excuse me, the
12 conclusions of Attorney Stewart failed to directly
13 address -- I'm sorry. Okay. Failed to directly address
14 the concerns raised by the ethical rules regarding Rule
15 111 and, specifically, Rule 1.7, excuse me, the conflict
16 of interest.
17 And, ultimately, the conclusion of the
18 petitioner's expert is that Attorney Milan does have a
19 personal interest, in essence, in ascertaining or
20 upholding the work of the State's Attorney's Office
21 because there is a significant risk or that there is a
22 conflict of interest because -- and I'll quote here.
23 There is a significant risk that Milan's representation
24 of the People as a Special Prosecutor in this case will

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1 be materially limited by personal interest of Milan's.
2 And it was explained in greater detail. And
3 this was under Illinois Rule of Professional Conduct
4 1.7(a)(2).
5 Again, as the Court looks to the specific
6 issues in this case that arise, the claim of a
7 significant risk that he will be material limited,
8 again, is not a sufficient showing under the language of
9 the statute that there -- if he established that there
10 is evidence that he has an actual conflict or per se
11 conflict. Even as I look at the language for, again,
12 the appearance of impropriety, at this stage, based on
13 the information the Court has, I do ultimately conclude
14 there has not been the showing, the requisite showing.
15 I do also want to make clear, however, that
16 should additional evidence come forward showing a direct
17 connection between Special Attorney Milan and the
18 petitioner's case, his direct involvement, his direct
19 knowledge, that certainly it will be important that
20 those matters are brought before the Court because then
21 there would be a showing, and that is what is not
22 present and what is necessary.
23 I will move forward to the petitioner's
24 additional claim and argument that the petitioner's

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1 desire to call Attorney Milan as a witness also fueled
2 that there is currently a conflict of interest that
3 disqualifies Attorney Milan from serving as Special
4 Prosecutor. And the Court -- when we look at TIRC
5 proceedings, they are akin to the third stage of a
6 post-conviction proceeding. And these are civil in
7 nature, but they do require analysis.
8 Or when I look at the TIRC proceeding, I look
9 at the Illinois Post-Conviction Hearing Act. And under
10 Section 6 of that Act, the Court may receive proof by
11 affidavits, depositions, oral testimony, or other
12 evidence. And the Court does have discretion to
13 determine the type of evidence it receives on
14 allegations in the petitions.
15 And in this instance the petitioner has
16 indicated its desire, as well as its intention, to call
17 Special Attorney Milan as a witness with respect to
18 discovering or learning his information about the
19 procedures, about his supervision of the attorneys
20 involved in the case back at that time. But, in
21 essence, there really would still need to be a showing
22 for the need to call Attorney Milan to testify at an
23 evidentiary hearing.
24 The petitioner specifically alleged that

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1 Attorney Milan has important knowledge regarding the
2 alleged prosecutorial and police misconduct. And that
3 petitioner -- that counsel expects that once the
4 petitioner is allowed to call Mr. Milan as a witness, he
5 will be -- the petitioner would be entitled to full
6 discovery, not only as to all the memos from Felony
7 Review at the pertinent time, but also Mr. Milan's
8 knowledge of torture by the Chicago Police Department,
9 the processes in place when confronted with evidence
10 of that torture, and also the training to his
11 subordinates on this crucial subject. Again, in the
12 face of that, Attorney Milan stated that he has no
13 personal knowledge of the circumstances of the
14 petitioner's case.
15 And in this instance, even given the wide
16 reaching bases upon which the petitioner would seek to
17 call Special Attorney Milan, that's a hurdle that still
18 has to be overcome. It is not a certainty that he would
19 be called as a witness. There must be a showing that
20 that is, therefore, necessary information for the matter
21 to proceed.
22 In this instance it's as if the petitioner --
23 and it is -- the petitioner is asking me to declare that
24 because there might be a conflict I should disqualify

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1 him now. And I think it's putting the cart before the
2 horse. There has to be established that there is the
3 conflict to have him removed. You can't say there might
4 be a conflict, so remove him.
5 At this point there has to be a showing, a
6 sufficient showing, that there is enough of a conflict
7 for that to occur. And I repeat again if there is that
8 showing, this matter should be brought before the Court
9 for the Court then to make these determinations.
10 Now, I did want to address briefly one
11 additional issue about the matters before the Court or
12 the motion. And that is with respect to the time that
13 the petitioner has waited to bring the claims before the
14 Court. And by bringing this part into it, it's not to
15 suggest that the petitioner did not have the right and
16 does not have the right. At any time that the
17 petitioner believes that there is a legal basis for the
18 claim, any claim as it pertains to the rights and
19 interests of the petitioner, those are properly before
20 the Court.
21 But I do note that the petitioner has known
22 about Special Attorney Milan's appointment as the
23 Special Prosecutor since the beginning stages of this
24 TIRC petition, and that dates back to 2018. And I note

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1 that Judge Byrne had appointed Attorney Milan as Special
2 Prosecutor back in 2017.
3 And in this instance the petitioner is the one
4 who sought Special Attorney Milan's appointment as
5 Special Attorney for the petitioner's matters. And
6 after Special Attorney Milan became engaged with the
7 matter, the discovery process happened, the initial
8 investigation that Special Attorney Milan conducted, and
9 the petitioner submitted to an interview with Attorney
10 Milan in the presence of petitioner's counsel. That
11 only after these matters occurred and Special Attorney
12 Milan announced that he would proceed with the
13 prosecution, it was at that time that the initial motion
14 to rescind occurred and then, ultimately, the new motion
15 that is currently before the Court.
16 I want to just speak a little bit to maybe
17 some of the matters that Attorney -- excuse me, that
18 Judge Martin addressed in his ruling. And this is
19 really citing to the authorities of People versus
20 Morgan, 385 Ill.App.3d 771, 2008, and citing to People
21 versus Blair, B-L-A-I-R, found at 215 Ill.2d 427, 2005.
22 And these are mentioned in -- and I don't have that
23 decision out here, People versus McElveen, capital M,
24 C, capital E, L-V-E-E-N, 2020 IL App (5th). This is an

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1 unpublished decision, so it's 180280-U. So, again, it
2 is only per persuasive authority, but from within that
3 McElveen decision was cited both the Morgan and Blair
4 decisions.
5 And a direct quote from the decision is that
6 the Illinois Supreme Court has observed that Illinois
7 law had intended to use the terms waiver and forfeiture
8 interchangeably.
9 The Blair Court, however, excuse me, has often
10 tended to use the terms waiver and forfeiture
11 interchangeably, not that it has tended to but often,
12 and that there are important distinctions between these
13 two terms.
14 When used correctly, waiver means the voluntary
15 relinquishment of a known right. Forfeiture is defined
16 as the failure to raise an issue in a timely manner,
17 thereby barring its consideration on appeal.
18 Now, in this case, if I look at the standard of
19 those particular words, and I believe those are the
20 words that Judge Martin was getting at when he entered
21 his ruling back when the first petition to rescind was
22 filed. That, in essence, the TIRC's findings, the
23 allegations of the Brady violation, those are not
24 recent. The TIRC disposition was released back in July

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1 of 2018. And since that date the petitioner has been
2 put on notice with respect to the chain of command
3 regarding Special Attorney Milan and put on notice to
4 determine if, as a supervisor of the Felony Review Unit
5 at the time, he was engaged in any of the matters
6 regarding the Petitioner Muhammad's case.
7 Now, petitioner's counsel did explain to the
8 Court that it was only after additional measures she
9 took to obtain information did she become more fully
10 aware of Special Attorney Milan's role as supervisor of
11 the Felony Review Unit at the relevant time.
12 But even giving consideration to that, the
13 concern for the Court is the timing then of the motions
14 to rescind while petitioner had knowledge of Special
15 Attorney Milan's roles within the State's Attorney's
16 Office. And that only after the passage of almost two
17 years, only after learning that petitioner -- that
18 Special Attorney Milan, who pursued the prosecution
19 versus dismissing it, did then the petition to rescind
20 surface.
21 And I do think under the language of the term
22 forfeiture, that failure to raise the issue in a timely
23 manner really speaks to the concern about it being
24 raised now.

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1 In essence, the Court, after considering the
2 claims, the reasons, therefore -- and I have not fully
3 detailed all of them, but please know they have all been
4 considered exhaustively -- it is the ultimate ruling of
5 the Court at this time that the petitioner has not
6 proven sufficient or shown sufficient facts and evidence
7 that Special State's Attorney Milan has a conflict of
8 interest in this case. And so for those reasons, the
9 new petition to rescind is denied.
10 I, again, stress, however, should there be a
11 showing of his actual or direct participation, the
12 matter should be brought properly back before the
13 Court.
14 There was a further request, I believe, that
15 this be certified as a question that needs to be
16 submitted to an interlocutory appeal. I don't find at
17 this point that the requirements for the rule are
18 satisfied to declare it as such, but petitioner
19 certainly can petition for the matter to be heard as
20 such, but I am not certifying it to be appealed at this
21 time. And it will then be returned to Judge Flood
22 barring any additional motions.
23 Okay. Which date is it back before Judge
24 Flood, Parties?

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1 MS. GORMAN: It's back on August 6, but I'm going to
2 be asking for an extension on that date.
3 THE COURT: Okay. I do understand that.
4 So I will send it back to Judge Flood for that
5 date, and, you know, I do understand the request for the
6 extension. Whatever happens or if further filings or
7 pleadings are back before this Court, that's what
8 happens.
9 So this will then go order of Court 8/6. Was
10 that August 6, Parties? Again, I'm having issues with
11 dates today.
12 MS. GORMAN: Yes.
13 THE COURT: '21 before Judge Flood.
14 Sharita, what's Judge Flood's courtroom number?
15 THE CLERK: 504.
16 THE COURT: Thank you.
17 Courtroom 504. And I'll just note it's --
18 MR. MILAN: Ms. Gorman, I have 11:00 a.m. on the
19 6th.
20 MS. GORMAN: Yeah, but I'm going to be motioning it
21 up on the motion call for 9:30 to continue the date.
22 THE COURT: All right. So, Parties, thank you.
23 MR. MILAN: Thank you.
24 MS. GORMAN: Thank you, Your Honor, for your

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1 exhaustive time on this.
2 I would like to ask the Court for leave to
3 certify the appeal. Should I file a motion before you
4 or should I just go ahead since you're already denying
5 it and go ahead with the Court?
6 THE COURT: Well, under the rule, it provides -- I
7 am not going to make the certification. I don't find
8 that it meets the criteria for that, but that doesn't
9 prevent, you know, the request still being made in other
10 words, so --
11 MS. GORMAN: I understand.
12 THE COURT: Okay. All right. Everyone, I think
13 that does conclude 101.
14 MS. GORMAN: Thank you.
15 THE COURT: Thank you.
16 MS. GORMAN: Have a good weekend.
17 THE COURT: You as well. Thank you, Counsels. All
18 right.
19 (Which were all the proceedings had
20 at the hearing of the above-entitled
21 cause, this date.)
22
23
24

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1 STATE OF ILLINOIS)
) SS:
2 COUNTY OF C O O K)

3

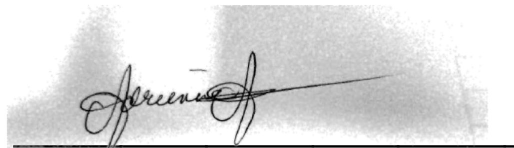
IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
4 COUNTY DEPARTMENT - CRIMINAL DIVISION

5

6 I, Adrienne Anderson, an Official Court
7 Reporter for the Circuit Court of Cook County, County
8 Department-Criminal Division, do hereby certify that I
9 reported in shorthand the proceedings had at the
10 above-entitled cause; that I thereafter caused the
11 foregoing to be transcribed into typewriting, which I
12 hereby certify to be a true and accurate transcript of
13 the proceedings had before the HONORABLE ERICA L.
14 REDDICK, Judge of said court.

15

16



17

ADRIENNE ANDERSON, CSR
18 Official Court Reporter
No. 084-004320

19

20

21

22

23 Dated this 12th day
24 of August, 2021.

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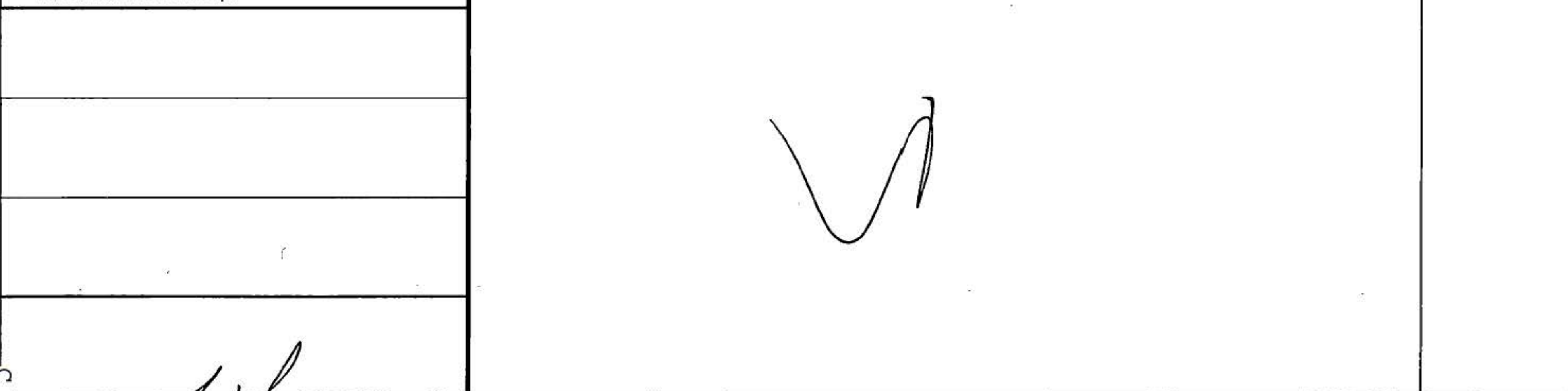
Sheet # 14	CRIMINAL DISPOSITION SHEET Defendant Sheet #1	Branch/Room/Location Criminal Division, Courtroom 504 2650 South California Avenue, Chicago, IL, 60608	Court Intrerpreter

Case Number	Defendant Name	Attorney Name	Session Date	Session Time
00CR1357201	MUHAMMAD, ABDUL	Gorman, H. Candace 6184278	3/11/2022	09:00 AM -

CB/DCN#	IR #	EM	Case Flag	Bond #	Bond Type	Bond Amt
004468639	1170296					

CHARGES	** IN CUSTODY 6/15/2000 ** COURT ORDER ENTERED	CODES
C001 720-5/9-1(A)(1) MURDER/INTENT TO KILL/INJURE 12/12/2001 DEFT. SENTENCED TO IDOC	DIC - AIS	
C002 720-5/9-1(A)(2) MURDER/STRONG PROB KILL/INJUR	Spec. Prosecutor's Motn To	
C003 720-5/9-1(A)(3) MURDER/OTHER FORCIBLE FELONY 11/13/2001 Nolle Prosequi	Dismiss Granted.	
C004 720-5/24-1.2(A)(2) AGG DISCHARGE FIREARM/OCC VEH 11/13/2001 Nolle Prosequi		
C005 720-5/24-1.2(A)(2) AGG DISCHARGE FIREARM/OCC VEH 11/13/2001 Nolle Prosequi	B/A 6-17-22 at 9:30 AM	



JUDGE: Flood, Lawrence Edward	JUDGE'S NO: 1826	RESPONSIBLE FOR CODING AND COMPLETION BY DEPUTY CLERK:	VERIFIED BY:

A149

130470

1 STATE OF ILLINOIS)
) SS:
2 COUNTY OF C O O K)

3 IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CRIMINAL DIVISION

4
THE PEOPLE OF THE)
5 STATE OF ILLINOIS,)
)
6 Plaintiff,)
)
7 vs.) No. 00 CR 13572-01
)
8 ABDUL MUHAMMAD,)
)
9 Defendant.)

10 RULING

11 REPORT OF PROCEEDINGS had before the

12 HONORABLE LAWRENCE E. FLOOD, on the 11th day of March,

13 2022, in Chicago, Illinois.

14

15 APPEARANCES:
OFFICE OF THE SPECIAL STATE'S ATTORNEY,
16 MR. ROBERT MILAN,
Assistant State's Attorney,
17 appeared on behalf of the People;

18 MS. CANDACE GORMAN,
ATTORNEY AT LAW,
19 appeared on behalf of the Defendant.

20

21

22

23
ELLEN DUSZA, CSR No. 84-3386
24 Official Court Reporter
773-674-6065

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1 THE CLERK: Abdul Muhammad.
2 MR. MILAN: Robert Milan, M-i-l-a-n, on behalf of
3 the Office of the Special State's Attorney.
4 THE COURT: Okay.
5 MS. GORMAN: Good afternoon, your Honor. Candace
6 Gorman for Mr. Muhammad, and Mr. Muhammad is here today.
7 THE COURT: All right. This matter is on the call
8 today for my ruling regarding the motions that I heard
9 previously. I'm going to read my ruling into the record.
10 The Illinois Torture Inquiry and Relief
11 Commission has referred this matter related to Abdul
12 Muhammad for a hearing in connection with the --
13 Mr. Muhammad's allegations that certain pretrial
14 statements made by him were the result of coercion and
15 torture by Chicago police detectives.
16 The Special State's Attorney has filed a motion
17 to terminate the proceedings alleging that the Commission
18 acted beyond its authority in referring this matter to
19 the circuit court for an evidentiary hearing.
20 Mr. Muhammad has filed a response asking that the motion
21 be denied.
22 The Court has reviewed all of the pleadings
23 along with exhibits filed by both parties. I've also
24 reviewed the trial transcript and the appellate court

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1 decision regarding this matter. Additionally, I have
2 listened to the recording of the Commission's
3 consideration of this matter as well as the final summary
4 of the deliberations and the referral to this court.
5 Finally, I have heard arguments from both sides on this
6 issue.
7 775 ILCS 40/40(d), the Illinois Torture Inquiry
8 and Relief Act permits the Commission to conduct
9 inquiries into claims of torture. Section 40/51 states
10 that claims of torture means a claim on behalf of a
11 living person convicted of a felony in Illinois asserting
12 that he was tortured into confessing to the crime for
13 which the person was convicted and the tortured
14 confession was used to obtain the conviction, and for
15 which there is some credible evidence related to the
16 allegations of torture. No remedy is provided under the
17 statute.
18 The Commission refers credible allegations of
19 torture to the circuit court for review of the claim
20 insofar as it may bear on the claimant's criminal
21 conviction. In essence, the Commission acts as a
22 gatekeeper regarding allegations of tortured confessions
23 that result in a conviction. Once the matter is referred
24 to the circuit court, the question becomes whether the

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1 Court can review the findings of the Commission and is
2 the Court bound by the decision in the referral to the
3 circuit court?
4 In this matter, the special prosecutor asks
5 that this referral be dismissed because he alleges the
6 Commission acted outside its authority in making the
7 referral. The Respondent essentially responds by arguing
8 that the Court must defer to the Commission's referral
9 until after an evidentiary hearing.
10 With respect to these arguments, the
11 Commission's referral is not an administrative decision
12 in terms as defined under the Illinois Administrative Law
13 Review Act, 735 ILCS 5/3-101. Under the Act, the right
14 to review a final administrative decision is limited to
15 those parties to the proceedings before the
16 administrative agency whose rights were affected by that
17 decision. That's the Tiskilwa case, T-i-s-k-i-l-w-a,
18 Economic Development Board versus Zoning Board of
19 Appeals.
20 In the case of People versus Christian,
21 2016 Il.Ap.1st 140030, the defendant's matter was
22 referred to the circuit court by the Commission. After
23 an evidentiary hearing, the trial court denied relief to
24 the defendant. He appealed arguing that the Commission's

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1 findings were entitled to, quote, unquote, preclusive
2 effect arguing that the trial court was obligated to
3 accept the Commission's conclusions and findings that the
4 defendant had been tortured.
5 The appellate court found that, one, the
6 Commission's findings were not subject to preclusive --
7 to a preclusive effect or deference because the
8 Commission's decision to make the referral was not the
9 kind of decision to which collateral estoppel, also
10 referred in the opinion as administrative deference,
11 applied.
12 Secondly, the Commission did not make a final
13 determination as to whether the defendant had, in fact,
14 been tortured into confessing.
15 And, third, the Commission's decision did not
16 represent any kind of final decision on the merits. And
17 the Court mentioned that the State was not a party to the
18 proceedings before the Commission.
19 These cases are instructive in two respects.
20 One, the Court is not bound by the conclusions made by
21 the Commission in making a referral. And two, the
22 circuit court does not review the actions of the
23 Commission in making the referral to determine whether
24 they were appropriate. The Commission's acts to

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1 determine whether there is enough evidence of torture to
2 merit judicial review -- I'm sorry, let me go back.
3 The Commission acts to determine whether there
4 is enough evidence of torture to merit judicial review.
5 The Court makes the final determination of whether the
6 provisions of the statute have been met. Two different
7 issues determined by two different bodies: the Torture
8 Commission and the Court. Therefore, the Court cannot
9 dismiss the referral based upon the actions of the
10 Commission in making the referral as the State, special
11 prosecutor, has requested. However, the question remains
12 whether there is a proper claim under the Torture
13 Commission statute before the Court.
14 Although the word "torture" is not defined in
15 the Act, the term "claim of torture" is defined as
16 follows: Claim of torture means a claim on behalf of a
17 living person convicted of a felony in Illinois asserting
18 that he was tortured into confessing to a crime for which
19 the person was convicted and the tortured confession was
20 used to obtain the conviction and for which there is some
21 credible evidence related to the allegations of torture
22 occurring within a county of over 3 million habitants.
23 The issue for this Court -- the issue for the
24 Court, rather, to decide at an evidentiary hearing is

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1 whether the defendant was tortured into confessing to the
2 crime for which he was convicted, and the tortured
3 confession was used to convict.
4 As the full statement entered into evidence in
5 this particular case at trial, it states as follows: He
6 said, meaning the defendant, he said he was a Vice Lord
7 member, a member of the Vice Lords street gang from
8 around 79th and Dotson. He denied any knowledge of the
9 aggravated battery case report which he was the victim.
10 He said he had no actual knowledge of the murder and that
11 he knew there was an arrest warrant for him regarding the
12 case, and he went to the State of Washington.
13 That is characterized in the referral as a
14 confession. Ms. Gorman has argued in her motion that she
15 believes that the detectives fabricated that statement,
16 but that was characterized by the Commission as the
17 confession.
18 The problem is that the statement is not a
19 confession based upon case law. There are a number of
20 cases throughout the years that have specifically defined
21 "confession" going back to the case of People versus
22 Nitti, N-i-t-t-i, from 1924. In that case, the Court
23 stated that a confession is a direct acknowledgment of
24 guilt on the part of the accused either by statements of

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1 the details of the crime or an admission of the ultimate
2 facts.
3 People versus Rollins, a 1970 Illinois
4 appellate case referring to "confession." It's limited
5 in its meeting to the commission of the criminal act, and
6 it is an acknowledgement or admission of the
7 participation in it. It is a comprehensive admission of
8 guilt, of facts which necessarily and directly imply a
9 deal.
10 Finally, in a Supreme -- in another case,
11 People versus Rupert, an older case, 1925, still good
12 law. Confession is limited to the criminal act and does
13 not include statements, declarations, or admissions of
14 fact incriminating in their nature of tending to prove
15 guilt. Clearly, the statement entered at trial was not a
16 confession. Looking at the full statement, it is an
17 exculpatory -- it is exculpatory in nature.
18 Mr. Muhammad denies the murder and any
19 knowledge of the facts prior to the murder. In the
20 statement, he also makes certain admissions. He was a
21 Vice Lord, he knew about the warrant issued for his
22 arrest, and he went to the State of Washington to turn
23 his life around. Such admissions do not equal a
24 confession.

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1 As the Illinois Supreme Court held in People
2 versus Jeorgev, J-e-o-r-g-e-v, 38 Ill.2d 165, a 1967
3 case, a confession must acknowledge all the elements of
4 the crime and is a confession of guilt. In this case,
5 the State argued in closing arguments at trial that his
6 statement and his flight to Washington should be --
7 should show consciousness of guilt. The State argued it
8 to counter the defendant's alibi defense.
9 Even if the defendant had never made a
10 statement about going to the State of Washington, the
11 State would have been able to argue consciousness of
12 guilt by his actions as one of circumstantial evidence to
13 rebut the alibi defense.
14 Neither the trial transcript nor the Appellate
15 Court affirmance of the case makes reference to any
16 confession being introduced at trial. Contrary to the
17 Commission's referral of a tortured confession used to
18 convict the defendant in this matter, there's no
19 confession presented.
20 Finally, in reviewing the referral by the
21 Commission to the circuit court, it is clear as stated in
22 the referral that they had serious concerns about
23 Mr. Muhammad's credibility regarding his allegations.
24 Quote, The scope of the allegations Muhammad made about

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1 coercive torture has grown in scope and severity over
2 time, and allegations of physical abuse, only in his
3 recent interviews, and we find that the objective
4 evidence supporting Muhammad's contention about withheld
5 lineup evidence makes his claim of coercion and torture
6 more credible.
7 In essence, the Commission is making an alleged
8 Brady violation part of the claim of torture to shore up
9 the credibility of a person the Commission had grave
10 reservations regarding his claim of coercion made
11 approximately 14 years after he was convicted.
12 Incorporating the Brady claim into the claim of
13 torture -- into the claim of the torture analysis would
14 require an evidentiary hearing on the part of the
15 referral without the appropriate opportunity for separate
16 consideration as would be appropriate under the
17 Post-Conviction Act or post-judgment proceeding under
18 2-1401.
19 Ms. Gorman argued that the Commission can
20 consider the issue of the alleged Brady violation, but
21 under 775 ILCS 40/45(d), under the Act, it states that
22 evidence of criminal and professional misconduct or other
23 wrongdoing disclosed through the process allows the
24 Commission to make a referral to the appropriate

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1 authority, whether that be to one of the parties or the
2 entity that they feel is appropriate based upon what they
3 find. In this particular case, such acts can be referred
4 as the Commission feels appropriate to the parties --
5 proper parties and entities.
6 For the reasons stated, the motion of the
7 Special State's Attorney to terminate the referral
8 proceedings by the Illinois Torture and Relief Commission
9 is granted.
10 MS. GORMAN: Thank you, your Honor. May I approach
11 the bench?
12 THE COURT: Sure.
13 MS. GORMAN: I filed an amended post-conviction
14 petition.
15 THE COURT: Right.
16 MS. GORMAN: And I would like leave to file that
17 today.
18 THE COURT: I'll grant you leave to file -- let me
19 ask you a question now.
20 As far as the post-conviction proceeding, does
21 the special prosecutor remain in that?
22 MR. MILAN: Yes. Yes, we do. It's still our case.
23 MS. GORMAN: I don't think there's any authority for
24 Mr. Milan to say that, and I will be investigating that

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1 issue, too.
2 MR. MILAN: Ms. Gorman may disagree, but we've
3 handled all post-convictions and TIRC and even trials.
4 THE COURT: Okay.
5 MR. MILAN: And, again, I know your Honor is
6 intimately familiar with the Post-Conviction Act, but
7 this is a successive petition that will be filed by
8 Ms. Gorman.
9 THE COURT: I think you phrased it as just a
10 straight post-conviction act -- petition, correct?
11 MS. GORMAN: It's filed under the Post-Conviction
12 Act and under TIRC, under the Torture Commission.
13 THE COURT: I understand that, but it's a subsequent
14 petition. He filed a previous petition, correct?
15 MS. GORMAN: Yes.
16 THE COURT: So it should be a successive.
17 MS. GORMAN: Yes. This was an amended successive.
18 We filed one a year ago.
19 THE COURT: I see. Okay. That was filed as a
20 successive?
21 MS. GORMAN: Yes.
22 THE COURT: Okay.
23 MS. GORMAN: Thank you, your Honor.
24 THE COURT: You're welcome.

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1 MR. MILAN: The only thing I'd add, Judge, again,
2 cut me off if you're aware of this, but only one petition
3 may be filed by a Petitioner under this article without
4 leave of Court. Leave of Court may be granted only if a
5 Petitioner demonstrates cause for his or her failure to
6 bring the claim and his or her initial post-conviction
7 proceeding and prejudice results from that failure. For
8 purposes of this subsection, a prisoner shows cause by
9 identifying an objective factor that impeded his or her
10 ability to raise a specific claim during his or her
11 initial post-conviction proceedings; and a prisoner shows
12 prejudice by demonstrating that the claim not raised
13 during his or her initial post-conviction proceedings so
14 infected the trial that the resulting conviction or
15 sentence violated due process.
16 I just cite two cases. One, People versus
17 Curtis Washington, 171 Ill.2d 475, and then People versus
18 Handy cited at 2019 Ill.App. 17021.
19 THE COURT: Okay.
20 MS. GORMAN: Your Honor, I think our petition
21 addresses these issues including Brady violations, the
22 other new evidence of witnesses that were tortured
23 themselves and --
24 THE COURT: Let me ask you this. Wasn't there a

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1 claim -- and I haven't -- I got -- I have to admit I
2 haven't looked at it in a while. Is there a claim of
3 actual innocence?
4 MS. GORMAN: Correct, your Honor.
5 THE COURT: Okay. I think under claims of actual
6 innocence, you don't have to -- we step beyond the
7 cause-and-effect requirement.
8 MR. MILAN: For actual innocence claims, the
9 defendant must show that he has newly discovered evidence
10 that had it been known would have changed the result.
11 Also, actual innocence claims cannot be dependent upon
12 the successful litigation of a due process violation.
13 The Washington case that I cited speaks to the
14 requirement that such claims of actual innocence be
15 freestanding.
16 THE COURT: But I still have the Robbins case that I
17 have to consider.
18 MR. MILAN: Understood.
19 THE COURT: That recent Supreme Court case regarding
20 that issue. So as it stands now, I'm granting you -- I
21 granted you leave to file it.
22 MS. GORMAN: Thank you.
23 THE COURT: And also to file your amended.
24 MS. GORMAN: Thank you.

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1 THE COURT: Then you would have an opportunity to
2 file a motion as you feel appropriate.
3 MR. MILAN: Understood, Judge.
4 MS. GORMAN: Thank you.
5 THE COURT: All right. When do you want come back
6 on this?
7 MR. MILAN: I'll defer to Ms. Gorman.
8 MS. GORMAN: I would ask for a date at the end of
9 April. I'm not sure what -- if there's going to be a
10 motion pending or motion filed.
11 THE COURT: Well, I don't know.
12 MR. MILAN: I'm sure there will be. Do you want to
13 give it a long date and we'll respond?
14 THE COURT: Sure. Because you so far made two
15 points. One, you don't believe that Mr. Milan should
16 continue, so that's an issue.
17 MS. GORMAN: Correct.
18 THE COURT: And secondly, Mr. Milan has to determine
19 what kind of responsive pleading he wants to file. I'll
20 give it a longer date.
21 MR. MILAN: Sure. Do you want to go June or July?
22 Is that too long?
23 THE COURT: No. Since we are going to go longer
24 and we're not dealing with any issue that requires a

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1 hearing at this point, I'm not going to extend the writ,
2 then.
3 MS. GORMAN: Okay. Any dates in June we should be
4 aware of?
5 THE COURT: I set a jury today for June 6th,
6 otherwise...
7 MR. MILAN: June 16th, does that work for you?
8 MS. GORMAN: It's a Thursday.
9 MR. MILAN: Friday, how about June 17th?
10 THE COURT: We can do that in the morning.
11 MR. MILAN: 9:30.
12 (The above-entitled cause was continued
13 until 6/17/2022.)
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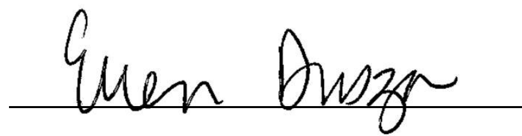
1 STATE OF ILLINOIS)
2) SS:
3 COUNTY OF C O O K)
4 IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
5 COUNTY DEPARTMENT - CRIMINAL DIVISION
6
7 I, Ellen Dusza, Official Court Reporter of the
8 Circuit Court of Cook County, County Department, Criminal
9 Division, do hereby certify that I reported in shorthand
10 the proceedings had on the hearing in the aforementioned
11 cause; that I thereafter caused the foregoing to be
12 transcribed into typewriting, which I hereby certify to
13 be a true and accurate transcript of the Report of
14 Proceedings had before the HONORABLE LAWRENCE E. FLOOD,
15 Judge of said court.
16
17 
18 Official Court Reporter
19 Ellen Dusza, CSR 84-3386
20 Circuit Court of Cook County
21
22
23
24 Date: March 29, 2022

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

IN RE APPOINTMENT OF SPECIAL PROSECUTOR	)	No. 2001 Misc. 4

MEMORANDUM OPINION AND ORDER

This cause was initiated when several public interest groups and independent citizens of Cook County filed a Petition for Appointment of a Special Prosecutor. Petitioners request that this court appoint a Special Prosecutor to investigate numerous allegations of "torture, perjury, obstruction of justice, conspiracy to obstruct justice, and other offenses by police officers under the command of Jon Burge at Area 2 and later Area 3 headquarters in the City of Chicago during the period from 1973 to the present." *Petition for Appointment of a Special Prosecutor,* p.1.

I. History of the Case

Petitioners contend that a Special Prosecutor should be appointed to investigate the abovementioned allegations and to prosecute those persons who may be criminally liable because the Cook County State's Attorney's Office faces a *per se* conflict of interest. They assert that the Cook County State's Attorney's Office is precluded from acting as the investigational and prosecutorial body as to the criminal allegations advanced against Commander Jon Burge and other members of the Chicago Police Department because Richard A. Devine, Cook County State's Attorney "labors under a

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per se conflict of interest in investigating and prosecuting any criminality at Area 2 and Area 3 because of his professional relationship with Jon Burge." *Petition for Appointment of a Special Prosecutor*, p.8.

According to petitioners, this *per se* conflict arises because Mr. Devine was a partner at Phelan, Pope & John, Ltd. during the time in which that law firm represented Commander Burge in two federal suits brought against the City of Chicago, Commander Burge and other Chicago Police Officers. Petitioners claim that the City of Chicago paid the firm $839,250.64 compensation for its representation.

Beyond the *per se* conflict that arises as a result of his being a partner at Phelan, Pope & John, Ltd. during the seven years it represented Commander Burge, petitioners argue that Mr. Devine has an actual conflict of interest because he personally appeared in federal court on at least one occasion as counsel for Burge and billed the City of Chicago $4,287.50 for the 24.5 hours he worked on Burge's case.

Consequently, petitioners argue, Mr. Devine, as the presently-elected Cook County State's Attorney, is prohibited by Illinois law and the Illinois Rules of Professional Conduct from prosecuting those he has defended for the same conduct.

In response to the allegations raised by petitioners, the Cook County State's Attorney's Office (hereinafter "the State") filed a 2-615 and 2-619 Motion to Dismiss. In that motion, the State never directly addresses whether a *per se* conflict of interest exists in this case. *See Respondents' Combined Sections 2-615 and 2-619 Motion to Dismiss Petition*. Rather, the State appends an independent analysis of the allegations of criminal activities set forth in the Petition for Appointment of Special Prosecutor prepared by John

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Barsanti.[1] ~~Mr.~~ Barsanti and the State argue that substantive defenses, including the statute of limitations, defeat petitioners' claims, thereby making the appointment of a Special State's Attorney unnecessary in this case.

II. Analysis

The threshold issue before this court is whether the claim of a *per se* conflict of interest by the State's Attorney must be considered before any of the substantive defenses can be addressed. As noted, the State's Attorney's Office appended an independent analysis of petitioners' claims by John Barsanti in their motion to dismiss. In his analysis, however, Barsanti does not specifically address the allegations of a *per se* conflict. Rather, he seeks to refute the substantive claims advanced by petitioners and concludes that those claims are without merit, thereby challenging petitioners' arguments for the necessity of a Special Prosecutor.

However, a distinction must be drawn between the substantive merit of petitioners' claims and the question of whether a Special Prosecutor need be appointed to investigate those claims. The question of the necessity for an independent investigation arises not from the merit of individual claims, but rather from a determination of whether a conflict of interest exists on the part of the elected State's Attorney. Thus, this court holds that the conflict issue must first be decided before any substantive legal issues may be considered.

The relevant Illinois statutory provision, 55 ILCS 5/3-9008 (West 2001), provides for the appointment of a Special Prosecutor:

[1] Mr. Barsanti was assigned the responsibility of independently reviewing petitioners' claims by Norbert J. Goetten, Director of the State's Attorney's Appellate Prosecutor's Office, who had been asked by Mr. Devine to provide a legal analysis of petitioners' allegations.

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Whenever the attorney general or state's attorney is sick or absent, or unable to attend, or is interested in any cause or proceeding, civil or criminal, which it is or may be his duty to prosecute or defend, the court in which said cause or proceeding is pending may appoint some competent attorney to prosecute or defend such cause or proceeding....

Nevertheless, when the need for a Special Prosecutor arises prior to the commencement of a proceeding, in the absence of specific statutory authority allowing for such an appointment, a court's power to appoint a Special Prosecutor will arise when the appointment is necessary to "prevent a failure of justice" and to protect the due process rights of the citizens of this country. *Wilson v. County of Marshall*, 257 Ill.App. 220, 226 (2nd Dist. 1930); *In re Appointment of Special State's Attorneys*, 42 Ill.App.3d 176, 182 (3rd Dist. 1976); *In re Special Prosecutor*, 164 Ill.App.3d 183, 186 (5th Dist. 1987).

The appointment of a Special Prosecutor is wholly within the discretion of the court; however, before a court can exercise this power of appointment, the court must make an initial inquiry whether "the legal contingency has arisen authorizing the exercise of such power." *Lavin v. Board of Commissioners of Cook County*, 245 Ill. 496, 502 (1910); *Hutchens v. Wade*, 13 Ill.App.3d 787, 789 (4th Dist. 1973).

Illinois courts have long recognized that "a legal contingency has arisen" authorizing the appointment of a Special Prosecutor when the State's Attorney who would normally oversee a prosecution is an "interested party" as defined by Illinois law. In *People ex rel. Hoyne v. Northrup*, 184 Ill.App. 638, 648 (1914), the Appellate Court ruled that the appointment of a Special State's Attorney was appropriate to investigate voting fraud and irregularities in the election for State's Attorney because the elected State's Attorney had an interest in the outcome of the investigation. Similarly, in *People*

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v. Doss, 384 Ill. 400, 405 (1943), the Supreme Court ruled that the appointment of a Special State's Attorney, prior to the presentation of a case to the Grand Jury, was appropriate since the State's Attorney was the only witness in a libel case and was therefore an interested party (*See also People v. Moretti*, 349 Ill.App. 67, 76 (1st Dist. 1952); *In re Appointment of Special Prosecutor*, 253 Ill.App.3d 218, 220 (5th Dist. 1993)).

Additionally, the Illinois Supreme Court in *People v. Coslet*, 67 Ill.2d 127, 133 (1977), crafted a "*per se*" conflict of interest rule to describe situations in which an absolute, disabling conflict of interest exists, thereby removing the necessity to prove prejudice.[2] *Coslet* merely restated in "*per se* conflict of interest" terms the doctrine set forth in the first Illinois case considering the issue, *People v. Gerold*, 265 Ill. 448 (1914). In *Gerold*, Webb, the prosecutor, had been defendant's attorney earlier in the case and had discussed with the defendant in confidence various matters pertaining to the indictment. In holding that this constituted a conflict of interest, the Supreme Court observed:

> The rule has long been firmly established that an attorney cannot represent conflicting interests or undertake to discharge inconsistent duties.... This rule is a rigid one, designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose

[2] The reviewing courts of Illinois have utilized the *per se* conflict of interest rule in many other instances. *See e.g.*, *People v. Stoval*, 40 Ill.2d 109 (1968); *People v. Kester*, 66 Ill.2d 162 (1977); *People v. Precup*, 73 Ill.2d 7 (1978); *People v. Fife*, 76 Ill.2d 418 (1979); *People v. Washington*, 101 Ill.2d 104 (1984); and *People v. Spreitzer*, 123 Ill.2d 1 (1988). Most recently, the Appellate Court reversed and remanded a murder conviction because of the *per se* conflict of interest of defendant's attorney who also represented a possible State witness, even though that witness ultimately did not testify at trial. *People v. Morales*, ____ Ill.App.3d ____, 1st Dist. Docket No. 1-99-0033 (March 28, 2002).

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> between conflicting duties. He should undertake no adverse employment, no matter how honest may be his motives and intentions.... [T]he law will not be less strict in criminal proceedings, especially as to the duty in this regard resting upon counsel for the state.... It is unnecessary that the prosecuting attorney be guilty of an attempt to betray confidence; it is enough if it places him in a position which leaves him open to such charge....

Id. at 478-79.

In the instant matter, petitioners contend that one of the primary persons involved in the alleged criminal activity was Commander Jon Burge who had earlier been represented by now-State's Attorney Devine and his former law firm. The rationale of the Supreme Court in *Gerold* is directly applicable. Mr. Devine's prior representation of Commander Burge creates the appearance that he may not be entirely objective in his investigation of Burge, thereby constituting a conflict of interest.[3] This conflict of interest "affects all the prosecutors" in the Cook County State's Attorney's Office. *See People v. Courtney*, 288 Ill.App.3d 1025, 1034 (3rd Dist. 1997).

In *Courtney*, a case closely analogous to the present case, the Appellate Court held that there was a *per se* conflict of interest where the State's Attorney was an "interested" party. *Id.* The reviewing court held that a Special Prosecutor should have been appointed because a defense attorney who had earlier represented the defendant was then appointed State's Attorney during defendant's prosecution. In its analysis, the *Courtney* court cited several out-of-state cases with the same essential facts as presented

[3] *See People v. Stoval*, 40 Ill.2d 109, 113 (1968) (discussing the necessity of avoiding possible conflicts of interest).

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here—a former attorney for defendant becomes a chief prosecutor. Each case held that the prosecution of a former client gave rise to an appearance of impropriety which can only be avoided with the appointment of a special prosecutor. *Id.* at 1033-34 (*citing State v. Cooper*, 63 Ohio Misc. 1, 409 N.E.2d 1070 (1980); *Arizona v. Latigue*, 108 Ariz. 521, 502 P.2d 1340 (1972); and *New York v. Shinkle*, 51 N.Y.2d 417, 415 N.E.2d 909, 434 N.Y.S.2d 918 (1980)).

In the present case, there is an appearance of impropriety that creates a similar conflict of interest. Mr. Devine candidly admits his involvement in the representation of Commander Burge while employed by Phelan, Pope & John, but contends that his role was minimal, despite the fact that he appeared in court at least once to represent Burge and billed 24.5 hours on Burge's case. *Respondents' Combined Sections 2-615 and 2-619 Motion to Dismiss Petition, Exhibit A.* However, assuming *arguendo* that Mr. Devine's previous involvement in the representation of Commander Burge was minimal, the mere fact that he was involved in Burge's defense in any respect requires that this court find that a *per se* conflict of interest exists, thereby warranting the appointment of a Special Prosecutor. Furthermore, any knowledge gained by the members of his prior law firm in the defense of Burge is imputed as a matter of law to State's Attorney Devine. *People v. Fife*, 76 Ill.2d 418, 425 (1979); *People v. Karas*, 81 Ill.App.3d 990, 995 (1st Dist., 2nd Div. 1980); *People v. Dace*, 153 Ill.App.3d 891, 896 (3rd Dist. 1987); *Illinois Rules of Professional* Conduct 1.10.

Based on the prior representation of Commander Burge by Mr. Devine and his former law firm, neither he nor the Cook County State's Attorney's Office can be permitted to have further involvement in the instant case, even though he vigorously

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argues that the petitioners' claims should be dismissed, primarily on statute of limitation grounds. This disqualification of the Cook County State's Attorney's Office serves to avoid the appearance of impropriety and is consistent with the well-established principle that "[a]n attorney cannot be permitted to assist in the prosecution of a criminal case if by reason of his professional relations with the accused he has acquired a knowledge of the facts upon which the prosecution is predicated or which are closely interwoven therewith." *Gerold*, *supra*, 265 Ill. at 478.

III. Conclusion

In accordance with Illinois law, this court finds that State's Attorney Richard A. Devine labors under a *per se* conflict of interest in the present case which necessitates the appointment of a Special Prosecutor to investigate the allegations made by petitioners.

This court therefore appoints retired Illinois Appellate Court Justice Edward J. Egan as Special State's Attorney to investigate the facts alleged by petitioners and to determine if any prosecutions are warranted.

After consultation with Justice Egan, this court also appoints Robert D. Boyle as Assistant Special State's Attorney, consistent with the holding in *People v. Moretti*, 349 Ill.App. 67, 77 (1st Dist. 1952).

ENTERED: [signature]
Paul P. Biebel, Jr. JUDGE PAUL P. BIEBEL, JR.
Presiding Judge of the Criminal Division
Circuit Court of Cook County APR 2 4 2002

Circuit Court - 1688

DATE: 4-24-02

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

IN RE APPOINTMENT OF SPECIAL PROSECUTOR	)	**No. 2001 Misc. 4**
IN RE THE MATTERS OF:	)	
AARON PATTERSON,	)	**86 CR 6091**
STANLEY HOWARD,	)	**84 C 13134**
DERRICK KING,	)	**80 I 1916**
LEROY ORANGE,	)	**84 C 667**
RONALD KITCHEN,	)	**88 CR 15409**
CORTEZ BROWN,	)	**90 CR 23997**
GRAYLAND JOHNSON,	)	**88 CR 7047**
ALONZO SMITH,	)	**83 C 769**
ERIC CAINE,	)	**86 CR 6091**
EDGAR HOPE,	)	**82 CR 1179/82 CR 1181**
ALTON LOGAN, and	)	**92 CR 7265**
CLARENCE TROTTER,	)	**86 CR 10969**
Petitioners,	)	
v.	)	
PEOPLE OF THE STATE OF ILLINOIS, Respondent.	)	

MEMORANDUM OPINION AND ORDER

On April 24, 2002, this court appointed retired Appellate Court Justice Edward J. Egan as Special Prosecutor and Robert D. Boyle as Assistant Special Prosecutor. (*In re Appointment of Special Prosecutor,* No. 2001 Misc. 4, April 24, 2002). The Special Prosecutors were ordered to investigate numerous allegations of police misconduct against Jon Burge or police officers under his command at Area 2 and later Area 3

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headquarters in the City of Chicago during the period from 1973 to the present ("Area 2 cases"). *Id.*

Following this court's April 24, 2002 ruling, Cook County State's Attorney Richard A. Devine ("the State") filed a Motion for Clarification. The Motion for Clarification contained an admission, two announcements, and a question. The admission – by making Burge a potential target of the appointed Special Prosecutor, this court's order gave Burge a limited, but real interest in any Area 2 post-conviction proceeding which might still go to an evidentiary hearing and require Burge's testimony. (*Resp't's Mot. for Clarification of the Court's April 24, 2002 Order, May 22, 2002* at 4, 6; *Resp't's Reply to Pet.'s Resp. to the Mot. for Clarification, Nov. 6, 2002* at 9).

The first announcement – the State's Attorney "recused himself from all cases involving Burge Defendants, as well as any which might arise in the future through clemency, habeus corpus, or other post-conviction proceedings. The State's Attorney has assigned Assistant State's Attorney Patrick Driscoll to stand in his stead and exercise full powers in the supervision of all Burge Defendant cases." (*Resp't's Mot. for Clarification* at 4). The second announcement – the State contacted the Attorney General of Illinois and "asked [the office] to be prepared to undertake the supervision of these prosecutions pursuant to the Attorney General's duty under 55 ILCS 205/4 to consult with the State's Attorney and, when 'the interest of the state requires,…attend the trial of any party accused of crime, and assist in the prosecution….'" (*Resp't's Mot. for Clarification* at 5 (*citing* 55 ILCS 205/4)).

Finally, the State asked this court the following question, the answer to which is the clarification sought: what impact does the April 24, 2002 order have on present and

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future cases involving Burge Defendants, as distinct from Burge and Burge-commanded detectives? *See Id.* at 6.

In response to the State's Motion for Clarification, twelve defendants[1] along with several public interest groups ("Petitioners") request that this court take two actions. First, in addition to the Special Prosecutors appointed by this court on April 24, 2002 to handle the investigation of alleged crimes committed by Area 2 investigators, Petitioners ask that this court appoint another Special State's Attorney to "act on behalf of the People of the State of Illinois in Petitioners' pending cases." (*Pet. and Mem. in Supp. of Pet. for Appointment of an Independent Special Prosecutor and Resp. to Mot. for Clarification, July 22, 2002* at 1). Second, Petitioners request their cases be reassigned to judges outside of Cook County. In response to Petitioners' two requests, the State filed a motion to dismiss and a motion for judgment on the pleadings.

In addition, the State argues the twelve defendant petitioners are not interveners within the meaning of the Civil Practice Act and should be dismissed. (*Resp't's Alternative Mot. to Dismiss and for J. on the Pleadings and Argument in Resp. to Def. Pet'rs' Pet. for a Special State's Att'y in Their Own Proceedings, Nov. 6, 2002* at 6-9). The State requests dismissal for three reasons: 1) Petitioners did not demonstrate, in writing, why intervention is necessary to protect their rights; 2) Petitioners do not possess an enforceable or recognizable right upon which their intervention is based; and 3) Petitioners' intervention was untimely. *Id.*

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[1] Former Governor Ryan pardoned Aaron Patterson, Leroy Orange, and Stanley Howard. However, they remain parties to the Petition for the Appointment of a Special State's Attorney as private citizens.

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The State and Petitioners present three items for ruling: 1) the State's Motion for Clarification; 2) Petitioners' request for appointment of a Special State's Attorney to litigate Petitioners' cases; and 3) Petitioners' request that their cases be reassigned to judges outside of Cook County.

While three issues have been presented to this court, the State's Motion for Clarification and Petitioners' Request for Appointment of a Special State's Attorney merge. Therefore, two issues will be decided by this order: 1) whether or not a second Special State's Attorney will be appointed to litigate Petitioners' cases; and 2) whether or not Petitioners' cases will be reassigned to judges outside of Cook County.

I. Request for Appointment of a Special State's Attorney

A. Background

1. Ethical Rules

First, Petitioners argue three provisions of the Illinois Supreme Court Rules of Professional Conduct ("IRPC") require the appointment of a Special State's Attorney. (*Pet. and Resp. to Mot. for Clarification* at 41). Specifically, Petitioners contend the State's Attorney cannot fulfill his duties under sections 1.7 ("Rule 1.7"), 1.9 ("Rule 1.9"), and 3.8 ("Rule 3.8") of the IRPC.

The State's Attorney violates Rule 3.8, Petitioners reason, because duties arising out of his attorney-client relationship with Burge conflict with interests of justice. Rule 3.8(a) announces the duty of a prosecutor is to "seek justice, not merely to convict." Ill. Sup. Ct. R. Prof'l Conduct 3.8 (2002). Petitioners attempt to prove violations of the rule by first citing the State's admission that Burge possesses a "collateral, but real, interest in

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the proceedings" involving Petitioners and "now may be regarded as having a personal stake, or being a 'party'" in Petitioners' cases. (*Resp't's Mot. for Clarification* at 4, 6). The State's Attorney, Petitioners argue, serves two masters: justice and the interests of a former client. This is impermissible because "the State's Attorney's obligation to evaluate Petitioners' cases without bias is powerfully inhibited by his attention to the interests of his former clients." (*Pet. and Resp. to Mot. for Clarification* at 44). Petitioners believe the State's Attorney's special duty as a prosecutor to disclose information favorable to Petitioners conflicts with his continuing duty of confidentiality to Burge.[2] (*Pet. and Resp. to Mot. for Clarification* at 44).

Second, Petitioners contend Mr. Devine's actions since being elected State's Attorney "may" constitute a violation of Rule 3.8. (*Pet. and Resp. to Mot. for Clarification* at 46). Instead of seeking justice in every individual case, as Rule 3.8 requires, Petitioners accuse the State's Attorney of doing "everything in his power to prevent Petitioners' claims from being adjudicated." *Id.* at 47.

Petitioners also argue the State's Attorney cannot fulfill his duties under Rule 1.7 and Rule 1.9 of the IRPC. (*Pet. and Resp. to Mot. for Clarification* at 7). Rule 1.7 prohibits any lawyer from representing a client if the representation of that client may be "materially limited by the lawyer's responsibilities to another client or third person." Ill. Sup. Ct. R. Prof'l Conduct, R 1.7 (2002). Rule 1.9 prohibits a lawyer who formerly represented a client from representing "another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of a

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[2] See Rule 3.8 and *Brady v. Maryland*, 373 U.S. 83, 87 (1963)(due process requires prosecutor to disclose material evidence favorable to accused upon request).

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former client." The substance of the ethical violations is the same as alleged with respect to Rule 3.8. Only the ethical rules have changed. Petitioners again assert that Mr. Devine's former representation of Burge makes him less than fair and impartial in relationship to Petitioners' cases. Therefore, Mr. Devine's ability to fairly represent the State, his current client, and protect the interests of Burge, his former client, is limited in violation of Rule 1.7 and Rule 1.9. (*Pet. and Resp. to Mot. for Clarification* at 48).

The State argues Petitioners apply the wrong ethical rules. The relevant ethical rule is IRPC 1.11 ("Rule 1.11"), which governs conflicts arising when an attorney moves from private to public law practice. (*Resp't's Alternative Mot. and Resp. to Pet.* at 20). The rule reads:

> (c) Except as otherwise expressly permitted by law, a lawyer serving as a public officer or employee shall not:
>
> > (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter...

Ill. Sup. Ct. R Prof'l Conduct, R. 1.11(c)(1) (2002). The State argues the above rule governs the present case because the ethical dilemma faced by Mr. Devine, now a public officer, arose out of his previous private practice. Rule 1.7, according to the State, governs attorneys in private firms. (*Resp't's Alternative Mot. and Resp. to Pet.* at 21-22).

Citing the "plain language" of Supreme Court Rule 1.11(c), the State contends the State's Attorney can delegate work to other attorneys in his office despite the fact that he participated personally and substantially in the Burge matter. (*Resp't's Alternative Mot. and Resp. to Pet.* at 21). According to this logic, the State's Attorney reacted to this

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court's April 24, 2002 order in accordance with the relevant rule – Supreme Court Rule 1.11(c). He acknowledged this court's April 24, 2002 order gave Burge a real interest in the litigation of Petitioners' cases. (*Resp't's Mot. for Clarification* at 6). He withdrew from any participation in or supervision of those cases. *Id.* at 5. Finally, he assigned Assistant State's Attorney Driscoll to stand in his stead and exercise full powers of supervision in all Burge Defendant cases. *Id.*

3. Personal Interest

Petitioners' second argument is that 55 ILCS 5/3-9008, otherwise known as the Special State's Attorney Statute, requires appointment of a Special State's Attorney because the entire Cook County State's Attorney's Office has a personal interest in Petitioners' cases. (*Pet. and Resp. to Mot. for Clarification* at 54-58). The Special State's Attorney Statute requires disqualification of a State's Attorney if it is established that the State's Attorney is interested in a proceeding that he has a duty to prosecute. 55 ILCS 5/3-9008. Petitioners direct the court's attention to the "extensive and involved history" between the State's Attorney's Office and Area 2 cases to find an interest sufficient to trigger disqualification. (*Pet. and Resp. to Mot. for Clarification* at 55).

Specifically, Petitioners allege the State's Attorney's Office possesses two disqualifying interests. First, the reputation of the office would suffer if allegations of torture in individual cases were sustained. *Id.* Second, results of the investigation conducted by the Special Prosecutor, empowered by this court's April 24, 2002 order, "may subject Assistant State's Attorneys to criminal or ethical sanctions, creating an undeniable incentive in these cases to continue to aggressively resist any and all efforts" to properly investigate allegations of torture in Area 2 cases. *Id.*

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The State replies the State's Attorney and his office lack the statutorily required interest in Petitioners' cases needed to trigger the appointment of a Special State's Attorney. (*Resp't's Alternative Mot. and Resp. to Pet.* at 9). Calling appointment of a Special State's Attorney a "drastic remedy," the State argues the statutorily required interest attaches to the State's Attorney if: 1) the defendant is a former client (this constitutes a *per se* conflict); or 2) specifically pled facts demonstrate that a State's Attorney's close relationship to an individual might cause him to not properly prosecute that individual. *Id.* at 10, 12.

The State believes the present case does not meet the above criteria. Unlike the set of facts that compelled this court to appoint a Special Prosecutor on April 24, 2002, Burge is not a potential defendant in Petitioners' cases. As to any specifically pled facts to support Petitioners' belief that the State's Attorney's Office is incapable of properly litigating their cases, the State finds none. The State's Attorney characterizes Petitioners' allegations as a non-specific "piece of literature which counterpoints a long litany of allegations respecting police misconduct, many concerning defendants not pending in these proceedings, alongside a personnel history of the State's Attorney's Office." *Id.* at 13.

4. Appearance of Impropriety

The third and final major argument Petitioners make to support the appointment of a Special State's Attorney is the following: removing the State's Attorney and his office from the litigation of Petitioners' cases is necessary to avoid appearances of impropriety. After citing the well-known ethical duty of prosecutors to avoid the appearance of bias or impropriety, Petitioners articulate two ways in which the State's

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Attorney, by participating in the litigation of Petitioners' cases, contributes to such an appearance. First, Petitioners cite the admission by the State (discussed above) as evidence that the State's Attorney's Office's continued involvement in Petitioners' cases, in and of itself, gives rise to an appearance of impropriety. In the Motion for Clarification, the State writes about possible problems of perception related to prosecutorial decisions in Petitioners' cases:

> On the one hand, decisions not to call Burge as a witness, or to move for a decision without an evidentiary hearing, may be seen as decisions to protect Burge if the decision is commanded or controlled by Burge's former attorney. On the other hand, decisions to pursue evidentiary hearings or call all detective witnesses to the stand, could be seen as unusually aggressive tactics to avoid such charges at the cost of achieving justice in the individual case.

(*Resp't's Mot. for Clarification* at 4). The above statement, Petitioners argue, constitutes a concession by the State's Attorney that "every tactical decision he might make in handling Petitioners' cases is likely to be called into question." (*Pet. and Resp. to Mot. for Clarification* at 59). Petitioners believe such questioning is *prima facie* evidence of an appearance of impropriety.

Second, Petitioners contend the failure of the State's Attorney and his office to take action in response to Area 2 torture claims gives rise to an appearance of impropriety. (*Pet. and Resp. to Mot. for Clarification* at 60). This argument rests on the contention that the State's Attorney's Office failed to take action in response to the torture claims. Petitioners support this claim by arguing "absolutely no evidence" exists that Mr. Devine or any of his predecessors "conducted a full, objective review of the cases that are tainted by the Area 2 scandal." *Id.* at 61.

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The State denies any allegations of inaction and then argues it removed the only potential appearance of impropriety by the withdrawal of State's Attorney Devine from any supervision of Petitioners' post-conviction proceedings. (*Resp't's Alternative Mot. and Resp. to Pet.* at 24-25). The State denies that every tactical decision in relation to the litigation of Petitioners' cases might be called into question. *Id.* at 24 (*quoting Pet. and Resp. to Mot. for Clarification* at 59). Instead, the State claims, its concession involved only "one, limited potential appearance of impropriety – the decision whether to call Burge as a witness…." *Id.* The State emphasizes not past concessions but its interpretation of present-day reality. Namely, the State's Attorney eliminated this apparent problem by delegating the litigation of Petitioners' cases to Assistant State's Attorney Driscoll. *Id.*

II. Analysis

A. Intervention

In considering the State's objection to Defendant Petitioners intervention, the court is mindful of the purpose of the intervention doctrine. Intervention expedites litigation by disposing of the entire controversy in one action. Intervention statutes, therefore, are remedial and ought to be liberally construed. *Adams v. County of Cook*, 86 Ill. App. 3d 68 (1st Dist. 1980); *Univ. Square, Ltd. v. City of Chicago*, 73 Ill App. 3d 872 (1st Dist. 1979).

The Code of Civil Procedure states, "Upon timely application anyone may in the discretion of the court be permitted to intervene in an action…when an applicant's claim or defense and the main action have a question of law or fact in common." 735 ILCS

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5/2-408. Petitioners' claim – that this court's April 24, 2002 order requires the appointment of a second Special State's Attorney to litigate Petitioners' post-conviction matters – has more than a question of law or fact in common with the main action. Petitioners' claim is inextricably bound to this court's decision as to whether or not its April 24, 2002 order needs clarification. Therefore, this court holds that its earlier ruling allowing intervention was properly granted.

B. Petition for the Appointment of a Special State's Attorney

When considering requests for appointment of a Special State's Attorney, the relevant statutory provision, 55 ILCS 5/3-9008, provides:

> Whenever the attorney general or state's attorney is sick or absent, or unable to attend, or is interested in any cause or proceeding, civil or criminal, which it is or may be his duty to prosecute or defend, the court in which said cause or proceeding is pending may appoint some competent attorney to prosecute or defend such cause or proceeding…

Id. A court's authority to appoint a Special State's Attorney will arise when the appointment is necessary to "prevent a failure of justice" and to protect the due process rights of the citizens of this state. *Wilson v. County of Marshall*, 257 Ill. App. 220, 226 (2d Dist. 1930); *In re Appt. of Special State's Attorneys*, 42 Ill. App. 3d 176, 182 (3d Dist. 1976); *In re Special Prosecutor*, 164 Ill. App. 3d 183, 186 (5th Dist. 1987).

The appointment of a Special State's Attorney is wholly within the discretion of the court. However, before a court can exercise this power of appointment, the court must inquire whether or not "the legal contingency has arisen authorizing the exercise of such power." *Lavin v. Board of Commissioners of Cook County*, 245 Ill. 496, 502 (1910); *Hutchens v. Wade*, 13 Ill. App. 3d 787, 789 (4th Dist. 1973).

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In its April 24, 2002 order, this court found a legal contingency sufficient to authorize its appointment of Special Prosecutor Egan and Assistant Special Prosecutor Boyle. The contingency consisted of a finding that, at least as to any investigation of police officers at Area 2 and later Area 3 during the period from 1973 to the present, State's Attorney Devine is an interested party as defined by Illinois law. (*In re Appointment of Special Prosecutor,* No. 2001 Misc. 4, April 24, 2002 at 7-8).

This finding of interest found its foothold in *People v. Coslet*, 67 Ill. 2d 127 (1977). The Illinois Supreme Court used *Coslet* to craft a "*per se*" conflict of interest rule that applies to situations in which an absolute, disabling conflict exists, thereby removing the necessity to prove prejudice. *Id.* at 133. After emphasizing similarities between State's Attorney Devine's relationship with Commander Burge and the fact pattern found in *People v. Courtney*, 288 Ill. App. 3d 1025, 1034 (3d Dist. 1997)(which held a *per se* conflict exists and Special State's Attorney should be appointed where a defense attorney who earlier represented defendant is appointed State's Attorney during defendant's prosecution), this court found that the State's Attorney "labors under a *per se* conflict of interest which necessitates the appointment of a Special Prosecutor to investigate the allegations made by [P]etitioners." (*In re Appointment of Special Prosecutor,* No. 2001 Misc. 4, April 24, 2002 at 8).

In the present case, however, no *per se* conflict exists. Unlike the situation in which the State's Attorney and his office might investigate and prosecute Burge, who was State's Attorney Devine's former client, this court is now asked to appoint a Special State's Attorney to litigate Petitioners' post-conviction proceedings. No one alleges Mr. Devine or any member of his office maintained an attorney-client relationship with

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Petitioners. To the contrary, the State's Attorney's Office successfully prosecuted Petitioners and continues to litigate Petitioners' post-conviction proceedings.

Although no *per se* conflict exists, the court must examine potential conflicts that might arise if the State's Attorney or members of his office continue litigating Petitioners' post-conviction proceedings. Immediately after this court's April 24, 2002 order appointing a Special Prosecutor, the State's Attorney "recused himself from all cases involving Burge Defendants, as well as any which might arise in the future through clemency, habeus corpus, or other post-conviction proceedings. The State's Attorney has assigned Assistant State's Attorney Patrick Driscoll to stand in his stead and exercise full powers in the supervision of all Burge Defendant cases." (*Resp't's Mot. for Clarification* at 4). The State's Attorney's recusal changed the nature of the ethical inquiry. Instead of asking whether or not State's Attorney Devine labors under an actual conflict in relation to litigating Petitioners' post-conviction proceedings, this court must ask whether or not Assistant State's Attorney Driscoll might labor under such a conflict.

The answer to the preceding question depends upon two factors: 1) whether or not State's Attorney Devine might have labored under an actual conflict had he maintained involvement in Petitioners' post-conviction proceedings; and 2) if State's Attorney Devine would have labored under such a conflict, whether the ethical screens he instituted after this court issued its Aril 24, 2002 order prevent those possible conflicts from extending to his assistants.

The facts of each case guide the court when determining if a conflict of interest exists. The court recognizes that facts elicited during Petitioners' future post-conviction proceedings could potentially create an actual conflict for the State's Attorney's Office.

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The consideration of possible future conflicts promotes judicial economy by expediting the resolution of these matters. Instead of staging an evidentiary hearing to determine whether an actual conflict exists in the post-conviction proceeding of each individual Petitioner, this court believes it prudent to anticipate and dispose of any future questions of conflict.

State's Attorney Devine may have labored under a conflict had he maintained any involvement in Petitioners' post-conviction proceedings. As noted, the State, not Petitioners, first argued that this court's April 24, 2002 order gave Burge a limited, but real interest in any Area 2 case which might still go to an evidentiary hearing and require Burge's testimony. *Id.* at 4, 6; *Resp't's Reply to Pet.'s Resp., Nov. 6, 2002* at 9). The State presented its ethical dilemma in clear terms:

> On the one hand, decisions not to call Burge as a witness, or to move for a decision without an evidentiary hearing, may be seen as decisions to protect Burge if the decision is commanded or controlled by Burge's former attorney. On the other hand, decisions to pursue evidentiary hearings or call all detective witnesses to the stand, could be seen as unusually aggressive tactics to avoid such charges at the cost of achieving justice in the individual case.

(*Resp't's Mot. for Clarification* at 4). In the above statement, the State admits that in post-conviction proceedings where Petitioners allege misconduct by Burge, the State's Attorney might have to refute those allegations by defending Burge's conduct. Having to decide whether or not to defend Burge's conduct, while that very conduct is the subject of an investigation creates, at minimum, a clear ethical quandary and, at worst, an actual conflict of interest.

The ethical screen instituted by State's Attorney Devine does not prevent the potential conflict from extending to his assistants. In an effort to shield his assistants

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from the conflict, the State's Attorney recused himself from Petitioners' post-conviction proceedings and delegated supervision of those matters to Assistant State's Attorney Driscoll. This attempt at establishing a proverbial "Chinese Wall," however, came too late. Prior to State's Attorney Devine's recusal, several Assistant State's Attorneys, while under Devine's supervision, were litigating Petitioners' post-conviction proceedings. Patrick Driscoll was employed by the State's Attorney's Office during this pre-recusal litigation of Petitioners' post-conviction matters. Thus, the potential for conflict already took root within the State's Attorney's Office before State's Attorney Devine's recusal.

In recognition of the potential ethical dilemma, the State informed this court in its Motion for Clarification that it contacted the Illinois Attorney General's Office and asked that it be prepared to undertake supervision of Petitioners' post-conviction matters. (*Resp't's Mot. for Clarification* at 5). This court notes that among the duties of the Attorney General, the Illinois legislature has included "[t]o appear for and represent the people of the state before the supreme court in all cases in which the state or the people of the state are interested." 15 ILCS 205/4; *see also* Il. Const. Art. V. § 15.[3]

In its discretion and in order to avoid having the ancillary issue of conflict litigated in each of Petitioner's post-conviction proceedings, this court hereby orders the Attorney General's Office, pursuant to its duty under 15 ILCS 205/4, to consult with the State's Attorney and, when "the interest of the state requires,...attend the trial of any

[3] Historically, the Attorney General has permitted the Cook County State's Attorney's Office to appear as co-counsel on appeals of capital cases, all of which are heard by the Illinois Supreme Court.

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party accused of crime, and assist in the prosecution," to assume complete responsibility for any subsequent litigation of Petitioners' post-conviction proceedings.

Recently elected by a clear majority of the citizens of Cook County,[4] Illinois Attorney General Lisa Madigan is personally free from any history of involvement in Petitioners' cases and will not be subject to any conflict of interest concerns.

II. Motion To Transfer Post-Conviction Matters To Judges Outside Cook County

A. Arguments

In addition to their request that a Special State's Attorney be appointed to litigate their individual post-conviction proceedings, Petitioners contend that their post-conviction matters should be transferred to judges sitting outside of Cook County. This request is based upon a statement of facts in which Petitioners allege that: 198 sitting Cook County judges are former Assistant State's Attorneys, 52 of which had direct involvement in the Area 2 cases; 41 judges are former Assistant Corporation Counsel, 8 of which had direct involvement in the Area 2 cases; 22 judges are former Assistant Attorneys General; 27 judges are former attorneys with "Other Law Enforcement" agencies, 2 of which had direct involvement in the Area 2 cases; and 37 judges are former law enforcement officers. Petitioners further allege that this past employment will require several judges to appear as witnesses in their various pending post-conviction proceedings.

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[4] This court takes judicial notice of the official polling records which indicate that Attorney General Madigan received over 76% of the votes cast in the City of Chicago and over 63% of the votes cast in Cook County.

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Because some judges would be required to evaluate the credibility of these testifying judges, Petitioners contend that there exists "an undeniable impetus for, and pressure on, sitting Cook County felony court judges, whether or not they were ever ASAs themselves, to protect their colleagues, who are former ASAs and who are presently sitting judges. Additionally, a number of the non-former ASA judges have close personal and professional relationships with judges who were former ASAs, as well as with present and former ASAs." (*Pet'rs' Pet. To The Chief J. To Req. That The Ill. S. C. Reassign The Above-Entitled Cases To Judges Sitting Outside Of Cook County, July 22, 2002* at 6).[5]

The only way to insure that these matters will be conducted free of any conflict of interest or even the appearance of impropriety, Petitioners' contend, is to remove all Cook County judges from presiding over their post-conviction proceedings. Specifically, Petitioners request that this court, in its supervisory authority, either request that the Illinois Supreme Court reassign these cases to judges sitting outside of Cook County or, in the alternative, conduct an evidentiary hearing "with full discovery rights, in order to determine the breadth and scope of the conflict and appearance of impropriety." (*Pet'rs' Pet. to Reassign* at 7).

The State, conversely, argues that allegations of judicial prejudice must be timely and specific. Without specific allegations of prejudice brought against individual judges in motions for change of venue or substitution of judge, the State contends that Petitioners' claims are nothing more than conclusory allegations based on speculation. The State further observes that these various post-conviction proceedings have been

[5] Hereafter cited as "Petition to Reassign."

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pending before judges in the Criminal Division of the Circuit Court of Cook County for months, even years, without complaint from any of the individual Petitioners. Finally, the State argues that Petitioners have no standing to litigate these issues under one, unified petition. Rather, the State claims, the instant petition involves several individual cases with unique facts and procedural histories.

In their reply,[6] Petitioners argue that their petition is not subject to traditional principles of waiver because it is not a traditional motion for change of venue, substitution of judge, or recusal. Rather, Petitioners claim that their request for the reassignment of these post-conviction proceedings arises out of an extraordinary group of cases that require extraordinary relief. Essentially, Petitioners allege that that the public cannot have confidence in rulings "issued by a judiciary that labors under an undeniable appearance of partiality and conflict" because: (1) several judges are former Assistant State's Attorneys who were participants or supervisors in the Area 2 and 3 investigations; (2) the remaining judges have close personal and professional relationships with the judges who are former Assistant State's Attorneys; and (3) the Cook County judiciary maintains a "reputational stake" in the defeat of the claims against Area 2 and 3. (*Petitioners' Reply* at 1-2). Petitioners assert that, as a result of these extraordinary circumstances and the appearance of impropriety draped over the judiciary of Cook County, the rules of professional conduct and principles of due process require that these cases be reassigned to judges outside of Cook County.

[6] Petitioners' *Reply In Support Of Petition To The Chief Judge To Request That The Illinois Supreme Court Reassign Cases To Judges Who Sit Outside Cook County* is cited as "Petitioners' Reply."

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B. Analysis

Initially, this court addresses the State's claim that Petitioners' motion is untimely. The State is correct when it argues that the post-conviction matters involved in the instant petition have been pending for months, some even years, and that judges in many of them have made substantive rulings. However, the waiver rule may be relaxed "when both the right of a defendant to an impartial trial and the duty of the court to avoid any appearance of impropriety are implicated." *People v. Eubanks*, 307 Ill. App. 3d 39, 41 (3d Dist. 1999); *People v. Lopez*, 187 Ill. App. 3d 999, 1007 (1st Dist. 1989); *People v. Austin*, 116 Ill. App. 3d 95, 101 (2d Dist. 1983). Since the issue of the appearance of propriety of the Cook County judiciary is the fundamental issue underlying the instant petition, it is prudent to disregard principles of waiver in this matter. Thus, the fundamental inquiry is: whether the history of employment and professional relationships of the judiciary of Cook County creates an appearance of impropriety.

Illinois Supreme Court Rule 63 requires that "A Judge Perform the Duties of Judicial Office Impartially and Diligently." 134 Ill. 2d R. 63. In pertinent part, subsection (C) proscribes:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

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(c) the judge was, within the preceding three years, associated in the private practice of law with any law firm or lawyer currently representing any party in the controversy (provided that referral of cases when no monetary interest was retained shall not be deemed an association within the meaning of this subparagraph) or, for a period of seven years, following the last date on which the judge represented any party to the controversy while the judge was an attorney engaged in the private practice of law;

* * *

134 Ill. 2d R. 63(C)(1)(a), (b) and (c).[7]

Clearly, a judge's "impartiality might reasonably be questioned" when the judge is likely to be called as a material witness in the same case over which he[8] presides. *People v. Ernest*, 141 Ill. 2d 412, 423 (1990). Thus, the law requires that a judge disqualify himself if the judge has "personal knowledge of disputed evidentiary facts concerning the proceeding." 134 Ill. 2d R. 63(C)(1)(a). Similarly, it is well settled that a judge must be disqualified when the judge has previously acted as counsel in the matter over which he now presides. *Austin*, 116 Ill. App. 3d at 100; 134 Ill. 2d R. 63(C)(1)(b). There can be no question, therefore, that if any of the individual petitioners in the instant matter has a case pending before a Cook County judge who either acted as counsel in the matter which is the subject of the post-conviction petition or who is likely to be a material witness in that post-conviction proceeding, those petitioners would be entitled to the recusal of that judge.

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[7] Canon 3E of the American Bar Association's Model Code of Judicial Conduct contains language nearly identical to subsections (a) and (b) of Rule 63(C)(1). The language in subsection (c) of Rule 63(C)(1), however, is not included in and reaches beyond the restrictions of the Model Code.

[8] The court's use of masculine pronouns denotes all Cook County judges.

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However, cases in which a judge had a more tenuous involvement in the proceedings have not required the judge's recusal. The mere fact that a sitting judge was once an Assistant State's Attorney, or even a supervisor in that office, has been held not to create an appearance of impropriety. *People v. Storms*, 155 Ill. 2d 498, 506 (1993); *People v. Del Vecchio*, 129 Ill. 2d 265, 277 (1989); *People v. Vasquez*, 307 Ill. App. 3d 670, 673 (2d Dist. 1999); *Eubanks*, 307 Ill. App. 3d at 42; *People v. Phinney*, 250 Ill. App. 3d 858, 861 (4th Dist. 1993); *People v. Thomas*, 199 Ill. App. 3d 79, 91 (2d Dist. 1990). In *Thomas*, the defendant moved for substitution of judge for cause based on the fact that the judge in the case had been chief of the criminal division of the DuPage County State's Attorney's Office prior to becoming a judge. Defendant observed that the judge had supervisory authority over the Assistant State's Attorney prosecuting the defendant's case for a period of six months before he became judge. Defendant argued that Rule 63 (C)(1)(b) required that the judge recuse himself. The defendant also relied on *Austin*, which held that the trial judge "acted as counsel" and should have recused himself when he represented the defendant at her preliminary hearing in the same case over which he later presided. 116 Ill. App. 3d at 100. The *Thomas* court distinguished *Austin*, however, holding that, because the judge's involvement in the case, "if any," was merely supervisory in nature, he cannot be said to have "acted as counsel" as prohibited by Rule 63 (C)(1)(b). *Thomas*, 199 Ill. App. 3d at 91; *see also Del Vecchio*, 129 Ill. 2d at 278; *FDIC v. O'Malley*, 249 Ill. App. 3d 340, 364 (1st Dist. 1993).

Likewise, it has been held that a judge is not required to recuse himself simply because the judge was an Assistant State's Attorney during the time in which one of his colleagues prosecuted the defendant. In *Eubanks*, the Illinois Appellate Court held that

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"the phrase 'in the private practice of law' as it is used in Supreme Court Rule 63(C)(1)(c) does not apply to those attorneys employed by the State's Attorney's office." 307 Ill. App. 3d at 42. The court reasoned "[t]here are significant and substantial differences between practicing law as an assistant State's Attorney and practicing law in the private sector." *Id.* Specifically, the reviewing court observed that a judge's impartiality might reasonably be questioned where the judge had a recent economic relationship with a private firm or where one of the judge's former clients is a litigant before the court — "concerns [which] do not attach to a judge...who was previously employed by the government as a prosecuting attorney." *Id.*

In the instant matter, Petitioners allege that an appearance of impropriety arises out of the fact that several Cook County judges were Assistant State's Attorneys at the time Petitioners' cases were being prosecuted. However, as in *Thomas*, the judges' former positions as Assistant State's Attorneys do not by themselves create an appearance of impropriety. Unless the judges actively prosecuted Petitioners at the trial stage, their mere employment as Assistant State's Attorneys, even if supervisory in nature, cannot be said to constitute acting "as counsel" as described in Rule 63 (C)(1)(b). Furthermore, the mere fact that many judges in Cook County worked in the State's Attorney's Office during the same period when their colleagues were prosecuting Petitioners does not mean that they were "associated in the private practice of law" as proscribed by Rule 63 (C)(1)(c). It also stands to reason, then, that no appearance of impropriety exists for those judges who were not employed by the Cook County State's Attorney's Office and had not acted as counsel in any of Petitioners' cases.

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Petitioners also claim that an appearance of impropriety arises out of the fact that the judges presiding over the various post-conviction proceedings will be required to evaluate the credibility of other judges who will likely be called as witnesses in those matters. Petitioners rely on "numerous cases with less compelling fact situations in which a presiding judge has asked the Illinois Supreme Court to reassign a case to a judge outside the County, where there was a perception of conflict." (*Pet'rs' Pet. to Reassign* at 20). Specifically, Petitioners cite: *Pucinski v. Keithly*, 99 D 04033 (wherein Chief Judge O'Connell held that where the Clerk of the Circuit Court of Cook County was a party to a divorce proceeding the case should be assigned to a judge outside of Cook County to avoid suspicion); *People v. Vosburgh*, 96 CF 2586-96 and *In re Appointment of a Special Prosecutor*, 95 MR 807 (in which the Chief Judge of the Eighteenth Circuit requested that two judges from outside of DuPage County be assigned to preside over cases against two former DuPage County prosecutors, one of whom was a sitting judge); *People v. Foxgrover*, 91 CR 1775, 91 CR 24394, 91 CR 24396 (wherein the Chief Judge of Cook County requested that the criminal trial of a sitting judge be assigned to a judge from outside of Cook County); *In re Baby T* (in which the adoption dispute involving Appellate Court Justice Anne Burke was assigned to a non-Cook County judge); *People v. Moore*, 159 Ill. App. 3d 850 (1st Dist. 1987) (wherein the Illinois Supreme Court reassigned the case of a defendant charged with the murder of a Cook County judge to a judge from outside of Cook County); *Keehner v. Staley Mfg. Co.*, 50 Ill. App. 3d 258 (5th Dist. 1977) (holding that under the facts of the case, it was error to grant a motion for change of venue but the error was deemed harmless); and other various federal and state cases.

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Additionally, this court makes note of the fact that it recently transferred two cases to judges outside of the Criminal Court Building at 26th Street and California, in Chicago. However, in those cases, as in the cases cited by Petitioners, a judge or public official was a party to the litigation or the victim of a crime. Because a judge — or the Clerk of the Circuit Court in *Pucinski v. Kiethly* — actually had a personal stake in the outcome of the proceedings, the court in each of these cases found it prudent to transfer the case to another judicial circuit either through a change of venue or a request for reassignment by the Illinois Supreme Court.

It should be noted, however, that such action is not required. In *Faris v. Faris*, 142 Ill. App. 3d 987 (2d Dist. 1986), a divorced husband and wife sought to modify their divorce decree. The matter was set for trial and the wife sought a change of venue. The wife claimed that she would not receive a fair trial in the circuit because the judges would be partial to her husband because of his personal and professional relationship with them both as an attorney and recently appointed judge. On appeal, the court observed that, "while judges in Illinois are subject to the standards of judicial conduct, the standards do not specifically address the issue before [the court] or suggest impropriety in hearing a case in the circuit in which a judge is a party." *Faris*, 142 Ill. App. 3d at 996. Thus, the reviewing court held that the mere fact that the judge was a party to the case did not create a *per se* appearance of impropriety.

Unlike the cases cited in Petitioners' motion, the judges involved in this case are not parties to the post-conviction matters that are the subject of the instant petition. They are merely potential witnesses. Like the court in *Faris*, this court has not found, nor have Petitioners cited, any case that stands for the proposition that an appearance of

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impropriety is created merely because one judge is required to evaluate the credibility of another judge.

While the law may be silent on this specific factual situation, it is clear that the law presumes judges to be impartial. It has been held that "[a] trial judge is presumed to be impartial, and the burden of overcoming this presumption rests on the party making the charge of prejudice." *Eychaner v. Gross*, 202 Ill. 2d 228, 280 (2002). "The mere fact that the judge has some kind of relationship with someone involved in the case, without more, is insufficient to establish judicial bias or to warrant a judge's removal from the case." *People v. Steidl*, 177 Ill. 2d 239, 264 (1997). Additionally, "the fact that a judge has ruled adversely to a party...does not disqualify that judge from sitting in subsequent civil or criminal cases in which the same person is a party." *People v. Vance*, 76 Ill. 2d 171, 178 (1979). Thus, it is clear that there is little support for Petitioners' contention that an appearance of impropriety necessarily arises out of the fact that some judges will be required to evaluate the credibility of other judges.

Despite the lack of specific supporting case law, Petitioners argue that the severity of the allegations and the serious nature of the ongoing investigation into police conduct at Areas 2 and 3 requires that this court exercise its discretion and supervisory authority to request that the Illinois Supreme Court reassign the cases to another judicial circuit. This argument is based on Petitioners' desire to maintain absolute public confidence in the integrity of the judicial process involving these cases.

This court agrees that public confidence in the judiciary is of significant importance. However, the court disagrees that removing the cases from the judiciary of Cook County is the best way to foster such confidence. The best remedy for any

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perceived lack of faith is to allow the judges of this jurisdiction to preside over these matters with diligence and impartiality, as they have sworn to do. The removal of Petitioners' cases from Cook County would, in essence, be an acknowledgement that the judges therein are incapable of fulfilling their duty. This court declines to draw such a conclusion.

Furthermore, confidence in the judiciary is only one of several considerations, which this court must balance. The court also has a duty to ensure that every individual defendant who is prosecuted in this county be afforded the rights guaranteed him by the laws of this country and the State of Illinois. To grant Petitioners' motion would be to ignore that obligation. Essentially, Petitioners seek to receive a remedy that exists outside the law merely because they allege similar facts in their post-conviction petitions. Implicit in Petitioners' argument is the notion that their rights as a group exceed the rights available to any individual defendant. It is clear from the case law discussed above that an individual defendant is not entitled to a change of venue or substitution of judge merely because the judge presiding over his case is a former Assistant State's Attorney or because another judge who is a former Assistant State's Attorney will be called as a witness. Although Petitioners insist the nature of these extraordinary cases warrant extraordinary remedies, this court is not persuaded that it should provide relief that is unavailable to any other individual defendant. It is not unusual at 26th and California for judges to be called as witnesses in cases on which they worked as Assistant State's Attorneys. If this court were to adopt Petitioners' theory, fairness would dictate that every defendant would be entitled to have his case transferred out of Cook County when a judge is called as a witness. This court declines to adopt a *per se* standard of transfer.

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Finally, while, as noted earlier, this court rejected the State's contention that Petitioners' claims are procedurally waived, it does take notice of the fact that Petitioners did not raise any of their arguments regarding an alleged appearance of impropriety until now. Petitioners treaded through various stages of post-conviction litigation without objection to the judges presiding over their cases. Take the case of former petitioner Patterson,[9] for example. The Illinois Supreme Court remanded his case for an evidentiary hearing on August 10, 2000.[10] During the nearly two years which preceded the filing of the instant motion, Patterson and his attorneys conducted extensive discovery and litigated one of two issues raised in his petition to final disposition — all before Judge Michael P. Toomin. Only after Judge Toomin denied one of Patterson's claims and after this court appointed a Special Prosecutor to investigate possible criminal charges against Area 2 detectives did Patterson take umbrage with Judge Toomin's appearance of partiality. Like Patterson, all of the Petitioners named in the instant petition have commenced post-conviction proceedings that have long been advancing through the stages of litigation. None of them, however, questioned the appearance of the judges' partiality until after this court appointed a Special Prosecutor on April 24, 2002.

In their oral argument, counsel for Petitioners stated that the appointment of a Special Prosecutor "raises the stakes" of the post-conviction matters by making "the determinations by the judges judging the credibility of judges more critical of [*sic*] because of their potential effect." (R. at 166). However, this court is not persuaded that

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[9] Former Governor Ryan's pardon of Patterson, Howard, and Orange rendered their initial inclusion in the Petition to Reassign moot.

[10] *See People v. Patterson*, 192 Ill. 2d 93 (2000).

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its decision to appoint a Special Prosecutor is relevant to the fundamental question of whether or not the Cook County judiciary labors under an appearance of impropriety.

In sum, Petitioners fail to establish that an appearance of impropriety exists which would require this court to remove Petitioners' post-conviction matters from all judges sitting in the Circuit Court of Cook County. Consequently, Petitioners' request that this court ask the Illinois Supreme Court to reassign their cases is denied. Additionally, because Petitioners have failed to establish any legal basis for their claim that the judiciary of Cook County labors under an appearance of impropriety, their request for an evidentiary hearing on that claim is likewise denied.

III. Conclusion

For the reasons discussed above, Petitioners' motion for the appointment of a Special State's Attorney is hereby denied. However, in its discretion, this court directs the Illinois Attorney General to assume complete supervision of the defense of Petitioners' post-conviction matters.

Also, Petitioners' motion that this court request that the Illinois Supreme Court reassign their cases to judges sitting outside of Cook County is denied. Petitioners' alternative prayer for an evidentiary hearing on that motion is also denied.

JUDGE PAUL P. BIEBEL, JR.
APR 09 2003 PPB
Circuit Court - 1688

ENTERED: Paul P Biebel Jr 1688
Paul P. Biebel, Jr.
Presiding Judge
Criminal Division
Circuit Court of Cook County

DATED: April 9. 2003

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
v.	)	No. 83C-769, 83CR-6091,
	)	80C-1916, 88CR-7047,
ALONZO SMITH, ERIC CAINE,	)	84C-667
DERRICK KING, LEONARD KIDD,	)	
GRAYLAND JOHNSON	)	Hon. Paul P. Biebel, Jr.,
	)	Judge Presiding.

MEMORANDUM OPINION AND ORDER

The underlying cause (No. 2001 Misc. 4) was initiated when several public interest groups and independent citizens of Cook County filed a petition for appointment of a Special Prosecutor to investigate numerous allegations of abuse, torture, and other offenses by Commander Jon Burge (hereinafter "Burge" or "Commander Burge") and police officers under his command at Area 2 and later at Area 3 headquarters in the City of Chicago. In an order dated April 24, 2002, this Court appointed retired Illinois Appellate Court Justice Edward J. Egan as Special State's Attorney and Robert D. Boyle as Assistant Special State's Attorney to investigate these allegations of abuse and torture.

In an order dated April 9, 2003, this Court directed the Illinois Attorney General to assume complete supervision of the defense of post-conviction petitions which included allegations of police misconduct by Burge and/or police officers under his command.

Now, Lisa Madigan, Attorney General of Illinois (hereinafter "Attorney General"), moves to reassign the Burge-related post-conviction petitions of Alonzo Smith, Eric Caine, Derrick King, Leonard Kidd, and Grayland Johnson (hereinafter

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"Petitioners") to the Cook County State's Attorney's Office (hereinafter "State's Attorney").

SPECIAL PROSECUTOR CASE HISTORY

I. *In re Appointment of Special Prosecutor*, No. 2001 Misc. 4 (April 24, 2002)

On April 24, 2002, this Court entered an order finding that Cook County State's Attorney Richard A. Devine (hereinafter "Devine") labored under a *per se* conflict of interest in matters involving allegations that Burge and his subordinates engaged in a practice of abuse and torture to coerce confessions out of citizens. Due to this conflict, this Court appointed retired Illinois Appellate Court Justice Edward J. Egan as Special State's Attorney and Robert D. Boyle as Assistant Special State's Attorney to investigate these allegations.

This Court noted that Illinois statutory provision 55 ILCS 5/3-9008 allowed for the appointment of a Special Prosecutor. The appointment was necessary because Commander Burge was the primary person alleged to have committed the criminal activity and he was previously represented by Devine and his former law firm. This fact alone created a *per se* conflict of interest. This Court found that this conflict affected all prosecutors in the Cook County State's Attorney's Office, citing *People v. Courtney*, 288 Ill. App. 3d 1025, 1034 (3d Dist. 1997).

II. *In re Appointment of Special Prosecutor*, No. 2001 Misc. 4 (April 9, 2003)

Following this Court's April 24, 2002 ruling, Devine filed a motion for clarification. In this motion, Devine indicated that as a potential target, Burge had an interest in any post-conviction proceeding which might require Burge's testimony. Second, Devine announced that he recused himself from all cases involving Burge

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defendants, as well as any that might arise in the future. Devine suggested that the Attorney General may have to assist in the defense of cases involving these allegations. Finally, Devine asked this Court to clarify the impact of the April 24, 2002 order on present and future cases involving Burge and police officers under his command.

In response to Devine's motion for clarification, twelve petitioners, along with several public interest groups, requested that this Court appoint another Special State's Attorney to act on behalf of the State of Illinois in the pending cases involving Burge defendants. Additionally, the twelve petitioners and public interest groups requested that this Court reassign the petitions involving Burge defendants to judges outside of Cook County.

Ultimately, in an opinion dated April 9, 2003, this Court denied the petition for appointment of a Special State's Attorney to prosecute these post-conviction matters involving Burge defendants. Rather, this Court directed the Illinois Attorney General to assume complete supervision of defending these matters. This Court also denied the request to reassign these cases to judges sitting outside of Cook County.

PROCEDURAL BACKGROUND

I. Illinois Attorney General's Motion To Reassign:

On December 8, 2008, the Attorney General filed a *Motion To Reassign To The Cook County State's Attorney's Office* (hereinafter "*Motion to Reassign*"). In the *Motion to Reassign*, the Attorney General notes that on April 9, 2003, this Court directed the Attorney General to supervise twelve petitioners' cases wherein they alleged Burge and

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police officers under his supervision abused them.[1] This Court later ordered the Attorney General to assume supervision over nine additional post-conviction cases alleging police misconduct at Areas 2 and 3 under Burge.[2]

These matters were assigned to the Attorney General due to Devine's conflict of interest arising from his prior representation of Burge while Devine was in his private law practice.

The Attorney General notes that of the Burge-related post-conviction proceedings, seven have been resolved.[3] Additionally, the Attorney General has seven other cases before various courts in which her office has investigated the post-conviction claims, filed responsive pleadings, or conducted an evidentiary hearing.[4] The Attorney General states that she does not seek to have these cases reassigned due to the considerable resources already expended, and to avoid undue delay. There are three other cases in which the Attorney General has expended considerable resources and effort to gain familiarity with the underlying facts. In the interest of justice, the Attorney General does not seek to reassign these cases either.[5]

However, as stated above, the Attorney General seeks to reassign the post-conviction cases of the five instant Petitioners to the State's Attorney because they have yet to file amended post-conviction petitions. The Attorney General asserts that she has not reviewed or responded to these Petitioners' claims. Furthermore, she notes that there

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[1] The twelve petitioners were Aaron Patterson, Stanley Howard, Derrick King, Leroy Orange, Ronald Kitchen, Cortez Brown, Graylond Johnson, Alonzo Smith, Eric Caine, Edgar Hope, Alton Logan, and Clarence Trotter.
[2] The nine post-conviction petitioners were David Fautleroy, Leonard Hinton, Leonard Kidd, Robert Ornelas, Marvin Reeves, Tyshawn Ross, James Andrews, Darryl Christian, and Keith Walker.
[3] Petitions from James Andrews, Darryl Christian, Stanley Howard, Alton Logan, Leroy Orange, Aaron Patterson, and Clarence Trotter have been resolved.
[4] These cases include Cortez Brown, Leonard Hinton, Edgar Hope, Ronald Kitchen, Robert Ornelas, Marvin Reeves, and Tyshawn Ross.
[5] Petitions from David Fauntleroy, Edgar Hope, and Keith Walker.

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are no related codefendants nor is there a conflict preventing the State's Attorney from handling these cases because Anita Alvarez succeeded Devine as the State's Attorney on December 1, 2008. Accordingly, the Attorney General contends that the State's Attorney is the appropriate party to prosecute these cases. 55 ILCS 5/3-9005(a)(1).

II. Petitioners' Response (Drafted By Harold Winston, Assistant Cook County Public Defender):

On January 21, 2009, Smith, King, Johnson, Caine, and Kidd filed their *Response To Motion To Reassign To The Cook County State's Attorney's Office* (hereinafter "*Response to Motion to Reassign*").[6] In this response, Petitioners object to the Attorney General's *Motion to Reassign*, noting that present State's Attorney Anita Alvarez and other attorneys currently employed in the Cook County State's Attorney's Office worked under Devine for many years. They contend that even though Devine is no longer the State's Attorney the conflict which was already imputed to all attorneys under Devine, when this Court first appointed the Attorney General to handle these petitions, still exists. Thus, Petitioners argue that the interest of justice and the appearance of impropriety prevent reassignment of these cases to the State's Attorney.

Petitioners contend that there are present and former Cook County State's Attorneys who have been accused of concealing and participating in police torture during the Burge era. Moreover, Petitioners note that in recent history the State's Attorney has hired a number of former police officers suspected of abuse in these cases as investigators, two of whom are still employed by the State's Attorney's Office. Petitioners argue, contrary to the Attorney General's assertion, that amended petitions have been filed in the cases of Kidd and King while discovery has occurred in the matters

[6] Attached to the *Motion to Reassign* are the following two exhibits: (1) Order entered April 24, 2002 appointing the Special Prosecutor; and (2) Order entered April 9, 2003 appointing the Attorney General to handle Burge Post-Conviction Petition cases.

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with Smith and Johnson. Finally, Petitioners contend that reassignment of these five cases will result in additional delay in obtaining justice. For all the reason stated above, Petitioners object to the reassignment of their petitions to the State's Attorney.

III. Cook County State's Attorney's Response To The Attorney General's Motion To Reassign:

The State's Attorney also responded to the Attorney General's *Motion to Reassign* in *The Cook County State's Attorney's Office Response To The Attorney General Office's Motion To Reassign Cases*. In this pleading, the State's Attorney relates that her primary concern is the full and fair litigation of these petitions. She also states that since she has not been involved in any related decisions on discovery and other important matters that her office will be at a disadvantage in ensuring the full and fair litigation in these petitions. The State's Attorney maintains that consistency in prosecution and cohesion of prosecutorial conduct are important considerations. Moreover, she posits that there are benefits to having the same office defend all of the Burge-related petitions. Finally, the State's Attorney states that she relies on this Court's discretion and inherent authority to assign cases.

IV. Amicus Brief In Opposition To The Attorney General's Motion To Reassign:

On January 28, 2009, the People's Law Office sought leave to file an amicus brief regarding these matters. This Court granted leave and allowed the filing of the *Amicus Brief In Opposition To The Attorney General's Motion To Reassign To The Cook County State's Attorney's Office* (hereinafter the "*Amicus*"). The brief was submitted on behalf of the individuals and organizations who originally petitioned this Court for the appointment of a special prosecutor to investigate these allegations of abuse by Burge and his subordinates. Specifically, the *Amicus* argues that Devine's retirement as the State's

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Attorney does not end the conflict of interest. Additionally, it is urged that the standards of professional ethics and public policy require the denial of the Attorney General's *Motion to Reassign*.

V. Illinois Attorney General's Reply In Support Of Motion To Reassign:

On February 4, 2009, the Attorney General replied to the State's Attorney's response, Petitioners' joint response, and the *Amicus* in her *Reply In Support Of Motion To Reassign To The Cook County State's Attorney's Office*. There the Attorney General reiterated her reasons for seeking reassignment.

First, the Attorney General notes that the State's Attorney does not challenge the basis for the Attorney General's motion to reassign, nor does the State's Attorney dispute that by statute the State's Attorney is the appropriate entity to prosecute these cases. She observes that the State's Attorney does not contend that a conflict of interest still exists even though Devine is no longer the State's Attorney.

Second, the Attorney General responds to Petitioners' joint response by asserting that State's Attorney Anita Alvarez never personally represented Burge and does not suffer from the conflict of interest that disqualified Devine. Petitioners note that current and former employees of the State's Attorney's Office are accused of participating in this abuse. However, the Attorney General responds that Petitioners fail to explain how this situation differs from any other post-conviction claim of a coerced confession, prosecutorial misconduct, a *Brady* violation, or a *Napue* violation. Claims such as these are regularly defended by the same State's Attorney's Office that originally prosecuted the case. The Attorney General disagrees with Petitioners' contention that considerable discovery has occurred in the instant post-conviction cases and directs this Court to the

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procedural history of each case to support this contention. Finally, the Attorney General argues that reassigning these cases to the State's Attorney will not result in a waste of time and resources.

VI. Illinois Attorney General's Supplement To Reply:

On February 13, 2009, the Attorney General filed a *Supplement To Reply* to respond to the allegations in the *Amicus* criticizing the Attorney General for her handling of these Burge-related matters. The Attorney General notes that her office has expended substantial resources defending these cases, and has given them the highest priority.

In addition, the Attorney General notes that her office has experienced substantial budget cuts and strained resources which support the claim that the office lacks the necessary resources to adequately defend these remaining five cases. According to her, this fact alone may delay the resolution of these cases. Specifically, the Attorney General notes that the budget of her office was cut by 25% last year which resulted in office-wide cutbacks, layoffs, furlough days, and a hiring freeze. The Attorney General also states that the resources of her office have been further depleted due to the responsibility of prosecuting many other serious and complex cases throughout the State. These facts further support the likelihood that resolution of Petitioners' cases will be delayed.

VII. Oral Arguments

On February 20, 2009, this Court heard oral arguments regarding the Attorney General's *Motion to Reassign*. Addressing the Court were representatives from the Attorney General's Office, the State's Attorney's Office, the Petitioners, and those who filed the *Amicus*. All of these parties elaborated on their respective motions and pleadings while also responding to questions from this Court.

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RESOLUTION

This Court notes that it served in various supervisory capacities in each of the three governmental entities appearing in this matter. The Court is aware of the concerns raised in these various pleadings. It realizes that the budgetary issues that the Attorney General faces are substantial. These post-conviction proceedings are difficult cases to manage and, as the Attorney General notes, require extensive resources to adequately handle.

However, this Court is also aware of the objections presented in support of retaining these cases under the control and supervision of the Attorney General. The various objections presented raise valid concerns. But this Court realizes that these cases must be resolved expeditiously and properly.

In the exercise of its discretion, and realizing the gravity of the matters presented, this Court is providing a remedy which none of the parties have requested. This Court orders the appointment of a Special State's Attorney pursuant to the provisions of 55 ILCS 5/3-9008 to defend the instant post-conviction matters.

The Special State's Attorney whom this Court appoints is a well respected member of the legal community who served with great distinction as a Cook County Circuit Court judge, and, prior to that, performed in an outstanding fashion as an Assistant Cook County Public Defender. This Court names Hon. Stuart A. Nudelman (Ret.) as a Special State's Attorney to undertake the defense of these Burge-related post-conviction petitions. Mr. Nudelman is given the authority to employ other attorneys and non-attorney staff as he deems necessary to assist him in this effort.

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ENTERED: Paul P. Biebel Jr 1688

Paul P. Biebel, Jr.
Presiding Judge, Criminal Division
Circuit Court of Cook County

DATE: 4-7-09

JUDGE PAUL P. BIEBEL, JR.
APR 07 2009 PPB
Circuit Court - 1688

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Links to Cited TIRC Decisions

In re Arnold Dixon, TIRC Claim No. 2019.598-D (Feb. 22, 2019), https://www2.illinois.gov/sites/tirc/Documents/Stamped%20Summary%20Dismissal.pdf (last visited Oct. 23, 2024).

In re Bobby Cooks, TIRC Claim No. 2019.619-C (Aug. 21, 2019), https://www2.illinois.gov/sites/tirc/Documents/COOKS%20Summary%20Denial-no%20attachments-STAMPED.pdf (last visited Oct. 23, 2024).

In re Derek Montgomery, TIRC Claim No. 2019.656-M (Oct. 16, 2019), https://www2.illinois.gov/sites/tirc/Documents/2019.10.16%20Dismissal-STAMPED.pdf (last visited Oct. 23, 2024).

In re Lorenzo Hall, TIRC Claim No. 2013.195-H (Oct. 21, 2020), https://www2.illinois.gov/sites/tirc/Documents/HALL%20Sum%20Dismiss10.21.2020-SIGNED.pdf (last visited Oct. 23, 2024).

In re Raul Fernandez, TIRC Claim No. 2019.618-F (Aug. 21, 2019 https://www2.illinois.gov/sites/tirc/Documents/FERNANDEZ%20summary%20dismissal-no%20attachmnts-STAMPED.pdf (last visited Oct. 23, 2024).

In re Vincent Buckner, TIRC Claim No. 2017.518-B (Dec. 18, 2018), https://www2.illinois.gov/sites/tirc/Documents/Stamped%20Filed%20Determination%20Buckner.pdf (last visited Oct. 23, 2024).

In re Willie Hampton, TIRC Claim No. 2013.141-H (May 17, 2017), https://www2.illinois.gov/sites/tirc/Documents/2017.5.17%20HAMPTON%20Determination%20-%20SIGNED%20and%20STAMPED.pdf (last visited Oct. 23, 2024).

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