No. 130470

IN THE
SUPREME COURT OF ILLINOIS

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

# REPLY BRIEF OF RESPONDENT-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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## ARGUMENT

The People established in their opening brief that the circuit court correctly dismissed petitioner's claim of torture because petitioner failed to assert that he was "tortured into confessing to the crime for which [he] was convicted" — Mims's murder — as required to state a claim under the TIRC Act, 775 ILCS 40/5(1); instead, he asserted that he never confessed and that prosecutors committed a *Brady* violation, *see* Peo. Br. 29-47.[1] Petitioner's arguments that he did not need to assert that he ever confessed are foreclosed by the plain language of the Act and rest on misunderstandings of the Act's purpose, this Court's decision in *People v. Fair*, 2024 IL 128373, and the Commission's decisions.

The People further established that the circuit court correctly denied petitioner's motions to rescind Milan's appointment as special prosecutor because he failed to prove that Milan had an actual conflict of interest. Peo. Br. 47-57. Petitioner's arguments to the contrary rely on the appellate majority's baseless assertions that Milan was involved in petitioner's prosecution and the bare fact that Milan opposed petitioner's claim.

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[1] The People apply the citation conventions from their opening brief, with these additions: the People's opening brief and petition for leave to appeal are cited as "Peo Br. __" and "PLA __," and petitioner's brief and the Commission's amicus brief are cited as "Pet. Br. __" and "TIRC Br. __."

## I. The Circuit Court Correctly Dismissed Petitioner's 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 failed to assert that "he was tortured into confessing to the crime for which [he] was convicted" as required to state a claim of torture under the Act. *See* 775 ILCS 40/5(1); Peo. Br. 31-47. Petitioner's arguments that he need not assert he was tortured into confessing are foreclosed by the plain language of the Act, as are his arguments that any incriminating statement constitutes a "confession."

### A. Petitioner failed to state a claim of torture because he denied making any statement as a result of torture.

Under the plain language of the Act, a petitioner does not state a claim unless he asserts, among other things, that "he was tortured into confessing to the crime for which [he] was convicted." 775 ILCS 40/5(1); *see* Peo. Br. 31-34. Petitioner did not do that. Instead, he consistently asserted before the Commission and the circuit court that he was tortured but did *not* confess as a result of that torture. *See* C446, 1141-42, 1144 n.4, 1184, 1189, 1193, 1205; SUP C50. Indeed, petitioner maintains before this Court that he never made any statement as a result of the alleged torture. *See* Pet. Br. 14 (asserting that evidence showed he "provided no statement"). Therefore, petitioner failed to assert that he was tortured into confessing to the crime for which he was convicted — murdering Mims — and the circuit court correctly dismissed the case for failure to state a claim of torture.

Contrary to petitioner's assertion, Pet. Br. 22, the People did not forfeit this argument. The People successfully argued in the circuit court that petitioner failed to state a claim, *see* A6-7, ¶¶ 18-19, then took the same position before the appellate court, *see* A14, ¶ 38, and in their PLA, *see* PLA 3, 18-19. They are now free to raise any argument in support of their position on that issue, for this Court only "require[s] parties to preserve issues or claims for appeal; [it] do[es] not require them to limit their arguments here to the same arguments that were made below." *Brunton v. Kruger*, 2015 IL 117663, ¶ 76. Moreover, as the appellee below, the People "may raise any issues properly presented by the record to sustain the judgment of the trial court," even if they "did not raise the issue in the appellate court or in [their] petition for leave to appeal." *People v. Gray*, 2024 IL 127815, ¶ 19 (cleaned up). Therefore, forfeiture does not bar review.

In addition to his meritless procedural defense, petitioner offers three substantive arguments that he did not need to claim he was tortured into confessing to state a claim under the Act, notwithstanding the plain statutory language. First, he argues that requiring a petitioner to assert he was tortured into confessing is inconsistent with the purpose of the Act. Pet. Br. 22, 31-32. Second, he argues that *Fair* held that being tortured into confessing is not an element of a claim of torture under the Act. *Id.* at 24-25. And third, he argues that the Commission's decisions do not show that the Commission construes the Act as requiring that a petitioner assert he was

tortured into confessing to state a claim. *Id.* at 26-28. All three arguments are meritless.

### 1. Requiring petitioners to assert that they were tortured into confessing is consistent with the purpose of the Act.

Petitioner's argument that requiring him to assert that he was tortured into confessing is contrary to the purpose of the Act is itself contrary to this Court's recognition in *Fair* that, "[i]n creating the Act, the legislature chose to address the serious problem of Chicago police torturing suspects *into confessing*, not acts of physical abuse by police in general." 2024 IL 128373, ¶ 82 (emphasis added)). Indeed, this purpose is clear from the Act's express requirement that a petitioner assert "he was tortured into confessing," 775 ILCS 40/5(1), for "[t]he best indicator of what the legislature intended in enacting a statute is simply the plain and ordinary meaning of the terms used by the legislature in the statute itself," *People v. Torres*, 2024 IL 129289, ¶ 31; *see Fair*, 2024 IL 128373, ¶ 61 (statutory language is "most reliable indicator of legislative intent").

The clarity of the Act's plain language similarly bars petitioner's invocation of the general principle that remedial statutes must be interpreted broadly to further their purposes. *See* Pet. Br. 34. That principle applies only when ambiguous statutory language is susceptible to two reasonable constructions, one that would frustrate the statute's remedial purpose and another that would further it. *See Cent. Ill. Pub. Serv. Co. v. Lawless*, 401 Ill.

528, 532 (1948) (declining to construe remedial statute more broadly where "[t]he plain and unambiguous language of the statute admits of no other construction"). There is no such ambiguity here.

Nor would construing the Act to give effect to its remedial purpose relieve petitioner from having to assert he was tortured into confessing. Such construction would require that the Act "be broadly interpreted to further its purpose of establishing 'an extraordinary procedure to investigate and determine factual claims of torture,'" *Fair*, 2024 IL 128373, ¶ 81 (quoting 775 ILCS 40/10), which the Act expressly defines as claims asserting that the petitioner was "tortured into confessing to the crime for which [he] was convicted," 775 ILCS 40/5(1). Thus, the Act's purpose is to provide relief for claims that a petitioner was tortured into confessing. Because petitioner did not raise such a claim, he failed to state a claim under the Act.

**2. *Fair* held that petitioners must show they were tortured into confessing.**

Petitioner's invocation of *Fair*'s paraphrase of the Act to avoid the Act's plain language is similarly unavailing. *See* Pet. Br. 24. *Fair* paraphrased the Act by breaking the statutory requirement that a petitioner show "he was tortured into confessing," 775 ILCS 40/5(1), into its two component requirements: that a petitioner show "(1) torture occurred and (2) resulted in a confession," *Fair*, 2024 IL 128373, ¶ 79. Petitioner characterizes this paraphrase as a holding that he need not assert "he was tortured into

confessing" and argues that the People "rewrite" *Fair*'s holding by "adding" that requirement. Pet. Br. 24.

But the language that petitioner accuses the People of "adding" is the actual text of the statute. *See* 775 ILCS 40/5(1) (requiring that petitioner assert "he was tortured into confessing"). This Court did not purport to delete that language from the Act by paraphrasing it, nor could it. *See, e.g., Ill. Landowners Alliance, NFP v. Ill. Commerce Comm'n*, 2017 IL 121302, ¶ 50 ("Of all the principles of statutory construction, few are more basic than that a court may not rewrite a statute to make it consistent with the court's own idea of orderliness and public policy."); *People v. Smith*, 2016 IL 119659, ¶ 28 ("No rule of construction authorizes this court to declare that the legislature did not mean what the plain language of the statute imports, nor may we rewrite a statute to add provisions or limitations the legislature did not include."). Indeed, doing so would have defeated the Act's purpose, which the Court articulated two paragraphs later: "to address the serious problem of Chicago police torturing suspects into confessing, not acts of physical abuse by the police in general." *Fair*, 2024 IL 128373, ¶ 82.

Nor is there any daylight between *Fair*'s paraphrase of the statutory text and the text itself: torture cannot have "resulted in a confession," *id.* ¶ 79, unless the person was "tortured into confessing," 775 ILCS 40/5(1). That is, if a person was tortured but did not confess, then he was not "tortured into confessing" because the torture did not "result[ ] in a

confession." Thus, under both the plain language of the Act and *Fair*'s faithful paraphrase of that language, petitioner had to assert that he was tortured into confessing.

### 3. The Commission recognizes that petitioners must assert they were tortured into confessing.

Contrary to petitioner's suggestion, Pet. Br. 26-28, the Commission has repeatedly recognized and enforced the Act's requirement that petitioners assert that they were tortured into confessing to state a cognizable claim of torture.

Indeed, the Commission's amicus brief "agrees that [the Commission] lacks the authority to refer cases to the circuit courts . . . that contend only that police officers either fabricated confessions or tortured claimants without inducing confessions," TIRC Br. 6 — that is, cases like petitioner's.[2] The Commission apparently referred petitioner's case because it mistakenly "understood [him] to argue both that he did not make any statements to police and, in the alternative, that any such statement was a tortured confession." *Id.* at 21. That understanding was unfounded, for petitioner has *never* asserted that he gave a statement to police, in the alternative or otherwise. And to the extent that petitioner's allegations were unclear before the Commission, they were perfectly clear before the circuit court, where

[2] A person who files a claim under the TIRC Act is a "claimant." *See* 20 Adm. Code § 2000 Appendix B; TIRC, Mission Statement, https://tirc.illinois.gov/about-us.html. A claimant whose claim of torture was referred for judicial review is a "petitioner." *See* 775 ILCS 40/50(a).

petitioner was adamant that he never made any statement as the result of the alleged torture. *See, e.g.,* 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, e.g.,* 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"). Therefore, the circuit court correctly dismissed the case because, even if petitioner had originally raised a claim that he had been tortured into confessing, he disavowed that claim before the circuit court.

Petitioner cannot distinguish the Commission's decisions in *Cooks*, *Hampton*, and *Fernandez* as turning on the claimants' failure to assert that they were tortured rather than their failure to assert that they confessed. *See* Pet. Br. 26-27. The Commission expressly dismissed all three claims on the ground that the claimants failed to assert that they confessed as a result of the alleged torture.

Cooks stated in his initial claim form that he "was not torture[d]," *In re Bobby Cooks*, TIRC Claim No. 2019.619-C, at 1 (Aug. 21, 2019), but he

subsequently amended his claim to assert that he *had* been tortured by detectives but ultimately "did not make any statement," *id.* The Commission dismissed the claim because Cooks "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." *Id.* at 2.

In *Hampton* and *Fernandez*, the claimants similarly alleged that they had been tortured but denied that they gave any statements to police. *In re Willie Hampton*, TIRC Claim No. 2013.141-H, at 1 (May 17, 2017); *In re Raul Fernandez*, TIRC Claim No. 2019.618-F, at 1 (Aug. 21, 2019). They further alleged that police had tortured witnesses. *Hampton*, TIRC Claim No. 2013.141-H, at 1; *Fernandez*, TIRC Claim No. 2019.618-F, at 1. The Commission dismissed both claims for lack of jurisdiction because the claimants did not allege that they were tortured into confessing. *Hampton*, TIRC Claim No. 2013.141-H, at 3 (summarily dismissing claim because Hampton "d[id] not allege that his torture resulted in any statement to the authorities" and therefore his claim "d[id] not meet the definition of a 'claim of torture' in Section 5(1) of the TIRC Act"); *Fernandez*, TIRC Claim No. 2019.618-F, at 2-3 (summarily dismissing claim "that [Fernandez] was tortured but . . . did not make any statement in response to that torture" because the 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").

Petitioner's attempts to distinguish *Buckner* and *Dixon* also fail. Both claimants alleged that they were physically abused but did not allege that they gave any statement as a result. *See In re Arnold Dixon*, TIRC Claim No. 2019.598-D, at 1 (Feb. 22, 2019); *In re Vincent Buckner*, TIRC Claim No. 2017.518-B, at 1-2 (Dec. 18, 2018). Instead, Buckner alleged that he was coerced into consenting to a DNA test, *Buckner*, TIRC Claim No. 2017.518-B, at 1-2, and Dixon "raise[d] issues with lineups," *Arnold Dixon*, TIRC Claim No. 2019.598-D, at 2. Petitioner's description of both cases as standing for the proposition that the Commission lacks jurisdiction to review claims that one was "coerced into providing non-testimonial evidence," Pet. Br. 27-28, actually *supports* the People's position: claims of torture that did not result in a confession lie outside the Commission's jurisdiction. *See* Peo. Br. 34-37; *see also Dixon*, TIRC Claim No. 2019.598-D, at 2-3 (summarily dismissing claim because Commission has jurisdiction to review only "claims that [one] was tortured into giving a statement against himself"); *Buckner*, TIRC Claim No. 2017.518-B, at 3-4 (summarily dismissing claim because the Act "is not a catch-all statute granting [the Commission] permission to review all criminal convictions where torture is alleged," only claims that "the state employ[ed] torture to secure a confession").

Finally, petitioner distinguishes *Montgomery* on the ground that the claimant there denied he was tortured at all, Pet. Br. 26, but that factual distinction does not address the Commission's legal conclusion that "[t]he fabrication of a statement from a defendant, while a severe violation of Due Process if true, does not constitute torture," *In re Derek Montgomery*, TIRC Claim No. 2019.656-M, at 2 (Oct. 16, 2019)), which is the proposition for which the People cited the decision, *see* Peo. Br. 35-36; *see also* Pet. Br. 26 (acknowledging that the People cited *Montgomery* for proposition that "fabricated confessions are not grounds for a statutory claim of torture"). Nor does petitioner's factual distinction provide any basis not to apply *Montgomery*'s legal principle to bar petitioner's own claim that police fabricated a statement rather than extracted one through torture.

### B. Petitioner further failed to state a claim of torture because the statement attributed to him was not a confession.

Even if petitioner had admitted making the statement attributed to him by police, he would fail to state a claim of torture because that statement was not a "confession" under the Act. Under both the common definition and Illinois law, a person has not "confessed" — in the context of "confessing to the crime for which [he] was convicted," 775 ILCS 40/5(1) — unless he has admitted to committing that crime. *See* Peo. Br. 33, 37-41. Because petitioner did not admit that he murdered Mims when he told police that he knew nothing about Mims's murder, knew there was a warrant for his arrest,

and had gone to Washington, *see* SUP3 R23, 28-29, 32-33, he did not "confess[ ] to the crime for which [he] was convicted," 775 ILCS 40/5(1), and his statement was not a "confession," tortured or otherwise.

Petitioner argues that the Act does not use "confession" to mean an admission to a crime because proceedings under the Act are civil in nature and "confession" only means an admission to a crime when used as a "criminal law term of art." Pet. Br. 30. Petitioner notes that outside of criminal law, "confession" can have "religious or psychological implications, it can be a social act or a professional one, or it can be just a colloquial admission of an unpopular opinion," and the "plain meaning of 'confession' reflects *all* of these contexts." *Id.* at 30-31 (emphasis in original).

But when construing a term's meaning within a statute, the Court uses the meaning that is appropriate within that particular statutory context. *People v. Villareal*, 2023 IL 127318, ¶¶ 38-39. Here, the Act uses the term "confession" to identify the result of a person having "confess[ed] to the crime for which [he] was convicted." 775 ILCS 40/5(1). In this context, "confession" means an admission that a person committed a particular crime, not an admission that a person holds an unpopular opinion.

The appellate court's and the Commission's reliance on *People v. Costa*, 38 Ill. 2d 178 (1967), which construed the term "confession" in section 114-11 of the Code of Criminal Procedure, *see* A18, ¶ 53; TIRC Br. 10-11, is misplaced for the same reason: section 114-11 and the Act use the term in

materially different contexts for materially different purposes. Section 114-11 allows a defendant to move to suppress "any confession given by him on the ground that it was not voluntary." 725 ILCS 5/114-11. As the Court explained in *Costa*, section 114-11 was enacted to protect defendants' constitutional rights, so if "relevant constitutional requirements [we]re not read into it, serious difficulties w[ould] result." 38 Ill. 2d at 182-83. To give effect to section 114-11's purpose, the Court construed the term "voluntary" as incorporating "the constitutional standards that govern admissibility" and construed "confession" as "includ[ing] both inculpatory and exculpatory statements," so that section 114-11 would protect the Fifth Amendment rights that it was enacted to protect. *Id.* at 182-83. But *Costa*'s interpretation of "confession" in section 114-11 as meaning "statement" was dictated by the purpose of that particular statute, not a broadening of the term's meaning in general. *See id.*

Indeed, in another decision issued that same day — *People v. Georgev*, 38 Ill. 2d 165 (1967), which addressed the prosecution's obligation to produce copies of, and witnesses to, a defendant's "confession," 725 ILCS 5/114-10 — the Court held that a statement that admitted to incriminating facts but did not admit to committing an offense is *not* a confession, but rather an admission. *Georgev*, 38 Ill. 2d at 175-76; *see People v. Lefler*, 38 Ill. 2d 216, 221 (1967) (also issued the same day and recognizing that "the distinction between confessions and admissions is preserved by section 114-10"). The

Court continues to recognize this distinction between confessions and admissions today. *See People v. Harvey*, 2024 IL 129357, ¶ 24 (citing *Georgev*, 38 Ill. 2d at 175). Thus, *Costa* does not stand for the proposition that the distinction between "confession" and "admission" is no longer valid.

At bottom, the argument based on *Costa* rests on the mistaken belief that the Act merely provides another vehicle to raise a Fifth Amendment claim. Unlike section 114-11, which was enacted to protect the Fifth Amendment rights of defendants across Illinois, the Act was enacted to address a problem specific to Cook County through the 1990s, 775 ILCS 40/10: Chicago Police Commander Jon Burge and officers under his supervision torturing suspects into confessing. *See* TIRC, Mission Statement, https://tirc.illinois.gov/about-us.html; *see also* 96th Ill. Gen. Assem., Senate Proceedings, Mar. 25, 2009, p. 27 (statements of Sen. Raoul) (purpose of Act was to provide "closure" for "victim[s] of Commander Burge" and "the police officers under his command"); *accord Fair*, 2024 IL 128373, ¶ 82 (Act was enacted "to address the serious problem of Chicago police torturing suspects into confessing"). Because the Act addresses this geographically and temporally specific problem, its remedy is limited to defendants who were tortured into confessing to crimes in Cook County, 775 ILCS 40/5(1), and who raise their claims within 10 years of the Act's effective date, 775 ILCS 40/70. Thus, the Act does not provide just another avenue to raise a Fifth Amendment claim, and *Costa*'s construction of "confession" in the context of a

statute intended to protect defendants' Fifth Amendment rights provides no basis to construe "confession" the same way in the Act.

Nor does the modification of the term "confession" with "tortured" broaden its scope. Again, the term "tortured confession" refers to the result of a person having being "tortured into confessing to the crime for which [he] was convicted." 775 ILCS 40/5(1); *see* Peo. Br. 41-42. In defending its administrative definition of "tortured confession" as including *any* statements that may be incriminating for some reason, *see* 20 Ill. Admin. Code. § 2000.10, the Commission ignores this statutory context, *see* TIRC Br. 9-18 (defending administrative definition of "tortured confession" as including statements other than admissions to crimes without acknowledging or referring to statutory requirement that petitioner have been "tortured into confessing to the crime for which [he] was convicted"). Indeed, the Commissions' acontextual definition of "tortured confession" is not only contrary to the plain language of the Act but in tension with the Commission's administrative definition of "torture" as severe suffering inflicted "for the purpose of obtaining . . . a confession *to a crime*," 20 Ill. Admin. Code. § 2000.10 (emphasis added). Therefore, given the plain language of the Act requiring that a petitioner have "confess[ed] to the crime for which [he] was convicted," 775 ILCS 40/5(1), the Commission's contrary administrative definition of "tortured confession" warrants no deference, 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

Moreover, petitioner failed to state a claim even if "tortured confession" were construed to encompass any incriminating statement. Under such a reading of the Act, an assertion that petitioner was tortured into making such an admission would satisfy the requirement that he assert his "tortured confession was used to obtain [his] conviction." 775 ILCS 40/5(1). But he still would have to satisfy the distinct requirement that he assert he was "tortured into confessing to the crime for which [he] was convicted," *id.*, which unambiguously requires that he assert he was tortured until he admitted to committing the crime. Because petitioner never asserted that he admitted to murdering Mims, he failed to assert that he was tortured into "confessing to the crime for which [he] was convicted" and therefore failed to state a claim of torture.

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

As the People established, the appellate court erred by holding that petitioner could raise his *Brady* claim — that prosecutors failed to disclose lineups from which petitioner was not identified as the shooter — in the proceedings on the claim of torture referred by the Commission. *See* Peo. Br. 45. The Commission agrees that "an independent *Brady* claim would be 'beyond the scope of the circuit court's review of [a] claim of torture referred by the Commission." TIRC Br. 19 (quoting and altering Peo. Br. 45)).

Recognizing that the Act provides no relief for *Brady* violations — and that the Commission correspondingly lacks authority to refer *Brady* claims for judicial review — the Commission explains that it considered petitioner's evidence of a *Brady* violation "only as part of its analysis of whether the torture claim was factually supported, and not as a separate basis for referral or relief." *Id.* at 19. In other words, the Commission considered petitioner's evidence that Cook County ASAs did not disclose the lineups to petitioner's counsel in November 2001 only as evidence that Chicago detectives tortured petitioner in April 2000, not as a claim on which relief could be granted in the torture case.

Petitioner does not dispute that his *Brady* claim was not properly before the circuit court but instead argues that the Chicago detectives' behavior related to his placement in lineups in 2000 was relevant to his claim of torture. *See* Pet. Br. 34-37. Specifically, petitioner argues that the detectives' conduct during and after lineups must be considered as part of the totality of the circumstances relevant to whether detectives tortured him. *Id.*

But that is beside the point. The People agree, as they did in *Fair*, that "whether a person was tortured" turns on "the totality of the circumstances," *see* 2024 IL 128373, ¶ 86 (internal quotations omitted), and therefore all of petitioner's interactions with detectives are relevant to whether detectives inflicted physical or mental suffering severe enough to rise to the level of torture. But the question before the Court is not whether

any particular evidence was relevant to the claim of torture referred to the circuit court; the question is whether petitioner's distinct claim of a *Brady* violation was properly before the circuit court. As the People and the Commission agree — and as petitioner does not dispute — it was not. Therefore, the appellate court erred by "rejecting" the contention that petitioner's *Brady* claim "could not be raised under the Act," A28, ¶ 77, and ordering the circuit court to "decide the merits" of petitioner's *Brady* claim, *see* A2-3, ¶ 6.

* * *

In sum, petitioner failed to assert a claim under the Act because he failed to assert that he was "tortured into confessing to the crime for which [he] was convicted." 775 ILCS 40/5(1). Instead, he asserted that (1) he was tortured but never confessed, and (2) prosecutors later committed a *Brady* violation. Therefore, the circuit court correctly dismissed petitioner's case.

## II. The Circuit Court Properly 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 properly exercised its discretion to deny petitioner's motions to rescind Milan's appointment as special prosecutor under section 3-9008(a-10) because petitioner failed to "prove[ ] by sufficient facts and evidence that [Milan] ha[d] an actual conflict of interest." 55 ILCS 5/3-9008(a-10). A prosecutor representing the People in proceedings on a collateral challenge to a conviction does not have an actual conflict of interest

just because he also represented the People in the underlying criminal case. Peo. Br. 49-55. Moreover, even if a prosecutor's participation in a criminal case could give rise to an actual conflict of interest in a subsequent collateral attack, petitioner failed to prove that Milan participated in his criminal case. *Id.* at 55-57.

### A. Petitioner failed to prove Milan had an actual conflict of interest.

Rather than identify any record support for his claim that Milan had an actual conflict of interest due to some past participation in petitioner's initial prosecution, petitioner simply parrots the appellate majority's assertions that Milan "'initiated'" that prosecution and "'fail[ed] to disclose his relationship'" with Detective McDermott. Pet. Br. 37 (quoting A28, ¶ 80). But those assertions remain unsupported by the record. With respect to Milan's alleged participation in petitioner's prosecution, the record contains only Milan's denials that he had any involvement in the case, *see* Peo. Br. 55-56 (citing C398, 638, 950), and the Commission's finding that someone else approved the charges against petitioner, *see id.* (citing C440). And the record contains no indication that Milan had *any* relationship with McDermott, much less that Milan "hired" McDermott, as petitioner now repeatedly asserts without citation to the record. *See* Pet. Br. 13, 39, 43, 44, 49.[3]

[3] In support of his related assertion that Milan's duties as CCSAO First Assistant included "supervision of the investigators," Pet. Br. 17, petitioner cites an article stating that Milan "supervised more than 900 assistant state's attorneys, 150 investigators and several-hundred [sic] support staff." *Former*

Therefore petitioner failed to prove that Milan had an actual conflict of interest due to some involvement with petitioner's criminal case or relationship with McDermott.

Nor can petitioner rely on the fact that the CCSAO recused itself. *See* Pet. Br. 39.[4] The CCSAO was free to recuse itself for any reason it "deem[ed] appropriate," 55 ILCS 5/3-9008(a-15), and so its recusal does not establish that there was an actual conflict of interest for everyone who worked there in 2000 and 2001.

Petitioner's remaining argument that Milan had an actual conflict of interest rests on the bare fact that Milan decided to defend against petitioner's claim of torture rather than reopen the investigation into Mims's murder based on the materials that petitioner provided him. *See* Pet. Br. 44 n.33 (faulting Milan for disagreeing about strength of petitioner's materials); *id.* at 45 (asserting that Milan was conflicted because he challenged petitioner's credibility and the propriety of the Commission's referral); *id.* at

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*U.S. Attorney Milan Joins A&M Disputes Division*, ABF Journal, *available at* https://www.abfjournal.com/former-u-s-attorney-milan-joins-am-disputes-division/ (last visited Jan. 18, 2025). Petitioner never presented that article to the circuit court, but even if he had it would not have proved that Milan had an actual conflict of interest due to a relationship with McDermott simply because McDermott was among the more than one thousand employees under Milan's supervision.

[4] Petitioner's assertion that the CCSAO had a conflict of interest is also in tension with his argument below that the CCSAO does *not* have a conflict, which was the basis on which he succeeded in having Milan removed as special prosecutor in his postconviction case. *See* C1324-25.

47 (offering Milan's decision to defend against petitioner's claim rather than reopen the criminal investigation as evidence of conflict); *id.* at 48 (faulting Milan for not "acknowledg[ing] the plethora of new evidence"). According to petitioner, by exercising prosecutorial discretion based on his own evaluation of the evidence, Milan had "prejudged" petitioner's case and therefore was barred from prosecuting it. *Id.* at 50. But if a prosecutor's determination that the evidence of guilt warrants prosecution bars him from participating in the resulting prosecution, then a special prosecutor would have to be appointed in *every prosecution*, for every decision to prosecute would be disqualifying.

At bottom, petitioner's assertion that Milan was disqualified by his belief in petitioner's guilt confuses the roles of prosecutors and judges. Petitioner cites *Withrow v. Larkin*, 421 U.S. 35 (1975), for the proposition that "recusal is required where 'the probability of actual bias on the part of the judge *or decisionmaker* is too high to be constitutionally tolerable,'" Pet. Br. 49 (quoting and adding emphasis to *Withrow*, 421 U.S. at 47), and asserts that Milan was "a decisionmaker in this matter" in the sense that, as prosecutor, he decided whether and how to litigate the case, Pet. Br. 49 n.38. But *Withrow* was explaining that the due process right to a fair tribunal "applies to administrative agencies which adjudicate as well as to courts," so that "a biased decisionmaker [is] constitutionally unacceptable," regardless of

whether that decisionmaker is a judge or an administrative adjudicator. 421 U.S. at 46-47. A prosecutor is not a "decisionmaker" in this sense.

Petitioner's reliance on other cases addressing when judges must recuse themselves, Pet. Br. 49-50, 53, is misplaced for the same reason: prosecutors are not judges. *See Williams v. Pennsylvania*, 579 U.S. 1, 8-9 (2016) (considering whether due process barred supreme court justice from hearing challenge to death sentence that the justice had secured in his prior career as prosecutor); *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 884 (2009) (considering whether due process barred supreme court justice from hearing case after party made substantial contributions to that justice's campaign); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822-24 (1986) (considering whether due process barred supreme court justice from participating in case recognizing tort liability for insurer's denial of claims in bad faith where justice was suing another insurer for denying claims in bad faith); *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971) (considering whether due process bars judge who held defendant in contempt from presiding over resulting trial for criminal contempt); *Tumey v. Ohio*, 273 U.S. 510, 514-15 (1927) (considering whether statute requiring that defendant be "tri[ed] by the mayor" violated due process where mayor had "pecuniary and other interests . . . in the result of the trial"). A prosecutor who defends against a defendant's or petitioner's claims of prosecutorial misconduct is not

acting as "a judge in his own case," Pet. Br. 52, because the prosecutor does not decide the merits of the claims — the judge does.

### B. An appearance of impropriety is not a basis for removal under section 3-9008(a-10).

Notwithstanding that section 3-9008(a-10) allows removal of a prosecutor only for an "actual conflict of interest," petitioner argues that Milan could be removed for an appearance of impropriety based on *People v. Lang*, 346 Ill. App. 3d 677, 683 (3d Dist. 2004), which asserted that removal "'may be necessary in order to maintain the public's confidence in the impartiality and integrity of our criminal justice system.'" Pet. Br. 38-39 (quoting *Lang*, 346 Ill. App. 3d at 683). But *Lang* construed the prior version of section 3-9008, which did not limit removal to cases of "actual conflict of interest." *See In re Appointment of Special Prosecutor*, 2019 IL App (1st) 173173, ¶¶ 36-39; *see also Schwartz v. Cortelloni*, 177 Ill. 2d 166, 179 (1997) (appearance of impropriety not grounds to remove counsel).

### C. Milan had no conflict under Illinois Rule of Professional Conduct 1.7(a)(2).

Contrary to petitioner's argument, Pet. Br. 42, Milan had no conflict of interest under Rule 1.7(a)(2) of the Illinois Rules of Professional Conduct. That rule provides that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest," which exists if "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. Resp. 1.7(a)(2). Petitioner relies on his expert's opinion that Milan could not faithfully represent the People because petitioner alleged *Brady* violations by CCSAO attorneys. Pet. Br. 42. According to petitioner's expert, as someone who worked at the CCSAO for a long time, Milan could not defend against such claims because "[i]t is likely, human nature being what it is, that Milan developed strong feelings of affection for the CCSAO and the people who worked there." C1065.

But this Court has rejected the position that even current government attorneys' loyalty to their agencies' reputations disqualifies them from cases involving accusations against fellow employees. *See People v. Banks*, 121 Ill. 2d 36, 43 (1987). Otherwise, a special prosecutor would be required whenever prosecutorial misconduct of any kind was alleged, whether in a post-trial motion or a postconviction petition. Petitioner provides no basis to believe the Court intended Rule 1.7(a)(2) to interfere so broadly with the ability of prosecutors to perform their roles.

* * *

Petitioner provided no evidence that Milan had an actual conflict of interest, which was the only permissible basis for his removal. Therefore, the circuit court correctly denied petitioner's motions to rescind Milan's appointment, and the appellate majority erred by reversing that ruling based

on unfounded factual assertions that Milan admitted to initiating petitioner's criminal prosecution.

## CONCLUSION

This Court should reverse the judgment of the appellate court.

January 18, 2025

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 5,999 words.

/s/ Joshua M. Schneider
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## PROOF 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 January 18, 2025, the foregoing **Reply Brief of Respondent-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided notice to the following registered email addresses:

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